



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

APPEAL NUMBER 10 OF 2014

ANNE WANGUI NGUGI & 524 OTHERS.....APPLICANTS

VERSUS

RETIREMENT BENEFITS AUTHORITY.....1ST RESPONDENT

STAFF PENSION FUND & KENYA COMMERCIAL BANK STAFF

RETIREMENT (DC) SCHEME 2006.....2ND RESPONDENT

RULING

1. The 2nd respondent in this suit has raised as preliminary the objection that:-
 - a. The Court lacks jurisdiction to hear and determine any dispute to a retirement benefits or pension scheme and any appeal arising from the determination of the Tribunal in connection with or relevant to such scheme, such as is the nature of the appeal herein.
 - b. No right of appeal lies to the Court as no such right has been specifically conferred either by the Constitution or enabling statutes, namely Employment and Labour Relations Act and the Retirement Benefits Act.
2. Mr. Fred Ojiambo Senior Counsel for the 1st respondent submitted that jurisdiction of the Court is clear from the legal provisions which gave birth to it. According to Counsel, it was the intention of the framers of the Constitution for the Court's jurisdiction to be restricted to hearing and determining disputes relating to employment and labour relations. Counsel further submitted that all instances set out under 12(1) read together with article 162(2) leave no doubt that the disputes envisioned as falling for consideration by the Court are those between the employer and employee.
3. Relying on Bennion's Statutory Interpretation, Counsel submitted that unambiguous words in a statute must be given plain, natural and ordinary meaning which correctly conveys their legislative intention. To this extent counsel cited the case of **Pinner v Everlt (1969) 1 WLR 1266, Mccornick v HorsePower ltd (1981) 1 WLR 93, Mcarthys Ltd v Smith (1979) 3 All ER 332 and African Development Bank v Agnes Acholla & Anor CA 135 of 2002.** Counsel therefore submitted that in the same view, the plain and natural meaning of section 12(5) (3) of Employment and Labour Relations Court Act correctly conveys the legislative intention that the Court has jurisdiction to hear and determine appeals arising from decisions of any other local

tribunal as long as the dispute relates to employment and labour relations or connected purposes.

4. According to Counsel, the matter before the Retirement Benefits Appeals Tribunal was not a matter related to employment and labour relations. Matter related to employment and labour relations must be matter between an employer and employee. They must be matters which relate to rights of employees or basic conditions of employment.

5. Mr. Ojiambo contended that the dispute which was before the Appeals Tribunal arose out of a decision of the Retirement Benefits Authority in connection with a retirement benefits scheme. According to counsel retirement is a voluntary termination of one's own employment or career hence contradistinctive to employment. Concerning right of appeal, Counsel relied on the cases of **Kakuta Mimai Hamisi v Peris Pasi Tobiko & 2 Others (2013) eKLR and Equity Bank Ltd V. Westlink Mbo Ltd Civil Application number 78 of 2011** and submitted that no right of appeal lies unless such right is conferred by some statutory provision and or granted under the Constitution. According to Counsel the Retirement Benefits Authority Act does not expressly confer appellate jurisdiction upon the Court. He further submitted that in the absence of rules having been made to govern the making of appeals, pursuant to section 52 of the Act, the provisions of the Civil Procedure Act apply as if the matter appealed from the Tribunal were a decree of the subordinate Court exercising civil jurisdiction. By dint of Section 65(1) of the Civil Procedure Act, except where otherwise expressly provided by the Act, an appeal shall lie to the High Court from any original decree or part of a decree of a subordinate Court on a question of law or fact. And while the Court has the status of the High Court, the jurisdiction is specific to matters relating to employment and labour relations. According to counsel the appellate jurisdiction from Retirement Benefits Authority Appeal Tribunal therefore lies with the High Court.

6. Mr. Moyende for the 1st respondent in support of the 2nd respondent's objection submitted that in Retirement Benefits Authority Act does not provide for right of appeal against the decision of the Appeals Tribunal. According to Counsel the right of appeal must be expressed and cannot be granted by implication or inference. He submitted that even though the Retirement Benefits Authority Appeals Tribunal is not per se a High Court, it nonetheless enjoys the status and powers of the High Court to a certain extent.

