



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
MISCELLANEOUS APPL. NO. 103 OF 2017

SAMUEL ODUAR OKEYO.....APPLICANT

VERSUS

POSTAL CORPORATION OF
KENYA STAFF PENSION SCHEME.....RESPONDENT

RULING

1. The Respondent has raised a preliminary objection to the Applicant's notice of motion for offending the mandatory provisions of the law and for contravention of the doctrine of *sub judice* as the subject matter is pending before the Retirement Benefits Authority. The objection was thus to the effect that this court lacks jurisdiction to entertain the application as currently framed. The Applicant filed submissions in opposition to the objection. The Applicant submits that the dispute is correctly before this court and that the Respondent does not specify which provisions of the law have been offended. It was the Applicant's position that the suit is not *sub judice* as there was no nexus between the motion pending before the Tribunal and the present motion. Reliance was placed on the case of **Said Majid Said v James Titus Kisia [2015] eKLR** for the proposition that *it is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit.* The Applicant submits that the motion before court seeks the issuance of a decree and warrant of execution which is a different matter from the matter of calculation of the amount due by an actuary pending before the Tribunal. It was submitted that it is trite law that no warrants of execution can be issued by the Retirement Benefits Appeals Tribunal owing to procedural constraints in the Tribunal's rules and that the Court has supervisory jurisdiction over the tribunals exercising dispute resolution arising out of employment contracts. The case of **Amon O Chuchu & 39 others v Retirement Benefits Authority & 2 Others [2015] eKLR** was cited for the position that the court has powers to address matters of retirement benefits.

2. The Respondent submitted that the motion in essence sought the leave of the court to file the motion arising out of the decision of the Retirement Benefits Appeals Tribunal and the issuance of a decree and warrant of execution in favour of the Applicant for Kshs. 1,334,816 plus interest at court rates. The Respondent submits that the matter of how much the Applicant is entitled to is pending determination before the Retirement Benefit Appeals Tribunal and that there is no explanation as to how the Applicant arrived at the figure he claims. The Respondent asserts that Section 6 of the Civil Procedure Act makes provision regarding the question of *sub judice* and that a proper reading of the section along Section 31(b) of the Interpretation and General Provisions Act is that no subsidiary legislation shall be inconsistent with the provisions of an Act. The Respondent cited the case of **Heritage Insurance Company v Patrick Kasina Kisulu [2015] eKLR** for the proposition that the court should stay the consideration of this

matter where a previously instituted suit or application is pending determination by a court of competent jurisdiction. The Respondent submitted that there was no written law that had been shown to clothe the court with jurisdiction over the application before it.

3. The primary issues to be determined in my view are 2.

i. whether the court has jurisdiction in matters emanating from the Retirement Benefits Appeals Tribunal

ii. whether the matter is *sub judice*

The objection taken on jurisdiction is one which has to be determined *in limine*. The oft cited case of **Motor Vessel Lillian 'S' v Caltex Oil (K) Ltd [1984] KLR 1** is instructive on the matter of jurisdiction. Without jurisdiction, a court has no power to take any steps in the matter before it and must down its tool when it holds it has no jurisdiction as jurisdiction is everything. Under Section 12 of the Employment and Labour Relations Act, there is provision as follows:-

12 (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) ...

(5) The Court shall have jurisdiction to hear and determine appeals arising from—

(a) ...

(b) *decisions of any other local tribunal or commission as may be prescribed under any written law.*

The law thus clearly indicates that disputes arising from the employment relationship are within the purview of this court and decisions from local tribunals or commissions as may be prescribed by any other written law.

4. Pension and gratuity are terms and conditions of the contract of service. At the core of this dispute is the contract of service which is the anchor upon which the Applicant has sought remedy before the Tribunal. The court therefore is imbued with jurisdiction over employment matters and in my view, this is one of them. However, whereas the Court has jurisdiction over such matters, the claim is not yet ripe for this court. There is no final determination which could be subject of review or reversal by this court. There is an undetermined sum due to the Applicant and it is imperative that the sum be ascertained before the court can enforce the recovery. In the premises, the objection succeeds and I strike out the Application but make no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 13th day of December 2017

Nzioki wa Makau

JUDGE