



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
PETITION NO.125 OF 2016

SALESIO NJERU MBOGO & 112 OTHERSPETITIONERS

VERSUS

KENYA PLANTERS COOPERATIVE UNION RESPONDENT

RULING

The Petition herein was filed on 19th September, 2016. In reply, the Respondent has filed Notice of Preliminary Objection on 16th November, 2016 on the grounds that;

- (a) The Petition filed offends the provisions of section 5 of the Oaths and Statutory Declarations Act and is an abuse of court process.*
- (b) The Petition revolves around benefits under a Pension Scheme which is under Liquidation thus the claim ought to have been brought by the Liquidator of the Pension Scheme centrally [contrary] to clearly laid down procedures in the provisions of the Civil Procedure Act and Order 1, Rule 10(2) and (4) and therefore is incurably defective, bad in law and ought to be struck out.*
- (c) The Petition offends Order 1 Rule 8(2), Rule 10(3) and 13(2) of the Civil Procedure Rules as the authorisation to bring the suit in a representative capacity has not been sought by the 1st Petitioner through a Notice of Public Advertisement.*
- (d) The Petition is defective to the extent that the Petitioners have been improperly joined since the claimed benefits accrue from different contracts, years of service and terms of benefits contrarily [contrary?] to the express provisions of order 1, Rule 6 of the Civil Procedure Rules.*
- (e) The Petition does not expressly disclose any infringements of the fundamental rights of the Petitioners by the respondent.*

Both parties filed written submissions on the above objections.

The Respondent submits that on the filed petition, several anomalies emerge that;

Petitioner No.36, Grace Mbogo's Replying affidavit is not signed;

Petitioner No.102, William K Ruto did not append his signature to the Verifying Affidavit and thus did not give authority to be enjoined herein and was not before the Commissioner For Oaths;

The signatures on the Verifying Affidavits are photocopies or were electronically transferred for;

Petitioner No.31, Karugu Macharia;

Petitioner No.43, James Kamau;

Petitioner No.54, John Nyamu Karuru;

Petitioner No.62, Lily Wanjikuu Njanja;

Petitioner No.64, Louis Nambiro Wesutsa;

Petitioner No.110, Joe Mbugua Maina; and

Petitioner No.111, Joseph N Nyaga.

There are deceased Petitioners yet no letters of administration have been attached to the Petition being;

Petitioner No.52, John Dryden Kimotho suing on behalf of Victor Muthee Kimotho;

Petitioner No.103, Dorrice Khariokha suing on behalf of Richard S Wamukota; and

Petitioner No.104, Esther Mumbi Ngugi suing on behalf of Eric Ngugi Kathanga.

The Petition therefore offends the provisions of section 5 of the Oaths and Statutory Declarations Act which requires every jurant is present before the Commissioner for Oaths for attestation of place, date of taking oath. On the basis that some Verifying affidavits are unsworn, some are without authorisation or signatures attached are invalid. The deponents were therefore not in the same room with the one commissioning the affidavits. All affidavits are by one commissioner putting into question as to whether all the deponents appeared and whether the contents therein are true. In **Rajput versus Barclays Bank of Kenya Ltd & 3 Others [2004] eKLR** the court held that where an affidavit does not comply with the Oaths and Statutory Declarations Act it is invalid. In **Mulusiah Land Consultants and Colourgenms Ltd versus Industrial Development Bank [2005] eKLR** the court held that the requirements of the Oaths and Statutory Declarations Act are not a cosmetic requirement. The purpose of stating the situations and circumstances do change leading to different legal positions. In the absence of dates, the court is left to guess as to when the affidavits were made and hence their worthiness in both law and fact. The Verifying affidavit was held as fatally defective.

The Respondent also submits that the Petition relates to a pension scheme which is under liquidation and hence ought to be filed by the liquidator as the Respondent is governed under the Companies Act, section 241 requires in liquidation the process applicable in a suit is have the liquidator file suit. In **Kituo cha Sheria versus John Ndirangu Kariuki & another [2013] eKLR** the court struck out the suit as the Petitioner had no legal capacity to file the same.

Under Order 1 Rule 8(2), 10(3) and 13(2) requires a suit filed on behalf of others in a representative capacity should be filed by 1st Petitioner upon a notice of public advertisement and the Petitioners have not complied. Where there are numerous persons having the same interest in one suit or is being sued Order 1 Rule 8 must be complied with as held in **Ruth Wambui Muturi versus Joseph Karisa Katsoma & 4 others [2005] eKLR**. In this case there is no consent from the Petitioners sought to be enjoined the Petition ought to be dismissed. Other Petitioners who ought to be in the Petition or suing in a representative capacity are improperly enjoined or unprocedurally enjoined. Without letters of administration or a special limited grant *ad colligenda bona* these Petitioners have no legal capacity herein to represent others.

