



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1554 OF 2014

PASTOR FRANK ESILABA1ST CLAIMANT

SAMUEL NGERU.....2ND CLAIMANT

GABRIEL KIVINGU.....3RD CLAIMANT

VERSUS

UNITED BIBLE SOCIETIES.....RESPONDENT

RULING

1. A preliminary objection was taken by the Respondent on the jurisdiction of this Court to hear the claim. It was submitted that the Court lacks jurisdiction as the dispute between the parties is on retirement benefits and the appropriate forum is the procedure set out under the Retirement Benefits Act.
2. The Claimants submitted that they were properly before this Court. They submitted that there are underlying issues that culminated in the non-payment of the Claimant's pensions which can only be articulated before this Court. It was submitted that Section 12(a) of the Industrial Court Act and Article 162(2) of the Constitution gives this Court the jurisdiction to deal with all disputes relating to or arising out of employment between an employer and employee. Reliance was placed on the case of **Maurice Munyao & 148 others v Albert Churembo Mumba & 7 others** Mombasa Cause No. 116 of 2013 and Cause 178 of 2012 **Samuel Oburu Okemwa v Kenindia Assurance Co. Ltd**
3. The Respondent has taken what it states is a preliminary objection. Does it fit in the definition of a preliminary objection?
4. A preliminary objection is a point of law when if taken would dispose of the suit. It is what was formerly called a "demurrer". The Respondent's Preliminary Objection fits the definition of a preliminary objection per the leading case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**. In the celebrated case Law J.A. stated a preliminary objection to be thus:- ?

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of

the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

5. Sir Charles Newbold, President stated in the same judgment as follows:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

6. The Respondent does not seek the exercise of judicial discretion. What the preliminary objection seeks to do is determine whether the Court has jurisdiction to hear this claim and the determination of this issue will, if successful, determine the suit *in limine*. It is well taken because if the preliminary objection succeeds the Court will be saved the cost of a lengthy trial and attendant expenses on either side.

7. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

8. The authority for the holding by Nyarangi JA is found in the writings of John Beecroft Saunders in **Words and Phrases Legally Defined – Volume 3: I – N. Words and Phrases Legally Defined** is a [law dictionary](#) containing statutory and judicial definitions of words and phrases which states at page 113 the following about jurisdiction:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

9. I am persuaded that if I have no jurisdiction I would be bound to down my tools and take no further step as jurisdiction is everything and I must have it if I am to sit on this case.

10. The issue the Claimants seek to have resolved is non-payment of pension entitlements. This is clearly borne out in pleadings. I held in the case of **Mary Nyathira Mbugua v Kiambu Unity Finance Co-op Union Limited** Cause no 537 of 2012 as follows:-

.....the claim on the provident fund which is a payment that falls under the Retirement Benefits Act. The

appropriate body to deal with the claim at the onset is the Retirement Benefits Authority as this Court would be the appellate court after the determination of the Authority or the Retirement Benefits Tribunal established thereunder.

11. I am the appellate Court contemplated under the Retirement Benefits Act and as such it is remiss to hear the matter as I am not the Court of first instance. I am not persuaded that the decision of Makau J. in **Maurice Munyao & 148 others v Albert Churembo Mumba & 7 others** is either binding on this Court or the proper position regarding retirement benefits. The provisions of Article 162 (2) are as follows:-

162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

12. Nothing in this Article ousts the jurisdiction of the Retirement Benefits Tribunal. I hold and find that this Court is devoid of jurisdiction and the preliminary objection is allowed with costs to the Respondent. Suit is struck out.

Orders accordingly.

Dated and delivered at Nairobi this 11th day of February 2015

Nzioki wa Makau

JUDGE