



**REPUBLIC OF KENYA**

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

**CAUSE APPEAL NO. 6 OF 2014**

**AMON O CHUCHU & 39 OTHERS.....APPELLANTS**

**VERSUS**

**RETIREMENT BENEFITS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**THE TRUSTEES, BARCLAYS BANK OF KENYA PENSION SCHEME...2<sup>ND</sup> RESPONDENT**

**RETIREMENT BENEFITS AUTHORITY.....3<sup>RD</sup> RESPONDENT**

(An Appeal from the decision of the Retirement Benefits Appeal Tribunal at Nairobi dated 11<sup>th</sup> September 2013)

**RULING**

1. On 16<sup>th</sup> January 2015, the applicant herein the 2<sup>nd</sup> respondent, Barclays Bank of Kenya Pension Scheme, filed the Notice of Motion herein under the provisions of Article 165(3) (e) of the Constitution, section 18(b) of the Industrial Court Act, order 2 Rule 15 of the Civil Procedure Rules, Rule 16(1) and 27(1) (g) of the Industrial Court (Procedure) Rules, seeking for orders;

- a. *The honourable Court be pleased to strike out the Appeal herein.*
- b. *The costs of this suit be awarded to the 2<sup>nd</sup> respondent/applicant.*

2. This application is supported by the annexed affidavit of Waweru Mathenge and on the grounds that the Retirement Benefits Act does not provide for a right of appeal against a decision made by the Retirement Benefits Appeal Tribunal and as a consequence the Appellants can only invoke the supervisory jurisdiction of the High Court against the orders made by the Retirement Benefits Appeals Tribunal. The Appellants have done so in **JR No. 78 of 2014 – Republic versus Trustees Barclays Bank of Kenya Pension Funds & 3 Others ex parte Amon O Chuchu & 39 Others**. Other grounds are that the Appellants have abused the Court process and its fair administration by simultaneously instituting two proceedings challenging the decision made by the Retirement Benefits Appeals Tribunal on 11<sup>th</sup> September 2013. The appellants have misled the Court on the concurrent proceedings being this Appeal and **JR No. 78 of 2014**. The Appeal herein should be struck out.

3. In the affidavit of Waweru Mathenge he avers that as the head of legal an secretarial service for the 2<sup>nd</sup> Respondent and in support of the motion herein, the Appellants has instituted the appeal hearing challenging the decision of the Retirement Benefits Appeals Tribunal on 11<sup>th</sup> September 2013 in disregard of the provisions of the Retirement Benefits Act that does not provide for a right of appeal from decisions of the Retirement Benefits Appeal Tribunal. Under Article 165(3) (e) of the Constitution read

together with section 18(b) of the Industrial Court Act, the Court only has jurisdiction to hear appeals where such a right has been provided by written law. The only way a party can challenge the decision of the Retirement benefits Authority Appeals Tribunal is by way of Judicial Review as in the proceedings already instituted by the Appellants in JR No.78 of 202014. To file suit herein is tantamount to duplication of proceedings. The Appellants are also concealing rhea existence of JR No. 78 of 2014 from this Court noting that on 18<sup>th</sup> June 2014 parties were before this Court where it was directed that all parties herein be served. Upon request for service by the 3<sup>rd</sup> Respondent on 11<sup>th</sup> August 2014 with JR No.78 of 2014, the Appellants noted that there was no such a matter. The 2<sup>nd</sup> Respondent wrote to the JR Division seeking clarification and on 24<sup>th</sup> September 2014 a mention was called but the Appellants was absent despite directions by this Court for the Appellants to appear and clarify the matter. Follow up communication by the Appellants advocates confirmed that indeed there was no such matter filed in JR No.78 of 2014.

4. The 2<sup>nd</sup> Respondent thus apply, in these circumstances the Appeal herein should be struck out and application herein be allowed.

5. In reply, the Appellants filed Replying Affidavit on 19<sup>th</sup> February 2015, sworn by Amon O Chuchu and being one of the Appellants averred that the application by the 2<sup>nd</sup> Respondent contradicts section 4 of the industrial Court Act which provide that all disputes relating to employment and labour relations in Kenya should be filed before this Court and further under section 12, the Court has exclusive jurisdiction to hear this matter on the basis of Article 162 (2) of the Constitution. The provisions violated by the appellants in coming to this Court have not been stated. Section 87(1) of the Employment Act creates a right for an employee or an employer who has neglected to fulfil a contract of service; there is a liability touching on misconduct, ill treatment or any injury to the person or property, to lodge suit before this court. In this case therefore no other Court has jurisdiction to hear matters set out under the jurisdiction of this court. The Appeal herein is from the decision of the Retirement Benefits Authority Appeals Tribunal and the claim having been based on employment and labour relations.

6. Mr Chuchu also avers that the jurisdiction of this Court is conferred by Article 165(5) and section 12 of the Industrial Court Act, especially the unlimited jurisdiction to hear appeals from decisions of Tribunals of competent jurisdiction in disputes relating to employment and labour relations. Such an appeal cannot be filed before the High Court. The Retirement Benefits Authority Act which creates the Tribunal, do not make the Tribunal appeals final and an aggrieved party can come to this court. The existence of a judicial Review case which has since been abandoned does not preclude a party from pursuing other avenues for redress as judicial review applications are not suits within the context of the law and cannot address merits of the Appeal herein. JR No.78 of 2014 was abandoned and has never been served upon the respondents and does not constitute a suit and the respondents were therefore never served.

7. The respondents will not suffer any irreparable damage where the Appeal is allowed to proceed for hearing. The application should therefore be dismissed.

The 3<sup>rd</sup> Respondent did not oppose the application.

### **Submissions**

8. On 12<sup>th</sup> February 2015 Court directed all parties to file their written submissions. The 2<sup>nd</sup> Respondent filed on 4<sup>th</sup> March 2015 and the Appellants on 15<sup>th</sup> March 2015.

9. The 2<sup>nd</sup> Respondent as he applicant submitted that the Court is granted jurisdiction under Article 162(2) of the Constitution over employment and labour relations and the relationship of the Appellants and the 2<sup>nd</sup> Respondent is that of a pensioner and a pension scheme which relationship is auxiliary to that of employer/employee as covered by the court. The parties herein are not covered by the court. There is no relationship of an employer/employee in this case or any relationship outlined under section 12(1) of

the industrial Court Act.

10. The 2<sup>nd</sup> Respondent also submitted that there is no right of appeal from decisions of the Retirement benefits Appeals Tribunal. Article 165(3)(e) of the Constitution read together with section 18(b) of the Industrial Court Act that give the power to hear appeals from written law and the Retirement Benefits Authority Act is not one such Act. The dispute between the parties arose from retirement benefits under the Retirement Benefits Act, but the Act does not give power to the Court to hear appeals from the Retirement Benefits Authority Appeal Tribunal as held in **The Board of Trustees of New Kenya Creameries (Junior) Staff Pension Scheme versus Retirement Benefits Authority [2012] eKLR** where the Court held that had the law intended for appeals from the Tribunal, it should have been so stated. And in **Trustees of Teleposta pension Scheme versus Attorney General & 5 others [2014] eKLR** where the Court held that;

*... a party aggrieved by a decision of the Appeals Tribunal has recourse to the High Court and the Industrial Court by way of a Judicial Review application by application of section 49(4) and 50(2) of the Act.*

11. In this regard, the Retirement Benefits Appeals Tribunal is the last decision making body with regard to retirement benefits. There is no right of appeal to the High Court. The only way an aggrieved party can challenge such a decision is by way of judicial review proceedings, which is not an appeal.

12. The 2<sup>nd</sup> Respondent also submits that the appeal is time-barred even where jurisdiction is established. Section 8 of the Industrial Court Rules provide for appeals be made within 30 days from the date the subject decision was made. The Tribunal Appeal was delivered on 6<sup>th</sup> December 2011; appeal herein is filed on 10<sup>th</sup> October 2013, over 2 years later. The Appellants filed JR No.78 of 2014 challenging the decision of the Appeals Tribunal and to institute the Appeal herein is an abuse of the Court process and should be struck out.

the Appellants, submitted that the application by the 2<sup>nd</sup> Respondent is premised on the grounds that the Retirement Benefits Act does not provide for a right of appeal against a decision made by the Retirement Benefits Authority Appeals Tribunal and as a consequence the Appellants can only invoke the supervisory jurisdiction of the High Court against the orders made by the Appeals Tribunal which the Appellants did when they filed JR No.78 of 2014 and to file the Appeal herein is an abuse of the Court process. however, this application lacks merit and should be dismissed.

13. The Appellants thus submitted that section 4 and 12 of the Industrial Court Act is relevant here and the decision in **Beatrice Achieng Osir versus The Board of Trustees Teleposta Pension Scheme, Cause No. 665 of 2011** where the jurisdiction of the Court is outlined. In matters of employment and labour relations, this Court has unlimited jurisdiction conferred by Article 162(2) of the Constitution and the constitutive Act, the Industrial Court Act.

14. The issues that emerge for the Court determination can be outlined as;

**Whether the Court has jurisdiction herein;**

**Whether there is a right of appeal to the Court from the Retirement Benefits Appeals Tribunal; and**

**Whether the suit should be struck off**

15. The normative framework for the establishment of this Court is set under Article 162(2) of the Constitution. The Court is given the exclusive mandate to hear employment and labour relations disputes unlike other superior court. By enacting the industrial Court Act, Parliament outlined the jurisdiction of the Court as having original and appellate authority in employment and labour relations disputes thus;

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—

[Emphasis added].

16. And given powers under section 12(3) to;

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) *Interim preservation orders including injunctions in cases of urgency;*

(ii) *a prohibitory order;*

(iii) *an order for specific performance;*

(iv) *a declaratory order;*

(v) *an award of compensation in any circumstances contemplated under this Act or any written law;*

(vi) *an award of damages in any circumstances contemplated under this Act or any written law;*

(vii) *an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or*

(viii) *any other appropriate relief as the Court may deem fit to grant.*

17. Therefore, the court, unlike the High Court that is specifically removed from addressing employment and labour relations disputes by Article 165(5) (b), such encumbrances are not directed at this court. The Court retains its original and unlimited mandate. The original jurisdiction is on matters outlined under section 12(3) while the appellate jurisdiction is conferred by written law.

