



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

RIFT VALLEY 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

RIFT VALLEY RAILWAYS (K) LIMITED.....3RD INTERESTED PARTY

ALEXANDER FORBES.....4TH INTERESTED PARTY

RULING

The application before me for determination is dated 19th October 2017 and seeks 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 this matter be placed before 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.

The application is supported by the grounds on the face thereof and affidavit of MUNAYI ISAAC OPONDO sworn on 19th October 2017. The grounds on the face of the affidavit are that –

1. That on the 19th day of August 2016 the Court in a ruling delivered in the above matter, directed, in its wisdom, that the matter be referred to the Retirement Benefits Authority Tribunal for purposes of seeking to have the Dispute Resolutions Mechanisms as are laid down in the Retirement Benefits Authority Act 1997, first exhausted before the court may assume jurisdiction.

2. That pursuant to the above directive, the claimant filed Appeal 5 of 2016 at the Retirement Benefits Authority Tribunal which appeal to date has not been litigated.
3. That following close to 12 months of active inactivity at the RBA Tribunal, the clerk of the said Tribunal addressed the claimant on the position of the Tribunal to the effect that the Tribunal is Currently dysfunctional with the terms of the sitting members having expired in February 2014, so that the ELRC ought of necessity to assume jurisdiction on the said matter.
4. That as stated in Paragraph 18 of the ruling that referred the matter to the RBA Tribunal, the sitting judge stated that the ELRC being a court of equal status with the High Court has Supervisory Jurisdiction over Tribunals so that same has to assume jurisdiction in a clear case where it has been ascertained that there is absolutely no Jurisdiction in the court to which reference was made by the High Court for purposes of exhausting the mechanisms that ought to have first been explored before seeking to invoke the High Court Jurisdiction.
5. That the court has not addressed itself to the contents of the letter by the Clerk of the Tribunal regarding the Tribunals Dysfuntionality and or jurisdiction has led to orders being issued in 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.
6. That the claimant avers that 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 Article 162(2) and the 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 respondents PO, that the Court does not have Jurisdiction in the said matter.
7. 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 standi to prosecute is being less than candid.
8. That further 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.
9. That the mere 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.

In the replying affidavit of Mr. Munayi, he reiterates the grounds on the face of the application and in addition deposes that while the matter was still at the RBA Tribunal, the respondents herein continued to engage in acts whose end objective was to negate the substance of the matters as were already before the court prompting the claimant to file Cause 783 of 2017 leading the impugned ruling and the orders subsequent thereto.

That this Court has the requisite jurisdiction to litigate the matter, and, that the claimant has the requisite *locus standi* to prosecute the matter both contrary to the findings by the ruling of 13th of October 2017.

That it is on the basis of the above that the claimant implores the Court to have the said directives stayed in the interim pending the clarification of the issues as are brought out in the claimant's application.

At the hearing of the application on 16th October 2018, Mr. Munayi submitted that the claimant approached this court because the Tribunal to which it had been sent by this court is dysfunctional. He submitted that the claimant has *locus standi* as it represents workers who are members of the pension scheme, that the Constitution accords the claimant the right to represent its members and that Mr. Munayi himself is a pensioner.

The respondents and Interested Parties opposed the application. Mr. Milimo appearing for the 1st and 3rd respondents and the 4th Interested Party relied on the 1st respondent's replying affidavit sworn and filed on 1st November 2017, 3rd respondent's grounds of opposition dated and filed on 3rd November 2017 and 4th Interested Party's grounds of opposition dated and filed on 3rd November 2017.

Mr. Milimo submitted that the application is not only frivolous but also devoid of merit and is an unprecedented abuse of court process.

He submitted that this court is devoid of jurisdiction to grant a permanent injunction as prayed in the application at interlocutory stage. He further submitted that the claimant has no right to participate in the affairs of the 1st respondent who is a pension scheme registered under the Retirement Benefits Act and representing pensioners. He submitted that none of the members of the 1st respondent is a member of the claimant, that the union can only represent members covered by a recognition agreement and that it has no members among pensioners.

Mr. Milimo submitted that Mr. Munayi did not draw the court's attention to any evidence that would entitle the claimant to the orders sought. He submitted that the claimant's allegation that it is a signatory to the Trust Deed and Rules of the 1st respondent which gives the claimant capacity to represent the members of the 1st respondent is not true. Mr. Milimo referred the court to the Trust Deed and Rules annexed to the memorandum of claim which does not have the signature of any of the claimant's representative. On this basis, he submitted the claimant has no right to prosecute the motion before the court.

Another issue raised by Mr. Milimo is in his submission in court is that the claimant had filed previous applications on the same subject matter which he has not prosecuted. Mr. Milimo drew the court's attention to a letter dated 15th October 2018 in which the applications filed by the claimant but not prosecuted on the same subject matter have been listed.

He submitted that the same issue has previously been prosecuted in Misc. Application No. 197 of 2017 in which Radido J. delivered a ruling on 15th February 2018. He submitted that at paragraph 6 of the ruling, at page 9, the Judge found that the application lacked merit and bordered on being vexatious. He submitted that no appeal has been filed against the ruling and it is binding on this court.

He submitted that the fact that the present application covers more assets while the ruling was subject to only one of the said assets does not bar the court from finding the present application vexatious, as parties should not litigate in instalments as that would cause confusion. He submitted that the application is therefore *res judicata* and ought to be dismissed.

Mr. Milimo further submitted that the claimant seeks an order of injunction yet it is not supported by the prayers in the memorandum of claim, that the court cannot grant an order in an interlocutory application that is not anchored on the pleadings.

He relied on the decision in **CECIL MILLER -V- JACKSON NGERU** and the case of **MARY NGARU -V- FAMILY BANK** in which the court stated that an application seeking injunction not anchored on pleadings is fatally defective and must be dismissed.

Mr. Milimo submitted that the property in the Legal Notice No. 2006 is vested in the 2nd respondent and the only source of income to pay pensioners. That in the Trust Deed and Rules the Trustees are given express power to lease, sell or deal with the property in the manner set out therein and those orders have not been varied or extinguished. That it is not the business of the court to re-write the Trust Deed and Rules for the parties and the court has not been invited to declare the same null and void, that the court must breath life into the same.

Mr. Milimo submitted that the issue was the subject of Nairobi Petition no. 468 of 2016 in which E. C. Muita J. stated "*I have perused the Trust Deed and Rules and it is clear that the Trustees have powers to sell the property.*" He submitted that the court further stated that without selling the land the Trustees may be unable to meet their obligations. That the claimant who was a party to the suit, did not appeal against the decision, and cannot litigate the matter further.

Mr. Milimo submitted further that the Retirement Benefits Act provides for sanctions against Trustees for mismanagement of a scheme and if the claimant is aggrieved by the decisions of the Trustees, the remedy does not lie in an injunction over the sale but under the Retirement Benefits Act. He submitted that the pensioners have gone without pension for three months because of the orders granted pursuant to the application by the claimant.

He submitted that the claimant having been adjudged by this court as a vexatious litigant, he should be condemned to pay the costs of this application because the respondents have been compelled to come and argue the matter that has already been determined. He submitted that the public interest weighs in allowing the pension scheme to sell the property.

Ms Kevaji for the 2nd respondent associated herself with the submissions of Mr. Milimo. She urged the court to look at the 2nd respondent's submissions filed on 19th February 2018 in relation to the same application.

Ms Opoka for the 1st Interested Party also associated herself with the submissions of Mr. Milimo. She added that ground 4 of the application is a Giella Test and submitted that the claimant has not discharged that burden to warrant the grant of the orders.

Determination

I have considered the pleadings, grounds of objection and submissions by the parties. I have further considered the authorities cited. Several issues arise for determination. The first is if the claimant has *locus standi* to bring the application, the second is if the application is *res judicata*, the 3rd is if the claimant is a vexatious litigant and the final issue is whether the claimant is entitled to the prayers sought.

Locus Standi

The respondents and Interested Parties submit that the claimant has no *locus standi* as there is no relationship of employer/employee or recognition agreement between the parties. The claimant on the other hand submits that its members are members of the pension scheme and it has a constitutional right to intervene where their interests are concerned.

I think this is a matter that would require a more in depth consideration in view of the many suits that have been filed by the claimant against the respondents and Interested Parties. It is a matter that I would not like to delve into as I think the parties did not give me sufficient material to enable me give it adequate consideration. It is also a matter that I think is not central to the determination of the application before the court. I will therefore leave it for determination at a later stage.

In this I take comfort in the finding of Mumbi J. in petition No. 159 of 2012 consolidated with Petition No. 353 of 2012 where she found that members of the Kenya Railways Staff Retirement Benefits Scheme, which is a closed fund, comprise former employees of Kenya Railways Corporation with over 9,000 pensioners and 2,500 deferred members, some of whom are former employees of Kenya Railways Corporation currently working for Rift Valley Railways Limited. Mr. Munayi submitted that the members of the claimant are members of the 1st respondent.