7. In support of the submissions Counsel relied on the case of the Trustees Teleposta Pension Scheme vs. Attorney General & 5 Others.

8. Mr. Koceyo for the appellants on his part submitted that the Court having the status of the High Court has jurisdiction to hear appeals from other subordinate Courts as set out under article 169 (d) as long as the dispute lies within the confined of employer-employee relationship. According to Counsel, the appellants having been dissatisfied with the decision of the Retirement Benefits Authority Appeals Tribunal were justified in seeking redress to a higher Court mandated with appellate jurisdiction for employment matters. It would therefore be a miscarriage of justice to lock out the appellants from exercising their right of appeal.

9. Mr. Koceyo retirement benefits by their very nature arise from employment and labour relations and to secure such benefits, the Authority is established. According to Counsel therefore, work benefits cannot be removed from the labour relations as they are a direct result of a work benefit. In this case therefore the Retirement Benefits Authority Tribunal where it has the mandate to hear appeals on retirement benefits, any aggrieved party has a right to approach the Employment and Labour Relations Court by way of judicial review, petition or an appeal. According to Counsel, where the RBA Act does not address the issue of further appeals, the Constitution is clear at article 165 (6) read together with article 161(2) with regard to the Court's supervisory powers over any Tribunal. In support of this submissions, Counsel relied on the case of **Nasim Devji & Others vs RBA Civil Appeal No. 108 of 2012.**

10. The Court having considered submission for and against the preliminary objection decides as

follows:-

a. **Jurisdiction**

Mr. Ojiambo for the 2nd respondent contended that in absence of rules to operationalize section 52 of Retirement Benefits Act provisions of Civil Procedure Act applies and by virtue thereof appeal lies to the High Court. Counsel further submitted that retirement being a voluntary cessations of employment is contradistinctive from employment hence the Court lacked jurisdiction.

11. It is now trite legal principle that jurisdiction is everything. Once a Court is found not to have jurisdiction the Judge must down tools and no amount of judicial innovation can confer such jurisdiction if found lacking.

12. Retirement is a stage in one professional, employment or sporting career. It is a stage when one decides or is compelled by circumstances to hang his boots as it were.

13. The appellants are former employees of Kenya Commercial Bank. Their retirement benefits therefore find their rooting on relationship with the Bank as its employees. This Court has as one of its areas of jurisdiction, resolution of disputes arising out of employer-employee relationship. A purposive interpretation of this jurisdiction includes prospective and former employees such as the appellants before me. It is therefore erroneous to submit as Senior Counsel Mr. Fred Ojiambo did that this Court lacks jurisdiction in the matter. This limb of the preliminary objection is therefore disallowed.

14. The second objection is that no right of appeal lies to the Court as no such right has been specifically conferred either by the Constitution or Employment and Labour Relations Act and Retirement Benefits Act.

15. Section 48 of the Retirement Benefits Act establishes an Appeals Tribunal while section 49 prescribes the jurisdiction of the Tribunal which are:-

- a. Appeals by persons aggrieved by the decision of the Authority or the Chief Executive made under the provisions of the Act or any regulations made thereunder.
- b. Appeal over a dispute between any person and the Authority as to the exercise of the powers conferred upon the authority by the Act.

16. Section 49 of the Act provides that in hearing of an appeal, the Tribunal shall have all the powers of a subordinate Court of the first class to summon witnesses, take evidence upon oath or affirmation and call for the production of books and other documents.

17. The section further provides that the Tribunal shall have power to award costs of any proceedings before it and to direct that costs shall be paid in accordance with any scale prescribed for suits in the High Court or to award specific costs.