18. In this regard, the Retirement Benefits Act establishes the Retirement Benefits Authority for;

*... The regulation, supervision and promotion of retirement benefits schemes, the development of the retirement benefits sector and for connected purposes*

19. Retirement benefits in their very nature arise from employment and labour relations and to secure such benefits, the Authority is established. Work benefits cannot therefore be removed from labour relations as they are a direct result of a work benefit. This finds justification in what this Court has established in **Cause No. 2013 of 2014, Central Organisation of Trade Unions & Another versus Cabinet Secretary Labour Social Security & Services and Another**. The establishment of the Retirement Benefits Appeals Tribunal is set to ensure the effective administration of retirement benefits once earned in an employer/employee relationship. Such administration of disputes is to ensure a fast and expeditious process as the first instance by the body exclusive to handle such matters. Decisions of the Appeals Tribunal under the Act though defined can be traced to the Constitution. Under Article 169(1) (d), subordinate courts are to include;

*Part 3—Subordinate Courts*

**169. (1) The subordinate courts are—**

(a) the Magistrates courts;

(b) the Kadhis' courts;

(c) the Courts Martial; and

(d) any other Court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2).

20. And with regard to matters before any subordinate court, the High Court;

*(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

[emphasis added]

21. In the High Court supervisory powers over subordinate courts, which include tribunals as defined under Article 169(1) of the Constitution, where such matters relate to employment and labour relations Article 165(5)(b) direct the High Court to refer to this Court. In this case therefore, the Retirement Benefits Appeals Tribunal, even where it has the mandate to hear appeals on retirement benefits, any aggrieved party has a right to approach this Court to assert their rights as under section 12(3) of the industrial Court Act, which rights can be asserted by way of judicial review, petitions, applications or as a party may deem appropriate. This being a Court of superior record, with regard to employment and labour relations, rights and duties that flow from such relations can be asserted or confirmed by this court. I therefore find this Court has the requisite jurisdiction to address matters of retirement benefits.

22. However, with regard to appeals, such a right of appeal only arise by grant of statute as in the case of the Court of Appeal or by seeking leave as before the Supreme Court where the specific right is not granted. Appeals before this Court are governed by section 18 of the Industrial Court Act and the procedures for filing of an appeal are found under the Court Rules at Rule 8 of the Industrial Court (Procedure) Rules. Where the Retirement Benefits Act does not give the right to an aggrieved party to approach the Court in appeal, reference must be made to the Constitution.

23. In this case the existence of JR No. 78 of 2014 has not been denied. This is confirmed in Annexure "WM1" in the Affidavit of Waweru Mathenge sworn on 19<sup>th</sup> December 2014. An aggrieved party by a decision of the Retirement Benefits Authority Appeals Tribunal has recourse to this Court by way of judicial review or as appropriate. However, such an aggrieved party cannot file for judicial review before the High Court and before this Court as to do so would be multiplicity of suits. The Appellants herein submit that JR No. 78 2014 ha since been abandoned and that is why the respondents were never served. Such evidence is not attached to the proceedings herein. The existence of JR No.78 of 2014 is a fact and where this has been withdrawn, such a fact should have been established by the Appellants. To file JR No. 78 Of 2014 and the current Appeal is fishing too wide and against the set principles of civil procedure and the Rules of procedure for this Court. The Appeal herein, I fin dis without leave and against the Rules of procedure as outlined under Rule 8 of the Industrial Court (Procedure) Rules.

24. Where the Appellants found themselves at the wrong forum for the JR No.78 of 2014, recourse is not to file the current Appeal. To do so is to abuse process and cannot find justification that the respondents had not been served. Where the Retirement Benefits Authority Act does not address the issue of further appeals after the Tribunal Appeals have made a decision, the Constitution is clear at Article 165(6) read together with Article 162(2) with regard to the Court supervisory powers of any tribunal. Appeals filed before this Court are regulated by Rule 18 of the Industrial Court (Procedure) Rules thus;

*Appellate jurisdiction.*

**18.** The Court shall have appellate jurisdiction to hear and determine appeals from—

*(a) decisions of the Registrar of Trade Unions; and*

*(b) any other court, local tribunal or commission as prescribed under any written law.*

25. The Appellants have not made any effort to address the above issue with regard to filing their Appeal out of time despite the 2<sup>nd</sup> Respondent raising this in the application. The omission in compliance thereto is fatal on its own accord.

**I therefore find merit in that the current Appeal as filed is an abuse of the Court process, the Appellants have already filed JR No. 78 of 2014 and by filing the current Appeal herein, there is no compliance with the Rules. In the interests of justice and due process, application dated 19<sup>th</sup> December 2014 is allowed and the Appeal is struck out but each party shall bear their own costs.**

**Delivered in open Court dated and signed in Nairobi on this 25<sup>th</sup> day of May 2015.**

**M. MBARU**

**JUDGE**

**In the presence of**

**Lilian Njenga: Court Assistant**

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