Res Judicata

It is the respondent's and Interested Parties submission that the issue in the application has been dealt with and finally determined before. The respondents/Interested Parties referred the court to two specific determinations; Misc. Application No. 197 of 2017 and Nairobi petition No. 468 of 2016. The court's attention has further been drawn to –

Misc. Application No. 84 of 2016,

Misc. Application No. 76 of 2015,

Misc. Application No. 59 of 2016,

Misc. Application No. 10 of 2018

and of cause, this claim No. 2289 of 2015.

The parties and issues in these suits are broadly the same with the claimant herein being the constant initiator of the suits. Mr. Munayi did not deny the submission by Mr. Milimo that there are currently about 10 applications filed by the applicant broadly over the same issues pending before the court which the claimant herein has not prosecuted.

I have perused the application dated 22nd June 2016 in Misc. Application No. 76 of 2015, application dated 12th May 2016 in Misc. Application No. 59 of 2016, application dated 2nd February 2018 in Misc. Application No. 10 of 2015 and application dated 18th July 2016 in Misc. Application No. 84 of 2016. The common denominator in the applications is stay of sale of property of the 1st respondent.

I have further perused the decision of E. C. Mwita J. dated 28th February 2018 where the Judge declined to grant orders among them an injunction to stop the sale of the 1st respondent's properties on grounds that the petitioners had alternative mechanism of addressing their grievances.

I further perused the decision of Radido J. dated 16th February 2018 in which the subject matter and prayers were similar to this one but with reference to three properties which are among those listed in Legal Notice No. 2006, the subject matter of the present application. Radido J. held as follows –

“The application is therefore in vacuo and drawing from the holding by Ringera J in *Kihara v Barclays Bank (K) Ltd* (2001) 2 EA 420 in dismissing as incompetent an application for injunction when no such injunction was sought in the Plaint (situation here is worse as there is no Statement of Claim/Memorandum of Claim), I would conclude that on that single ground, the application is unmerited.

Two, there is material before Court that the Union in Cause No. 783 of 2017, Rift Valley Railways Workers Union (K) v Kenya Railways Staff Retirement Benefits Scheme & Ar. had moved Court seeking

1. ...

2.

3. That the Respondent's intended process of Sale of the Pensioners Asset Number LR/Number 209/6507 measuring 3.4 acres Matumbato Road Upper Hill area of Nairobi County be stayed until the issues as brought out in this application are heard and determined.

4. ...

In the very same file, the Union filed a Misc. Application No. 99 of 2017 seeking –

1. ...

2. ...

3. That the intended sale of the pensioners asset LN 209/378/5 measuring 0.48 acres located along woodland lane off Jabavu road Argwings Kodhek Road Hurlingham Estate Nairobi be stayed until the issues as are brought out in this application are heard and determined.

The applications were heard and in a ruling delivered by Abuodha J on 13 October 2017, the Judge held that the Union did not have locus standi to prosecute a claim over the properties in contention.

A Court of concurrent jurisdiction having determined that the Union could not litigate in respect of the named property(ies), this Court cannot by the stretch of our liberal Constitution admit a re-litigation over the same property(ies).

Three, Ndolo J had in a ruling delivered on 19 August 2016 in Cause No. 2289 of 2015, Rift Valley Railways Workers Union (K) v Kenya Railways Staff Retirement Benefits Scheme found and held that the parties had not exhausted the dispute resolution mechanisms established under the Retirement Benefits Act and thus declined jurisdiction and directed the parties to exhaust the mechanisms under that Act (the

Union has legal representation in the Cause).

Despite the ruling, the Union went ahead to file another application in Cause No. 29 October 2017 seeking similar injunctive relief.

It appears from the record that the Union filed an Appeal being Retirement Benefits Authority Tribunal Civil Appeal No. 5 of 2016 which is still pending.

The Union might have genuine grievances but the route it is taking is prone with legal risks which may have unintended consequences on its capacity and ability to prosecute the complaints.

Considering that it has legal representation in one of the Causes, it should seriously take legal advice on how to conduct the pending litigation, both in this Court and before the Retirements Benefits Authority Tribunal.

As for the present application, the Court finds that it not only lacks merit but borders on abuse of the Court process. It could as well be vexatious.”

I would agree with my brother Radido J. that like the application he was dealing with the present application borders on abuse of court process and could as well be vexatious due to the number of pending as well as determined litigation over the same subject matter.

This takes care of issues no. 2 and 3.

Whether the claimant is entitled to the prayers sought

Having found that the prayers sought herein have been sought and refused before in several applications and suits, I must agree with the respondents and Interested Parties that the application is *res judicata*, that the claimant/applicant has suffocated the respondents with suits on similar grounds and that the claimant’s actions border on vexation of the respondents and Interested Parties and abuse of court process.

It is on these grounds that I dismiss the application dated 19th October 2017 with no orders as to costs and discharge the orders dated 12th October 2018.o

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE