



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 59 OF 2018**

**ABDALLA OSMAN & 628 OTHERS.....CLAIMANT**

**VERSUS**

**STANDARD CHARTERED BANK(K) LIMITED.....1ST RESPONDENT**

**DAVID GICO NJOROGE.....2ND RESPONDENT**

**WALTER MUNGAI.....3RD RESPONDENT**

**AZIRIKAM MUDIKA LUBIA.....4TH RESPONDENT**

**DAVID KIARIE TORO.....5TH RESPONDENT**

**BARTESH SHAH.....6TH RESPONDENT**

*(The 2nd, 3rd, 4th, 5th and 6th Respondents are being sued on their own behalf and as the trustees of Standard Chartered Kenya Pension Fund (SCKPF) hereunder referred to as 'the 1st Scheme')*

**DAVID GICO NJOROGE.....7TH RESPONDENT**

**WALTER MUNGAI.....8TH RESPONDENT**

**BEATRICE MAINGI.....9TH RESPONDENT**

**JANE CHEGE.....10TH RESPONDENT**

**NICHOLAS OTADO.....11TH RESPONDENT**

**JULIUS MWANGI.....12TH RESPONDENT**

*(The 7th, 8th, 9th, 10th, 11th and 12th Respondents are being sued on their own behalf and as the Trustees of Standard Chartered Kenya Pension Fund (SCKPF) hereunder referred to as 'the 2nd Scheme')*

**RULING**

**Introduction**

1. The 1st Respondent filed a notice of preliminary objection to the suit herein dated 23.2.2018 seeking to have the proceedings herein struck out on the following grounds

(a) The Honourable Court lacks jurisdiction to hear and determine the suit.

(b) The Retirement Benefits Act has provided for an alternative dispute mechanism under section 46 and 47.

(c) The suit is *res judicata* because the Retirement Benefits Appeals Tribunal has determined the same dispute in Civil Appeal No. 9 of 2010, *Hezekiah Isambo Sakwa & Others Vs Standard Chartered Bank Staff Pension Fund*.

2. The Preliminary Objection (P.O) is supported by the 2nd – 12th respondents but it is opposed by the 629 claimants who have filed a Replying Affidavit sworn by their counsel Ms. Michelle A. Ouma on 7.6.2018. The P.O. was however disposed of by written submissions.

## **Background**

3. The 629 claimants were employed by the 1st Respondent and were also members of the 1st scheme and therefore entitled to payment of pension benefits and interest thereon pursuant to the Trust Deed and the Rules of the Scheme upon retirement or exiting the 1st Respondents employment. Some of the claimants retired or left the said employment before 1999 when the pension scheme changed from defined (non-contributory) scheme to contributory pension scheme. The rest of the claimants retired or exited after 1999 after having tested the contributory pension scheme.

4. According to the claimants, something went terribly wrong with the pension scheme which resulted to reduction of their pension benefits after the pension metamorphosed in 1999. It is their case that the surplus funds in the defined pension was transferred to the 1st Respondent without consulting them and against the advice from the commission of Income Tax that the funds could not revert to the sponsor when the scheme was not wound up but only changing its nature to contributory scheme. The claimants have further contended that the said reduction of their pension benefits was confirmed by an actuarial calculation done in 2009 in respect of the lump sum Equivalent of the Net Accrued pension as at their respective date of exiting the 1st respondent's employment.

5. As a result of the foregoing matters, the claimants filed this suit in the High Court seeking the following relief

(a) Payment of Kshs.9,077,954,690/= being balances of lump sum pension benefits and interest payable to the Plaintiffs as at the 31st March, 2009.

(b) A refund of Kshs.1.1 billion by the 1st Defendant to the Standard Chartered Kenya Pension Fund, together with interest thereon at the rate 20% therein from the 28th February, 2000 to 31st March, 2009, totaling to Kshs.5.79 billion.

(c) Payment to the Plaintiffs of interest on (a) and (b) totaling to the sum of Kshs.14,867,954,690/= at the commercial rate of 20% from 1st April, 2009 until the date of filing this suit and further interest at the rate of 20% per annum from the date of filing the Suit until payment in full.