18. A plain reading of section 49(1) therefore equates the Appeals Tribunal to a subordinate Court of first class and clothes it with powers similar to that Court. It therefore cannot be correct as argued by Senior Counsel Fred Ojiambo and Mr. Moyende that the Tribunal has the status of a High Court. Such interpretation would further be inconsistent with article 162 (2) of the Constitution which limits the Court with equal status of the High Court which parliament can establish to wit Environment and Land Court and Employment and Labour Relations Court. The only association with the High Court in so far as the Tribunal is concerned is on the award of costs which can be awarded using scales applied in High Court in civil claims. This cannot possibly by any manner of interpretation confer on the Tribunal the status of a High Court. The Act is however silent on whether the decision of the Tribunal is appealable to this Court or the High Court. The object of the Act as stated in the preamble is:-

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

18. The preamble presents the Act as a regulatory legislation. Its intention is to provide a regulatory framework for creation, promotion, management and supervision of retirement benefits schemes. This is a very specialized area familiar mostly to experts in actuarial science. Like any specialized field or profession a Court of law is least equipped to supervise and question the technical and scientific rationale of the decisions of such specialized bodies. The role of the Court is limited to ensuring that in conducting their affairs such bodies adhere to regulatory framework and observe legal controls and directions obtaining in constitutive Acts of Parliament or internationally accepted practices in the industry.

19. It has however been argued that since the Act is silent on whether the decisions of the Tribunal are appealable to this Court, no such appeal lies. This argument is in contrast to the arguments obtaining around legislation that contain ouster clauses preventing a superior court from intervening in decisions of inferior Tribunals.

20. Nyamu J (as he then was) in the case of **Republic v. Public Procurement Administrative Review Board & Anor ex parte Selex Sistemi Integri (2008) KLR 728 at page 742** held as follows:-

“The Courts guard their jurisdiction jealously but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest curtailment of the Courts’ power of review give rise to a tension between the principle of legislative mandate and judicial fundamental access to Court. ...it is well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly.”

21. From international jurisprudence, the following are discernible concerning ouster clauses.

- (a) statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly.**
- b. the Court will not normally intervene where the agency whose decision is contested acts within its permitted field, even when the emerging decision is wrong.**
- c. in spite of finality clause, it is open to the Court to examine whether the action of the agency in question is in excess of its jurisdiction, or contravenes a mandatory provision of law conferring upon it power to take such action.**
- d. breach of the principles of natural justice, including the right to a full hearing, opens up the decision of the agency to review even if there is an ouster clause.**
- e. Breach of fundamental rights and freedoms enshrined in the Constitution, including the right to protection of the law, and respect for fundamental human rights will entitle a Court to intervene, notwithstanding the existence of a finally or ouster clause.**
- (f) an ouster clause may be negated if there are strong and compelling reasons.**

22. What is deducible from the foregoing is that whether the legislation concerned is silent or contains an ouster clause the Court will generally not intervene except in those circumstances adumbrated above. That is to say whereas the Court guards jealously its supervisory power and the right of any citizen to seek the Court’s intervention either by way of appeal or judicial review, such intervention ought to take place in clear and obvious cases. Where it would appear that the

party moving the Court for intervention merely wants of the Court to intercede and replace its own decision with that of a Tribunal best placed to make such decisions, the Court must decline to do so. Further where the enabling statutes is silent on whether the Court should intervene or an appeal lies the matter is left to the interpretation of the Court rendered in each case since every case must be decided on its own circumstances. The absence of any inhibitive legislative provision cannot be construed to oust a fundamental right such as the right to access the Courts for redress. Further whether there was an ouster clause or not such ouster cannot effectively deny the Court its supervisory jurisdiction over inferior tribunals exercisable by way of judicial review. However with regard to appeals, it would be advisable before such an appeal is filed for the leave of Court to be sought and obtained for reasons proffered earlier in this ruling.

23. Considering the uniqueness of the circumstances of this appeal and the apparent lack of clarity in the law the Court will admit the appeal for hearing on merit but would recommend that future appeals arising from the decisions of the Tribunal be not filed unless with leave of Court first had and obtained.

24. In conclusion the preliminary objection is disallowed with no order as to costs.

25. It is so ordered.

Dated at Nairobi this 10th day of February 2016

Abuodha J. N.

Judge

Delivered this 10th day of February 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge