



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT MOMBASA
CAUSE NUMBER 173 OF 2016

BETWEEN

ABDULLAHI ALI

MOHAMMED.....CLAIMANT

VERSUS

1. KENYA PORTS AUTHORITY

**2. THE REGISTERED TRUSTEES OF THE KENYA PORTS AUTHORITY PENSION
SCHEMERESPONDENTS**

RULING

1. The Claimant was employed by the 1st Respondent in 1980. He was allocated staff house in Mbaraki area Block 95/1, on a monthly rent of Kshs. 12,000. He was notified by the Managing Director of the 1st Respondent in 2002, alongside the other staff, that the ownership of the houses had been transferred from the 1st Respondent to the 2nd Respondents. The 1st Respondent is an Employer, and the 2nd Respondents are the Trustees of the Pension Scheme which is sponsored by the 1st Respondent. Employees were advised by their Employer they would enter into lease agreement with the new owners, and would have the option of purchasing the houses. The new owners did not however execute any lease agreement, and enquiry from the Claimant on the sale option elicited no response. The Claimant states he therefore became a protected tenant, with his tenancy subject to the law governing the Rent Restriction Tribunal.

2. On 12th November 2015, the 1st Respondent notified the Claimant that he had attained the retirement age. Retirement was effective from 22nd February 2016. The Claimant was required to vacate his staff house, by 22nd February 2016. This triggered the filing of this Claim on the 4th March 2016. The Claimant seeks against the Respondents, the following substantive orders:-

- a. An injunction to restrain the Respondents, by themselves, their servants, workmen, agents, workmen, or otherwise howsoever from interfering with the Claimant's occupation of staff house at Pension Scheme Block No. 95/1.
- b. A declaration that the Claimant is entitled to exclusive possession on Pension Scheme Block No. 95/ 1 Mbaraki until such a time he will surrender it.
- c. Costs of the Claim.

3. Filed together with the Statement of Claim is an Application for Interim Measures, dated 4th March 2016, which is supported by the Affidavit of the Claimant, sworn on the 4th March 2016. The Claimant seeks the following main interim measure:-

- a. Pending hearing and determination of the Claim, the Respondents are restrained by themselves [or through persons named at paragraph 2 [a] above], from interfering with the Claimant's quite possession of the staff house.

The Court granted the Claimant interim injunction protecting his quite possession of the staff house, pending hearing of the application *inter partes*. The interim order was made on the 4th March 2016.

4. The Respondents filed their Statement of Response on the 18th March 2016. They filed a Replying Affidavit sworn by 1st Respondent's Human Resource Officer Amani Mambo on the same date. Also filed is a Notice of Preliminary Objection. The Respondents state the Employment and Labour Relations Court, does not have jurisdiction in this dispute. The objection was argued by respective Advocates on the 22nd March 2016, and is the subject matter of today's Ruling.

Respondents' Objection

5. The Respondents pray for striking out and dismissal of the Claim, for want of jurisdiction. They justify this prayer on the ground that the Claimant retired from the 1st Respondent on the 22nd February 2016. He was notified about the effective retirement date by the Employer on the 25th November 2015. He was given a full 3 months' notice. He attained the mandatory age of retirement. The notice advised he was expected to relinquish the staff house on retirement.

6. The Respondents state the Court has no jurisdiction to hear and determine the Claim. Its jurisdiction is given under Section 12 of the Employment and Labour Relations Court Act. Jurisdiction of this Court is confined to disputes between Employers and Employees. The Claimant is no longer an Employee of the 1st Respondent. He is retired.

7. He is a Pensioner of the 1st Respondent's Pension Scheme. He alleges to have a dispute with the 2nd Respondents. Such a dispute falls under the Retirement Benefits Act Cap 187 the Laws of Kenya. It is not an employment and labour relations dispute, but a pension dispute, involving a Pensioner and a Pension Scheme. Jurisdiction is with the dispute resolution mechanisms created under the Retirement Benefits Act, not with this Court. Firstly it is submitted the dispute between the Claimant and the 1st Respondent is not a dispute between an Employer and an Employee, and is therefore outside the competence of the Employment and Labour Relations Court under Section 12 of the Act creating and regulating the Court. The right to housing, enjoyed by an Employee, ends immediately the contract of employment is ended. The Respondents relies on the decision of this Court in ***Abdi Mohammed Daib v. Kenya Ports Authority [2015] e-KLR***, where it was held that the employment contract having gone, the fringe benefit of subsidized housing goes with it. This is a dispute which implicates landlord and tenant law, not employment and labour relations law. Secondly, the dispute between the Claimant and the 2nd Respondents is a dispute between a Pensioner and a Pension Scheme, governed by the Retirement Benefits Act, which deprives the Court jurisdiction.