(d) A Declaration that the purported approval by the Commissioner of Income Tax for the transfer back of Kshs.1.1 billion from the Standard Chartered Kenya Pension Fund of the 1st Defendant was illegal, null and void.

(e) A Declaration that the conversion of a Section of the Scheme from a Defined to a Contributory Scheme with effect from the 1st January, 1999, was illegal, null and void.

(f) An Injunction restraining the Defendants, their servants and/or agents and each or any of them howsoever from continuing with the operations of the New Contributory Section of the Scheme commenced on the 1st January, 1999, until the correct accrued pensions and interest of the Plaintiffs who remained in the service of the Bank following the said conversion have been calculated and paid, together with interest.

(g) An Injunction restraining the Defendants their servants and/or agents and each or any of them howsoever from effecting or implementing the amendments and additions to the Trust Deed dated 3rd June, 1975 and Rules, contained in the Supplementary Trust Deed dated 22nd December, 2008 or indeed carrying out any amendments, additions or changes to the said Trust Deed and Rules now or at any time thereafter until the correct accrued pensions and interest of the Plaintiffs have been calculated and paid, together with interest.

(h) A Declaration that the amendments and additions to the Trust Deed dated 3rd June, 1975 and Rules contained in the Supplementary Trust Deed dated 22nd December, 2008 is illegal, null and void.

(i) Special Damages, as pleaded hereinabove

(j) General Damages

(k) Cost of this suit.

(l) Interest on (i), (j) and (k) at the commercial rate of 20% per annum until payment in full.

(m) Any other relief or further relief as this Honourable Court may deem fit to grant.

6. The first Respondent admits in her defence that by a Trust Deed dated 3.6.1975 her predecessor established a Trust Fund (1st Scheme) for pension and benefits of her present and future employees. That on 1.1.1999, she with the agreement of the Trustees of the 1st Scheme, established a new Defined Contribution Scheme as a separate section of the 1st scheme but which was administered under the same Trust Deed and the Rules. That the new scheme absorbed all the active employed members from 1.1.1999 but all the other members who were already pensioners remained in the 1st scheme and their pension was never transferred or deferred to the new defined contributory scheme.

It is therefore the first respondent's case that the terms and condition of the pensioners under the 1st scheme remained the same and no loss

was suffered. The first respondent further contended that by a Trust Deed dated 1.7.2006, the 2nd Scheme was established effective 1.1.2006. The new scheme was a defined contributory pension scheme established with the agreement of all the eligible employees.

7. The first respondent further contended that any disputes arising from decisions made by Managers, Administrators or Trustees of Pension Schemes like the present suit are supposed to be referred to the CEO of the Retirement Benefits Authority (RBA) and any appeals therefrom to go to the Appeals Tribunal established under the Act. She further avers that in 2004 the dispute herein was referred to the RBA but it was dismissed and the claimant never bothered to refer their own appeal to the Appeals Tribunal.

8. In addition, the first respondent has pleaded that there is misjoinder of parties both on the claimants and the defence side. She contends that the pension scheme in issue does not apply to all the claimants since they retired during different times. She further contends that the orders sought against her are not tenable.

9. The 2nd – 12th respondents' defence is generally echoing the averments made by the first respondent in her defence and I will therefore not reiterate it herein save to point out that the said respondents have pleaded that the claimants indeed referred the present dispute to the RBA under the RB Act through Kenya National Commission for Human Rights but after consideration, the case was dismissed by the letter dated 26.5.2004 and no appeal was preferred against the said dismissal. She further contended that the court lacks original jurisdiction over the dispute herein.

### **1st Respondent's Submissions**

10. The first Respondent further contended that this Court lacks jurisdiction to entertain claims arising from pension schemes. She contended that the jurisdiction of the Court is set out under section 12 of the ELRC Act and contemplates disputes between employers and employees and trade disputes and not disputes arising from pension schemes as in this case.

11. The first respondent has submitted that there is procedure for resolving disputes arising from decisions made by management of pension schemes like the present dispute. She contended that under section 46 of the Retirement Benefits Act, appeals against the decisions of the Management of pension schemes can only be lodged with the RBA and if a party is aggrieved he can appeal further to the Retirement Benefits Appeals Tribunal. She therefore submitted that filing this suit at the High Court was improper. She relied on ***Speaker of the National Assembly Vs James Njenga Karume [1992]eKLR*** where the Court of Appeal held that where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of parliament, that procedure should be strictly followed.