The Respondent also submits that the claims relate to different contract, years of service and terms of benefits which cannot be made in one suit and contrary to Order 1 Rule 6. The Petition does not disclose any infringement of any fundamental rights of the Petitioners by the Respondent and should be dismissed. The mere fact that the constitution is cited does not elevate the matter to a constitutional matter as held in

International Centre for Policy and Conflict & 5 Others versus the AG 7 4 others [2013] eKLR.

The **Petitioners** submit that the 36th Petitioner who has not signed a Verifying Affidavit has since withdrawn her Petition and such claim is spent.

The 31st, 43rd, 54th, 62nd, 110th and 111th Petitioners on their photocopy verifying affidavit, that all the 7 executed one set of Verifying Affidavit and when filing such was commissioned instead of filing the original affidavit. Whereas section 5 of the Oaths and Statutory Declarations Act requires the Commission for state the place and date of the affidavit, the affidavit by the 7 Petitioners is dated and states the place of affidavit is Nairobi. Such affidavit does not require authorisation from any other party to be made. The averment that the Commissioner for Oaths was not in the same place and room with each Petitioner is a matter of evidence and there is proof that the affidavit was done on equal date and place.

In the case of **Lazararus Kabete versus Andero Njairu Mugo HCCC No.1222 of 1999** where there was an omission in the jurant on the date of a Verifying Affidavit, the court accepted the affidavit for the ends of justice as it did not prejudice the other party. In **Jamii Bora Bank Ltd versus Ernest & Young LLP, HCCC No.337 of 2016** where the Verifying Affidavit was defective for being sworn before an advocate who did not have a practicing Certificate the court declined to strike it out and directed the party to file a fresh affidavit.

The Petitioners also submit that the objections that the claim relates to pension claims over a scheme that is under liquidation, that such is a misinterpretation of the fact and the law relating to liquidation of companies. Section 241 of the Companies Act, the Pension Act is not subject to the Companies Act as a pension scheme is not a company but a trust registered under the Trustees Act and subject to the Retirement Benefits Act and the relevant Trust Deed and Rules of the scheme is separate. The Petitioners are suing in their individual capacities for their owing dues under the pension scheme. The sums claimed in the Petition are held by the Respondent and not the pension scheme.

The Petition is not filed as a representative suit under Order 1 Rule 8(2), 10(3), 13(2) of the Civil Procedure Rules. The Petitioners who are deceased, their representatives have since withdrawn their respective claim in the Petitioner by filing Notice of Withdrawal.

The Petitioners also submit that the challenge of Petition being defective for the fact of the Petitioners having been on different contracts does not hold as all the Petitioners are former employees of the Respondent and former members of the same pension scheme. Order 1 Rule 1 allow all person to be joined in one suit as claimants where any right or relief arise out of the same transaction or series of acts and in this case there is a common question of law that necessitate filing one petition. The Petition relate to benefits accruing to the Petitioners from their employment with the respondent. Different contracts only apply to the amounts claimed and such can be addressed in one common suit instead of multiple suits.

The Petition relates to violation of rights which can only be set out at the hearing and for the Petitioners to state the facts on the breaches of committed breaches and resulting suffering

Determination

On the submissions by the Petitioners' Counsel that the 36th Petitioner has withdrawn the petition, such is marked as spent. Equally, the submissions that the Deceased Petitioners have since had their legal representatives withdraw their respective petitions by filing Notice of Withdrawal. – The Petition by the 36th, 52nd, 103rd, and 104th are spent.

Before going into the substance of the objections by the Respondent is relevant to state herein that, all matters filed before this court are subject to the applicable law and the Employment and Labour Relations Court (Procedure) Rules, 2016 [which have replaced the Industrial Court (Procedure) Rules, 2011] unless such Rules do not address any particular matter. Any grey area that arises, any written law apply and in

terms of the Rules, where the Rules of the court are not specific in any matter, the Civil Procedure Act and the Rules thereto apply. As such parties should strive to apply the Rules applicable before this court before reliance on the Civil Procedure Act and the Rules thereto.

Starting with the last issue raised by the Respondent that the Petition has been filed without disclosing any breach of a fundamental right(s) by the Petitioners and thus has not complied with the Practice Rules for the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012 as noted above, the Rules of this court apply in terms of filing proceedings unless there is a gap. In this regard, Rule 7 provides that;

7. (1) A party who wishes to institute a Petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.

(2) A person who wishes to institute judicial review proceedings shall do so in accordance with section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules.

(3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.

It is thus clear that a Petition ought to be filed in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012 but the Rules also appreciate a Memorandum of Claim can be filed setting out enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court. As such, it is not the form that is the issue rather, the substance of the claim, Petition or suit before court. As much as parties should conform to the Rules so that the Respondent or the other party can well be able to respond thereto particularly as regard judicial review matters, a suit filed in form of a Memorandum of Claim or as a Petition seeking the enforcement of an employee's rights is not fatal for want of form. What should be clear is the nature of remedy sought. I will not go into the merits of the current Petition as the matters sought can well be addressed at a full hearing.

Under Rule 9 of the Court Rules, essentially where there are many claimants with a common cause of action and against the same Respondent forming the same series of claims, one claimant or Petitioner is allowed to file suit for and on behalf of all the other claimants/petitions and the only condition relevant to meet is that the main claimant or Petitioner should file a letter of authority signed by all the other parties and also comply with Rule 9(3) thus;

(3) The statement of claim shall be accompanied by a schedule of the names of the other claimants in the suit, their address, description, and the details of wages due or the particulars of any other breaches and reliefs sought by each claimant.

These Rules are to ensure that an employee who has lost employment is not put into unnecessary expenses and is able to move the court within minimum requirements and to have the claim addressed without undue regard to technicalities. Where the claim claimant or Petitioner is able to set out the list of the other claimants by giving their particulars in terms of a description, address and the details of the nature of claim, with such compliance, the court should proceed and hear the petition.

In this case I find the Petitioners have each set out their claim and the joinder of all of them in the Petition even where each was employed on a different date and on a different contract of service, the cause of action arose on termination and the claims relate from such employment and the pension dues. As such, the objections to the nature of Petition filed and the claims set out should not technically be interpreted so as to defeat the substance of the Petition by each of the petitioners. The Rules apply equally to all parties once the pleadings have been filed.

With the above set out, it is therefore not necessary when filing a common claim or Petition to require

that the Petition should be supported by a Verifying Affidavit from each Petitioner listed and described by the main petitioner. However, where the Petitioners have filed a Petitioner as individual Petitioners but within a common Petition and each setting out their individual claim or breach of rights, a Verifying Affidavit should accompany each petitioner's case. In this regard there should be compliance with section 5 Oaths and Statutory Declarations Act.

Due to the form chosen by the Petitioners in filing the current Petition of each filing their individual claim, where there is no Verifying Affidavit or the one filed is not appropriate as challenged by the Respondent and noting the provisions of Rule 9 read together with Rule 7 and in appreciating the provisions of section 3 and 20 of the Employment and Labour Relations Court Act, the lack of a Verifying Affidavit or the one filed being a photocopy is not fatal to the substance of the Petition, each Petitioner listed or names has a chance to amend and address as appropriate.

The second objection is that;

The Petition revolves around benefits under a Pension Scheme which is under Liquidation thus the claim ought to have been brought by the Liquidator of the Pension Scheme centrally [contrary?] to clearly laid down procedures in the provisions of the Civil Procedure Act and Order 1, Rule 10(2) and (4) and therefore is incurably defective, bad in law and ought to be struck out.

The Respondent herein is *Kenya Planters Cooperative Union*.

The parties herein are described in the Petition as;

The Petitioners are adult persons of sound mind former employees of the Respondent and members of the Kenya Planters Co-operative Union Ltd Staff Retirement Benefits & Life Assurance Scheme ...

The Respondent is a body Corporate and also a Co-operative Society with perpetual succession established under the Company Act and also the Co-operative Societies Act. ...

At paragraph 4 of the petition, the petitioners' case is that;

That by virtue of being employees of the respondent, the Petitioners were members of and made contributions to the Kenya Planters Cooperative union Limited Staff Retirement Benefits & Life Scheme ('Retirement Scheme') in accordance with the Retirement Benefits Act, the law and the Trust Deed and Rules of the Scheme. The Retirement Scheme is an irrevocable trust established by the Respondent for the benefits of the Petitioners upon their retirement and old age.