8. The Respondents further submit the Claimant was granted an extension of 3 months to continue occupying the staff house, after the retirement notice took effect. This was purely on humanitarian grounds. Paragraph 18 of the Statement of Response which admits this Court has jurisdiction, was pleaded in error. The Respondents submit they intend to amend this paragraph. Of importance is that the Court cannot confer on itself jurisdiction beyond that given by the Act and the Constitution. The date of the Claimant's birth, which is undisputed, is what determined his retirement age. The law governing his contract of employment places retirement age at 60 years. The Respondents submit this Court lacks jurisdiction and the Claim should therefore be struck out and dismissed.

9. The Claimant's position is that the Objection is misplaced, and veers from the principle that preliminary objection must be restricted to pure point of law, as advanced in the notorious decision of **Mukisa Biscuits**. This aside, the Respondents concede in their Statement of Response, that the Court has jurisdiction. The Claimant submits he approached this Court while still an Employee of the 1st Respondent, having received the retirement notice, on 20th January 2016.

10. Housing of Employees is an employment matter. The Court deals with disputes involving housing of Employees. The house the Claimant occupies is owned by the 2nd Respondents. The Claimant is entitled to continue residing there, as long as he pays the agreed rent. The Claimant urges the Court to accept jurisdiction, reject the Preliminary Objection and hear the Parties on merit.

The Court Finds:-

11. The question of the jurisdiction of the Employment and Labour Relations Court with regard to disputes between Pensioners and their Pension Schemes, was answered by the Court of Appeal of Kenya in **CA at Malindi, Civil Appeal Number 38 of 2014, involving the 2nd Respondents herein v. Maurice Munyao & 148 Others**.

12. The 2nd Respondents argued in the above Appeal, and in original Cause before this Court, that Section 46 of the Retirement Benefits Act, places disputes between Pensioners and Pension Schemes, within the jurisdiction of the Chief Executive Officer of the Retirement Benefits Authority. Parties, who do not agree with the decision of the Chief Executive Officer, are to appeal to the Retirement Benefits Appeal Tribunal. The High Court prior to the Constitution of Kenya 2010, and the Employment and Labour Relations Court post the Constitution of Kenya 2010, would not have original jurisdiction in such disputes.

13. The Court of Appeal rejected the jurisdictional challenge. It held that Section 46 of the Retirement Benefits Act does not take away the original jurisdiction of the Court in hearing and determining of disputes between Pensioners and their Schemes. The Court of Appeal concluded that Courts have heard and determined pension disputes involving retired Employees. Some of the cases cited include **Director of Pensions v. Cockar [2000] 1 E.A. 37; Court of Appeal Civil Appeal Number 300 of 2009 between Teachers Service Commission v. Simon P. Kamau & 19 Others;** and **High Court Civil Case Number 65 of 2006, at Nakuru, between Teachers Service Commission v. Simon P. Kamau**. The Court of Appeal further held that the Constitution of Kenya and the Fair Administrative Action Act 2015 advance the principle of non-exclusive approach to challenge of administrative action.

14. The Respondent's Advocate while arguing the Preliminary Objection indicated that the 2nd Respondents were not satisfied with the Court of Appeal decision and intend to seek further interpretation at the Supreme Court of Kenya. For now, the decision of the Court of Appeal must be taken as the binding law on the subject. The Employment and Labour Relations Court has jurisdiction as established by the Court of Appeal. The Court has primary, as well as secondary jurisdiction in pension disputes. It is not proper for the Respondents to raise preliminary objection based on an argument which has been settled by the Court of Appeal, in an Appeal involving the 2nd Respondents.

15. This Court is constitutionally bound by the decisions of the Court of Appeal. The holding on jurisdiction of this Court, in pension disputes, made by the Court of Appeal at Malindi must therefore apply in resolving the preliminary objection raised herein.

16. The Claimant entered the disputed house as an Employee of the 1st Respondent. He has continued to occupy the house pursuant to Section 31 of the Employment Act 2007. It is not clear from the Pleadings filed by the Parties, which of the Respondents owns the houses. If the houses are owned by the Scheme, it is not clear why the 1st Respondent, has issued the Claimant with the notice to vacate. The Respondents are legally separate. From the *prima facie* facts it does not seem to the Court that this is a pension dispute, involving the Claimant and his Pension Scheme. Housing, which is at the centre of the dispute, is not a subject governed by the Pension Scheme Rules and Regulations. The material jurisdiction of the Court

cannot be denied on the ground that this is a pension dispute.

17. With regard to Section 12 of the Employment and Labour Relations Court Act, this Court held in ***Hakika Transporters Services Limited v. Kenya Long Distance Truck Drivers and Allied Workers Union [2015] e-KLR***, that the jurisdiction of this Court is meant to be given a broad interpretation, to cover the traditional social partners and the tripartite-plus. Employment and Labour Relations disputes today involve more than the traditional tripartite Partners- the Government, Trade Unions and Employers.

18. Pension is a subject which is at the heart of social security law, an offshoot of the employment and labour relations law. It cannot be that the Employment and Labour Relations Court, is in any way deprived of jurisdiction in a matter central to social security law. Section 35 [5] and 35 [6] of the Employment Act 2007 refers to Service Pay Schemes; Registered Pensions or Provident Funds under the Retirement Benefits Act; Gratuity or Service Pay Schemes under Collective Bargaining Agreements; Other Schemes established by Employers; and the National Social Security Fund. These are matters relating to social security law, which is part of the wider labour law regime. It is to be noted that Section 12 of the Employment and Labour Relations Court Act, confers jurisdiction on the Court in matters listed under that Section, and incidental or otherwise related to the matters listed thereunder. In ***Hakika Transporters***, it was pointed out that the material jurisdiction of the Court is created by Article 162 [2] [a] which states the Court shall hear and determine disputes relating to, employment and labour relations. Pension disputes, are therefore at the core of this Court's mandate. If there is a pension dispute between the Claimant and the 2nd Respondents, this Court would be the correct forum to hear and determine the dispute.

19. The submission that the Claimant is no longer an Employee of the 1st Respondent, and therefore not eligible to present a dispute between an Employee and an Employer under Section 12, is incorrect. As discussed above, the Court takes cognizance of disputes between Employers and Employees, and disputes incidental or relating to employment and labour relations matters. The personal jurisdiction is not restricted to the Employers, Employees or their respective Combinations, but extends to the other Parties implicated in the employment and labour relations disputes. Secondly termination of the employment contract does not signal the end of the jurisdiction of the Employment and Labour Relations Court, in disputes relating to or incidental to the terminated contract of employment. The employment contract creates between the Employer and the Employee short term obligations, such as payment of salaries, wages, social security contributions, housing, and paid annual leave. These are obligations arising under current employment. But the employment contract also creates post-employment obligations. It confers benefits such as pensions, life insurance, housing mortgage, medical care etc. The contract of employment may impose obligations on the Parties to act, or not act in a certain way after termination, such as where the Employee may be barred from working for competitors, or from revealing trade secrets and other confidential material belonging to the Employer to 3rd Parties. The mutuality of obligations does not always end with the termination of employment. Obligations can be created through the terminated contract, or through other contracts entered into, after termination of employment. These post-employment obligations would not be enforceable, if the Court perceived, as urged by the Respondents, its personal jurisdiction to end with the termination of employment. Disputes between ex-Employers and ex-Employees which arise out of, or relate to the terminated contract are within the jurisdiction of this Court.

20. The Claimant states he was allocated a staff house by the 1st Respondent. He alleges the staff houses were transferred to the Pension Scheme by the Sponsor, the 1st Respondent. He alleges there was an option to purchase. These facts do not suggest this is a pension dispute as alleged by the Respondents. If it was a pension dispute, the Court has given its view on the law applicable to pension disputes. But the prima facie facts suggest this is not a pension dispute, and the Claimant is not before this Court as Pensioner. This is not a dispute between a Pensioner and his Scheme, but a dispute between an ex-Employer and an ex-Employee. The Claimant assumed occupation of the staff house as an Employee of the 1st Respondent, under Section 31 of the Employment Act (or Section 9 of the repealed Employment Act). He continued to occupy the house and pay rent as required under his contract of employment. He does not occupy the house under the rules and regulations governing the Pension Scheme, but under his

terms and conditions of service with the 1st Respondent. That is why it is the 1st Respondent demanding the Claimant surrenders vacant possession, and not the Scheme Trustees who are legally separate from the 1st Respondent. The 2nd Respondents have been joined to the Claim because they are alleged to own the staff houses. The Court is of the view that although the Claimant's employment contract has definitely been terminated through retirement, he asserts to have a post-employment benefit. It is a benefit which was current and in continuity prior to retirement, but which was not necessarily extinguished by retirement. There is an allegation that the terms of tenancy of the staff house occupied by the Claimant had an option for purchase. Parties need to be given the opportunity to argue these facts. The Claimant needs to be given the opportunity to show the Court why he should continue staying in the staff house, after he has retired. The Respondents need the opportunity to clarify ownership of the houses, and the terms of occupancy. ***The Preliminary Objection is rejected. Parties shall agree on a date for the main application. Interim order given on 4th March 2016 is extended. No order on the costs.***

Dated and delivered at Mombasa this 27th day of June, 2016

James Rika

Judge