12. The first Respondent further contended that, there is no right of appeal under the Retirement Benefits Act to the High Court or this Court. She relied on ***Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) scheme 2006 and another Vs Anne Wangari & 524 others [2018]eKLR*** where the Court of Appeal upheld a decision of this Court whereby a similar P.O was allowed.

13. The 1st respondent has submitted that the suit herein is **res judicata** because it was first heard and determined by RBAT, which is the body authorized to conclusively determine this issues, in ***Hezekiah Isambo Sakwa & others Vs standard Chartered Bank Staff pension fund and the Retirement Benefits Authority*** which involved similar claim. She urged that a person does not need to be formerly enjoined to a suit for it to be deemed to be **res judicata** and relied on ***Lotta Vs Tanakai & others [2003] 2 EA 556*** to support that view.

### **2nd – 12th Respondents submission**

14. The 2nd – 12th Respondents supported the P.O and contended that the court lacks jurisdiction to entertain the suit. She further urged that the suit is res-judicata because the RBAT has already expressed itself in ***Civil Appeal No. 9 of 2010 Hezekiah Isambo Sakwa Case*** aforesaid. The 2nd – 12th respondents relied on several binding and persuasive precedents to urge their case.

### **Claimants' Submissions**

15. The claimants opposed the P.O and submitted that his court has the jurisdiction under Article 162(2)(a) of the constitution to determine the dispute herein. They relied on this court's decision in ***Anne Wangui Ngugi and 524 Others Vs Retirement Benefits Authority & Another [2016]eKLR*** and the Court of Appeal decision in ***The Registered Trustees of Kenya Ports Authority Pension Scheme Vs Maurice Munyao & 148 others [2016]eKLR*** to support their case. They further contended that the courts have dealt with pension dispute in many cases and specifically relief on ***Emanuel Titus Manadu & 2 others Vs The Registered Trustees of the Kenya Ports Authority Pension Scheme [2011]eKLR*** where Ojwang J (as he then was) set out the test for the adjudication of pension matters as being disputes which involve a wrong which require final redress under the law as opposed to general or one forming part of a chain which lends itself unspecified administrative solutions.

16. As regards the alternative procedure, the claimant's contended that section 46 of the RB Act does not oust the original jurisdiction of this court over employment disputes. She relied on ***Abdullahi Ali Muhammed Vs Kenya Ports Authority and Another [2016]eKLR*** to support the foregoing view.

17. As regards the allegation that the suit is res judicata, the claimants submitted that it was not. They referred to the ***Civil Appeal No. 9 of 2010 Hezekia Isambo Sakwa Case*** where the RBA held that the dispute in the Appeal was not **res judicata** by virtue of this suit and further that the claim in the said appeal was not substantially the same as the present suit. According to the claimants, the suit herein raises issues of fraud and misrepresentation and it involves people who retired or exited employment in various ways and during the subsistence of different pension schemes as opposed to the dispute in the ***RBAT Appeal No. 9 of 2010*** aforesaid.

## Analysis and Determination

18. The issues for determination herein are:

- (a) Whether the court has jurisdiction to entertain the suit.
- (b) Whether there is an alternative procedure for resolving pension disputes established under the law.
- (c) Whether the suit is *res judicata*

## Jurisdiction

19. The suit herein is between former employees of the first respondent and their former employer on one hand and also between pensioners and their respective pension schemes. Under section 12 of the ELR Act this Court has jurisdiction to determine disputes between employers and their employees and by extensions, former employees and their former employers. The said jurisdiction is donated by the said Act pursuant to provisions of Article 162 (2)(a) of the constitution of Kenya. There is therefore an inherent jurisdiction of this court to entertain any sort of dispute which arised from the context of employer employee relationship.

