



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 98 OF 2017

IN THE MATTER OF ALLEGED CONTRAVENTION OF

FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 22, 23, 41(1), 41(2)A, 43(1)E, 57, 159(2)(D) OF THE CONSTITUTION OF KENYA

NJOROGE SERAH WAHU & 88 OTHERS

(All suing as former member of the Barclays Bank Of Kenya Pension Fund).....CLAIMANTS

VERSUS

THE TRUSTEES BARCLAYS BANK OF KENYA PENSION FUND.....1ST RESPONDENT

BARCLAYS BANK OF KENYA.....2ND RESPONDENT

THE RETIREMENT BENEFIT AUTHORITY.....3RD RESPONDENT

THE RETIREMENT BENEFITS APPEAL TRIBUNAL.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

Introduction

1. The petition herein seeks the following orders:

- a. A Declaration that the Respondents have breached the Petitioners fundamental rights under Articles 22(3)(d), 41(1), 43(e) 57 and 159(2)(d) of the Constitution.
- b. An Order directing the 1st and 2nd Respondents to pay the Petitioners their pension benefits as per the Orders of the Retirement Benefits Appeals Tribunal on 28th September, 2012 in RETIREMENT BENEFITS APPEALS TRIBUNAL APPEAL NO. 1 of 2012; SARAH NJOROGE & OTHERS – VS- RETIREMENT BENEFITS AUTHORITY & ANOTHER
- c. General damages for breach of the Petitioners Constitutional Rights.
- d. Interest on (c) above at Court Rates from the date of filing suit.
- e. Any other or further order this Honourable court may deem fit to grant in the circumstances.
- f. Costs of the suit.

2. The petition is supported by the Affidavit of Njoroge Serah Wahu and the written statement by the same petitioner on behalf of all the other 88 petitioners. In brief, the petition content that this petition is for enforcement of the decision of the Retirement Benefits Appeal Tribunal dated 28.9.2012 because there is no mechanism for execution by the said Appeal Tribunal. That the claim against the 1st and 2nd

Respondents is for breach of trust, fiduciary duties, violation of petitioners' constitutional and labour rights arising out of underpayment of Retirement Benefits (Pension), which was granted by the Appeals Tribunal.

3. The 1st and 2nd Respondent have opposed the petition by the Replying affidavit sworn by Milkah Maina on 26.4.2018. In brief, the 1st and 2nd Respondents contend that the petition is *res judicata* as the same dispute was determined in several other matters before the 3rd Respondent, the 4th Respondent, High Court and the Court of Appeal. They therefore prayed for the petition to be dismissed for being vexatious.

4. The case against the 3rd, 4th and 5th Respondent was withdrawn through the notice of withdrawal filed by the petitioners on 13.11.2017. They therefore did not participate in the petition.

Background

5. The petitioners were employed by 2nd Respondent during which employment they became members of the 1st Respondent Pension Scheme. Upon retirement from the employment by the 2nd Respondent, they received retirement benefits from the 1st Respondent but the sums paid were disputed by the petitioners on ground that the computation was less than their rightful amounts due. As a result the petitioners lodged a complaint with the 3rd Respondent on 18.7.2011 but on 6.12.2011, the 3rd Respondent returned that the computation by the 1st Respondent was correct and in accordance with the provisions of the prevailing Trust Deed and Rules.

6. The petitioners were dissatisfied and on 4.1.2012 they lodged an appeal before the 4th Respondent being RBAT No. 1 of 2012. After hearing, the appeal was allowed and the dispute referred back for fresh consideration by the 3rd respondent after the 4th respondent found that the 3rd Respondent had not considered all the matters raised individually. The 3rd respondent was to prepare a report and the appeal was to be mentioned again on 19.10.2012 before the 4th Respondent. However nothing was said about what happened on 19.10.2012 when the appeal was to be mentioned. The 3rd respondent made her report on 27.11.2013 and served it on the petitioners' Advocates and never filed a copy with the 4th Respondent.

7. On 7.7.2014, the petitioners filed another Memorandum of Appeal before the 4th Respondent but no new case number was assigned to it but instead, the new appeal was "merged" with the Appeal No. 1 of 2012 on ground that the earlier appeal was still pending, since the 3rd Respondent had not complied with the order dated 28.9.2012. The 1st and 2nd Respondent objected to the alleged joinder of the two appeals on ground that the 4th Respondent was *functus officio* in the older appeal but objection was however dismissed.

