



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 783 OF 2017**

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

**VERSUS**

**KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME.....RESPONDENT**

**AND**

**KENYA RAILWAYS CORPORATION.....INTERESTED PARTY**

**RULING**

1. By a notice of preliminary objection dated 15<sup>th</sup> May, 2017 the respondent raised the following objections:

- a) This court lacked jurisdiction to hear and determine the claim and application herein.
- b) The application as filed and the entire claim herein are *res judicata* and *sub judice*.
- c) The claimant had no *locus standi* to bring this claim and they had no nexus whatsoever with the respondent hence their claims are thus not justifiable.

2. In his submission in support of the objection as to jurisdiction Mr Mulimo for the respondent submitted that the court did not have jurisdiction since the matter was *sub judice* and or *resjudicata*. On the issue of *res judicata*, it was counsel's submission that the matter before me involved same parties and same issues as Cause No ELRC 2289 of 2015, ELRC No 783 of 2017 and Retirement Benefits Authority Civil Appeal No 5 of 2016. According to Counsel in ELRC 2289 of 2015 the claimant sought that the sale of the Pensioners assets be stayed until the issues brought in that application were heard and determined.

3. This suit (ELRC 2289 of 2015) was determined by the ruling of the court on 19<sup>th</sup> August, 2016 where the court held that the claimants had not exhausted all the dispute resolution mechanisms provided under the Retirement Benefits Act and declined to assume jurisdiction. Mr Milimo therefore argued that the matter having been determined by the court differently constituted and was still pending before the Retirement Benefits Authority Tribunal it was an abuse of the court process for the claimant to file the present claim and application raising the same issues.

4. On the issue of *locus standi* counsel submitted that the claimant is a trade union under the Labour Relations Act and under the Act a Trade Union was defined as an association of employees whose

principle purpose is to regulate relations between employees and employers. The respondent was not an employer of the claimant's members. The claimant is a workers union and not a pensioner association.

5. The claimant on its part contended that article 162(2) of the Constitution established the ELRC and this article has been operationalized by the enactment of ELRC Act which bestows upon the court unlimited original and appellate jurisdiction in all matters arising out of employer –employee relationship. The court according to Mr Munai therefore had jurisdiction to entertain the matter as filed.

8. On the issue of *res judicata* and *sub judice*, Mr Munai submitted that the issues in this cause had not been canvassed nor had the court pronounced itself thereon.

7. On the issue of locus, Mr Munai submitted that the claimant was a duly registered trade union hence had *locus standi* to engage itself in the activities as were before the court. Mr Munai further submitted that there was no alternative remedy available as alleged by the interested party at the Retirement Benefits Tribunal. According to Mr Munai, the Tribunal was presently dysfunctional with terms of the majority of its members having expired on 14<sup>th</sup> February, 2017.

8. Jurisdiction is everything. As was held in the often cited case of **“Lilians” Vs Caltex Oil** where the court stated

*“Jurisdiction is everything without it a Court has no power to make one step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence and a Court of Law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction”.*

9. The Supreme Court further in the case of **Samuel Kamau Macharia & Anor Vs K.C.B. & 2 Others** stated:

*“A courts jurisdiction flows from the Constitution or legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law”.*

10. Mr Milimo for the respondent has contended that this Court does not have jurisdiction by reason of *res judica* and or *sub judice*. That is to say, this Court (Ndolo J) had ruled in Cause No 2289 of 2015 that it does not have jurisdiction because the claimant had not exhausted the remedies available under Retirement Benefits Act. That is to say, the claimant ought to have filed an appeal before the Retirement Benefits Appeals Tribunal prior to invoking the jurisdiction of the Court. There is however one important aspect of jurisdiction which counsel did not address and which the court on its own motion should delve into. That is whether this court has jurisdiction to entertain disputes originating from the Retirement Benefits Act such as this one.

11. The preamble to the RB Act states:

*“An Act of Parliament to establish a Retirement Benefits authority for the regulation supervision and promotion of retirement benefit schemes, the development of the retirement benefits sector and for connected purposes”*

12. The respondent is a retirement benefits scheme contemplated by the Act and the dispute herein concerns disposal of its properties which the claimant feels is being irregularly done. There is therefore a dispute between the claimant and the respondent concerning the management of the affairs of the respondent.

13. Section 46(1) of the RB Act provides;

*“Any member of a scheme who is dissatisfied with a decision of the manager , 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 of the Act under which the scheme is established”.*

14. Section 48(1) provides for appeals from the decisions of the RBA Chief Executive Officer to the Tribunal established under section 47. Where as Lady Justice Ndolo in her ruling in 2289 of 2015 suggested that an appeal could lie to the court from the decisions of the Retirement Benefits Appeals Tribunal, the Act does not seem clear on this. That is to say there is no express provision in the Act allowing appeals from the Tribunal to the Court. The claimant pursuant to the ruling of Lady Justice Ndolo in 2289 of 2015 filed an appeal before the Tribunal which appeal he concedes has not been for the reasons (according to him that the Tribunal is dysfunctional as most of its members retired in February this year) not been heard and determined.

15. The Court of Appeal in the case of **Kenya Ports Authority Vs Industrial Court of Kenya & Another** after referring to the definition of Trade Dispute as contained in the Trade Disputes Act (now repealed) stated:

*“From the definition, it is abundantly clear that trade disputes concern dismissal or suspension of employees, the redundancy of employees, allocation of work or recognition agreements. Pension disputes are not included within the definition of a trade dispute. Consequently there can be no doubt that Industrial Court did not have jurisdiction to hear and determine pension disputes”.*

16. This court is the successor to the former Industrial court and the definition of trade dispute as contained in the Trade Dispute Act (now repealed) remains more or less the same as in the Labour Relations Act. It would therefore seem that the decision of the Court of Appeal in Kenya Ports Authority cited above is still binding on the Court with the consequence that this court lacks jurisdiction to determine pension disputes.

17. On the issue of *locus standi* to agitate pension disputes, section 46 of the Act provides that any member of the scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme can request for a review by the CEO of RBA. A member is defined under the Act to include a person entitled to or receiving a benefits under a retirement benefits scheme. The claimant is a trade union and cannot possibly fit the definition of a member under the Act. Further under the Employment Act, a trade union is defined as an association of employees whose principal purpose is to regulate relations between employees and employers and includes an employer’s organization.

18. 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 1<sup>st</sup> respondent’s retirement scheme.

19. In conclusion the court declines jurisdiction to entertain this claim and the same is hereby struck out with costs.

20. This ruling and consequential order applies to cause number Misc 99 of 2017.

21. It is so ordered.

Dated at Nairobi this 13<sup>th</sup> day of October, 2017

**Abuodha J. N.**

**Judge**

Delivered this 13<sup>th</sup> day of October, 2017

**Abuodha J. N.**

**Judge**