20. However considering the pleadings filed by the claimants, the ultimate remedy they are seeking is payment of arrears of their lump sum pension plus interest from the pension schemes and not from the employer. They are not enforcing a right under their respective contracts of service. The court therefore finds that dispute is essentially a pension dispute between pensioners (claimants) and their respective pension schemes. Consequently the court being aware that there is an alternative avenue for resolving the dispute provided by statute, it is only fair and just that it upholds the doctrine of exhaustion. Under the said doctrine, courts are supposed to exercise restraint and let the alternative process to be concluded before invoking their own jurisdiction.

## Alternative Remedy

21. There is no doubt that section 46 and 48 of the Retirement Benefits Act provides for the process of resolving pension disputes between pensioners and the management of their pension schemes. The said sections provides:

*“46 (1) Any member of a scheme who is dissatisfied with a decision of a Manger, Administrator, Custodian or Trustee of the Scheme may request, in writing, that such 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 Act under which the scheme is established.*

*(2) A copy of every request under this section shall be served on the Manager, Administrator, Custodian or Trustees of the scheme. 48 (1) Any person aggrieved by a decision by the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made thereunder may appeal to the Tribunal within thirty days of receipt of the decisions.”*

22. In view of the foregoing clear provision of the statute relevant to the dispute herein, I find that, the claimants’ first port of call was the RBA under section 46 of the Retirement Benefits Act and not the High Court or this court. The foregoing view is fortified by the Court of Appeal decision in *Speaker of National Assembly Vs James Njenga Karume [1992]eKLR* where it was held:

*“In our view, there is merit in the submission that where there is a clear procedure for readdress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”*

23. The court of Appeal also made a similar decision in *Geoffrey Muthinja & Another Vs Emanuel Muguna Henry & 1756 Others [2015]eKLR* in a church dispute where it held that:

*“We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside of courts. This accords with Article 159 of the constitution which commands Courts to encourage alternative means of dispute resolution”*

## Rejudicata

24. The first respondent has contended that **Civil Appeal No. 9 of 2010, Hezekia Isambo Sakwa & others Vs Standard Chartered Bank Staff Pension Fund and Another** which was decided by the RBAT was dealing with a similar issue to the one in the present suit and as such, the suit is *res judicata*. She submitted that it is immaterial that the claimants herein were not enjoined in the said Civil Appeal No. 9 of 2010. The 2nd – 12th respondent have put the notch higher by contending that the claimants herein lodged the present dispute to the CEO of the RBA under section 46 of the retirement Benefits Act through the KNCHR and the case was dismissed and no appeal was preferred against that decision to the RBAT under section 48 of the Act. The claimants have denied the alleged similarity between the present suit and Appeal No. 9 of 2010 and maintained that the issues herein are diverse and require final redress by the court and not administrative decision by a tribunal.

25. After careful consideration of the submission presented on the question of **res judicata**, I am of the view that some evidence of the alleged decisions need to be presented to court and be considered. That is like taking evidence to substantiate the merits of preliminary objection. I will therefore not consider any evidence in the form of letter from the RBA's CEO to the Kenya National Commission on Human Rights to verify whether the matter is **res judicata**. I would rather leave that matter to the person who is properly seized with the immediate and original jurisdiction to entertain the merits of the dispute. The said person has already held that Appeal No. 9 of 2010 was not **res Judicata** vis a vis this suit.

### **Conclusion and Disposition**

26. I have found that, although the court has jurisdiction to entertain disputes brought by employees against their employers or disputes relating to their rights as employees or former employees, there is however an alternative procedure provided by statute to deal with pension disputes, namely section 46 and 48 of the Retirement Benefits Act. I have further found that under the doctrine of exhaustion, the court ought to withhold its jurisdiction in favour of the alternative dispute resolution mechanism provided by the constitution or statute. I have also held that the question of **res judicata** raised herein require evidence to be taken to prove that the CEO of the RBA wrote a letter to the claimants lawyers dismissing the present dispute and that no appeal was preferred to impugned the same. Consequently, I down my tools at this juncture and refer this dispute to the CEO of the Retirement Benefit Authority to determine it on the merits under section 46 of the Retirement Benefits Act. Considering the age of the suit, I direct that priority be accorded to the matter. No order as to costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 12th day of October 2018**

**ONESMUS N. MAKAU**

**JUDGE**