8. Aggrieved by the dismissal of the objection, the 1st and 2nd Respondent filed Application for judicial Review before the High Court being JR. Appl. No. 110 of 2015 and the order of the 4th Respondent was quashed on ground that the 4th Respondent was *functus officio*. The petitioners appealed to the Court of Appeal vide Appeal No. 162 of 2016 but the appeal was dismissed.

Analysis and Determination

9. The issues for determination herein are:

- a. Whether the petition is a new suit or execution of the 4th Respondent's judgment dated 28.9.2012 in BRAT Appeal No. 1 of 2012.
- b. Whether the petition is *res judicata* and vexatious.

New suit or execution of Judgment dated 28.9.2012

10. The petitioners deny that the petition is a new matter and contend that the Petition is intended to execute the decision delivered by the 4th respondent on 28.9.2012 in their Appeal No. 1 of 2012. According to them there is no set procedure for execution of the 4th respondent's decision and as such they chose to use this petition to enforce it. On the other hand, however, the 1st and 2nd respondent contend that the said decision by the 4th respondent directing the 3rd respondent to reconsider the petitioners' claims afresh was acted upon by the 3rd respondent and a new decision was passed on 27.9.2013, which decision has not been varied or set aside on appeal under section 48 of the Retirement Benefit Act.

11. There is no dispute from the record that the 4th respondent did pass a judgment in Appeal 1 of 2012 on 28.9.2012 directing the 3rd Respondent to consider afresh the petitioners' claims against the 1st respondent. There is further no dispute that the 3rd Respondent considered the claims afresh and rendered itself on 27.9.2013 dismissing the claims again, and served the decision on the petitioners' Advocates. There is further no dispute that the petitioners never filed any appeal before the 4th respondent within the 30 days window provided under Section 48 of the Act but only attempted to do so after 7 months which was way out of time. Flowing from the foregoing observations, I find and hold that there is nothing pending execution in the decision by the 4th respondent dated 28.9.2012 in Appeal 1 of 2012. In appreciation of the foregoing fact, the petitioners withdraw the petition against the 3rd and 4th Respondents on 13.11.2017 and as such, the petition is not execution process any more. Consequently, I return that the petition is a new suit seeking reliefs for alleged violations of the petitioners' Constitutional rights under Article 22, 41(1), 43(1)(e), 57 and 159 of the Constitution of Kenya.

Res judicata

12. The 1st and 2nd Respondent had contended that the petition herein is an attempt to re-litigate matters which were concluded by the 3rd respondent on 27.9.2013 against which no appeal was preferred under section 48 of the Retirement Benefits Act. It is therefore their case that the petition is *res judicata*. It is further their case that the petition is an attempt to indirectly challenge the decision of the Court of Appeal in

this Court.

13. I agree with the 1st and 2nd respondents that the petition herein is *res judicata* vis a vis the decision by the 3rd respondent dated 27.9.2013 whereby the petitioner's claims were considered and dismissed on merits. The said verdict settled the whole dispute under the Act and the only way to challenge it was by review application before the 3rd Respondent, or Appeal to the 4th respondent under section 48 of the Act or even Judicial Review before this court. None of the foregoing mechanisms was employed by the petitioners within the limitation period prescribed by the laws relevant to each process. To the contrary the petitioner brought this petition which I do not hesitate to find and hold that it is *res judicata*. The foregoing finding is fortified by the decision of the Court of Appeal in *Ngugi Vs Kinyanjui and 3 others [1989]eKLR* where it was held that:

“In law litigation must come to an end. Once a decision has been reached by the competent court, it cannot be re-opened to be started all over again unless the decision reached has been set aside. Any decision reached, If not set aside, it can only be challenged on appeal and cannot be challenged in any inferior court, tribunal or in the same court except in the case of review. The law will not allow any dispute between the same parties or between those who claim through them to re-open the dispute while the judgment remains on record.”

Reliefs Sought

14. In view of the findings herein above that the judgment by the 4th respondent dated 28.9.2012 in Appeal 1 of 2012 was full executed by the 3rd respondent and that the petition herein is *res judicata*, the reliefs sought by the petitioners are declined.

Conclusion and Determination

15. I have found that the judgment by the 4th respondent dated 28.9.2012 in Appeal 1 of 2012 was fully executed by the 3rd respondent by her decision dated 27.9.2013. That the said decision by the 3rd respondent was competent and it was never impugned, in any manner either on appeal or review. I have further found that the petition is an attempt to relitigate on matters, which were determined by a competent tribunal on 27.9.2013 by a decision which is still on record and which renders the petition *res judicata*. Consequently, I dismiss the petition with no costs.

Dated, Signed and Delivered in Open Court at Nairobi this 26th day of October, 2018

ONESMUS N. MAKAU

JUDGE