At paragraph 7, the petitioner's case is that the Respondent was placed under receivership and as such, the benefits under the Retirement Scheme under the sponsorship of the Respondent should be paid to its beneficiaries. The Petition is also that the Pension Scheme remained afloat until it went into liquidation in January, 2011 and a liquidator was appointed by the regulator, the Retirement Benefits Authority. That at the time, the regulator issued a report that the Respondent had not remitted contributions amounting to Kshs.77 million as of 30th April, 2010.

From the Petition itself, the petitioners' case is that the Pension Scheme under which they claim has a Liquidator appointed. However, the Petitioners acknowledge that the Retirement Scheme had a registered Trust deed regulated under the Retirement Benefits Authority Act. Indeed the law requires that; the management of the retirement scheme be made separate from the management of the employer and hence the purpose for the registration of the Trust Deed with its trustees who receive and invest the funds received from the employer for the benefit of the employees and payable as under the Rules and regulations of the Retirement Benefits Authority Act and its regulations. The RBA thus has severe sanctions where the employer once the Trust Deed is established and proceeds to deduct and not remit the funds due for the benefit of its employees. Such deduction is also subject to section 19 of the Employment Act. Where deducted and not remitted as required, such funds should be repaid by the employer from its

account.

The Trustees listed under the Trust Deed are therefore accountable to the employees and members of the Pension Scheme. In this regard it is not only the employer or Respondent who is accountable only as the Trustees carry a fiduciary duty to its members as well. This much is noted in the Petition as details in averments in paragraphs 4, 5, 6 and 7. That the Retirement Scheme was established under the Trust Deed and funds comprised therein became protected in law and the Respondent thus had no legal right to appropriate in any manner but such should have been dealt as required in the Trust Deed and rules of the scheme.

Where then there is appropriation by an entity that has since gone into receivership such as the respondent, and that the Pension Scheme also went into liquidation in January, 2011 and a Liquidator has since been appointed by the RBA as the regulator, the claim now made against the Respondent as an entity under receivership for breach of trust, fiduciary duties and failure to remit funds due to the pension scheme due to misappropriation, sections 66 and 67 of the Employment Act falls into play.

On the face of averments in the Petition that the Respondent as a Company and also entity registered under the Companies Act and Co-operative Societies Act has gone into receivership and that a pensions Scheme under which the employees' benefits were to be remitted is in liquidation, a notice must issue to the Minister. Under section 66 of the Act upon insolvency of a company or an employer, the employee is required to;

66. Insolvency of employer

Where on an application made to him in writing by an employee or his representative the Minister is satisfied that—

(a) The employer of an employee has become insolvent;

(b) The employment of the employee has been terminated; and

(c) On the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies, the Minister shall, subject to section 69, pay the employee out of the National Social Security Fund, the amount to which, in the opinion of the Minister, the employee is entitled in respect of the debt.

Section 67 goes further to define what *insolvency* under the Employment Act means and that is;

67. Definition of insolvency

An employer is insolvent for the purposes of this Part—

(a) If the employer is a person who—

(i) Has been adjudged bankrupt or has made a composition or arrangement with his creditors; or

(ii) Has died and his estate is to be administered in accordance with the Law of Succession Act;

(b) If the employer is a company—

(i) A winding-up order or an administration order has been made, or a resolution for voluntary winding-up has been passed, with respect to the company; or

(ii) A receiver or a manager of the company's undertaking has been duly appointed, or

possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge

Therefore, on the averments made by the Petitioners and noting the Respondent being under receivership and the pension scheme now placed under a liquidator, the petitioners, even where the Petition is filed under the correct form and procedure, the entire Petition has to be rethought in terms of section 66 and 67 of the Employment Act as to move as now sought under the Petition on their petitioners' own admissions, to award against an entity such as the Respondent in receivership will not achieve justice and to move against the pension scheme which is not a party herein and is also noted as being held by a liquidator will also not achieve justice for the petitioners.

Noting the above, both parties shall take into account the provisions of section 35(6) of the Employment Act and not negate its provisions as by setting up the Pensions Scheme in terms of the RBA the respondents employees were thus removed from the protections of section 35(6) however the termination of employment and the pension scheme is now affected by the insolvency of the Respondent and the liquidator taking over the pensions scheme. The notice to the minister shall take these facts into account.

The Petitioners are liberty to move the minister as under section 66 of the Employment Act. Save for matters set out above, the Petition cannot be heard in its current form and the basis of the respondent being under Receivership and there being no joinder of the Pension Scheme which is also stated to be under liquidation. Objections allowed to that extent only.

Each party shall bear own costs.

Dated, signed and read in open court at Nairobi this 19th day of April, 2017.

M. MBARU

JUDGE

In the presence of:

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