



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

Cause No. 116 Of 2013

MAURICE M. MUNYAO & 148 OTHERS (*Suing on their own behalf and on behalf of the othermembers/Beneficiaries of the Kenya Ports Authority Pension Scheme affected by the averaging of the Pensionable salary and freezing of the pensionable House allowance pursuant to the Order made by Hon. Justice Maraga J. on the 28th November 2007*).....CLAIMANTS

VERSUS

ALBERT CHAUREMBO MUMBA & 7 OTHERS (*Sued on their own behalf and on behalf of their predecessors and/or Successors in title in their capacity as the Registered Trustees of the Kenya Ports Authority Pension Scheme*).....RESPONDENTS

AND

CFC BANK LIMITED (*Formerly Stanbic Bank Kenya Ltd*).....GARNISHEE

MAURICE MILIMU AMAWA.....INTERESTED PARTY

R U L I N G

1. The issue before the court is whether the court lacked jurisdiction to entertain this suit *abinitio* and whether the ensuing judgment and the Garnishee order *nisi* made in execution of the said judgment were a nullity for being made *ultravires* the courts jurisdiction. According to the respondents in the main suit and the interested party, the court acted without jurisdiction and as such it should quash the said judgment and lift the Garnishee order *nisi*. On the other hand the claimants have urged that the court was seized with the jurisdiction and as such the judgment should not be interfered with and instead the Garnishee order *nisi* should be made absolute. The court's opinion is that the claimants are right in their contention for the reason hereinbelow.

BACKGROUND

2. The claimants who were all former employees of Kenya Ports Authority (KPA) filed this suit in the High Court at Mombasa seeking declaration that the respondents had made unconstitutional, illegal, unlawful, wrongful and fraudulent amendment to the trust deed which had the effect of reducing the accrued benefits of the claimants and other members of the KPA pension Scheme. The claimants also prayed for the arrears of their accrued pension benefits including the lumpsum pay on retirement and the monthly pension which resulted from the underpaid pension due to the said fraudulent and unconstitutional amendment of the Trust deed.

3. The claimants pleaded 12 particulars of fraud which included concealment by the respondent that the sponsor (KPA) had not remitted ksh.6,857,627,602 to the KPA Pension Scheme as at 31/12/2003 and ksh.6,982,340,602 as at 31/12/2004.

4. The respondents filed defence to the suit on 11/1/2007 denying liability and justifying the impugned amendment to the Trust Deed. In addition the defence averred that the court lacked jurisdiction to “interfere with or amend the rules governing the scheme or to vary, alter, enhance, improve or reverse the effects that those rules have on the pension payable to the plaintiffs and other members of the scheme”.

5. The suit was fixed for hearing by the consent of the defence counsel on several occasions and evidence was taken from a witness before the High Court between 2007 and 2012. On 18/12/2012, Mwongo J, who was presiding over the trial asked the counsel for the two parties to consider whether the dispute was “emanating” from employment and labour relations and whether the same should be transferred to this court. The counsel requested to be allowed to do research and report back. On 26/2/2013, the counsel for both parties appeared before Muya J, and agreed to have the suit transferred to this court for determination. The proceedings were then typed and the file transferred to this court.

6. On 24/9/2013 the counsel for both parties appeared and agreed to have the hearing proceed from where it had reached. The court heard all the witnesses on 29/9/2013 and 30/9/2013. On 15/10/2013 counsel for both parties made their closing submissions by highlighting on their respective written submission. The respondent urged in their submissions paragraph (ix) that the court lacked jurisdiction to “interfere with or amend the rules governing the scheme or vary, alter, enhance, improve or reverse the effect that the rules have on the pensions payable to the effect that those rules have on the pension payable to the effect that those rules have on the the pension payable to the plaintiffs and other members of the scheme”. Consequently it was submitted for the defence that the suit was prematurely filed before exhausting the dispute resolution mechanism set out under the Retirement Benefits Act.

7. On 14/2/2014 this court delivered its judgment on the dispute by which it made the declaration sought in the suit and made an award of money to the claimants. It would appear from the record that the court did not make any finding on the issue of jurisdiction which was raised by the written submissions by the defence. The reason for not dealing with that issue is because it appeared obvious that the court had jurisdiction because the dispute related to employment and violation of Bill of right under the repealed constitution and also that it was being raised too late in the day. The respondents were not satisfied with the said judgment of this court and exercised their right of appeal by filing a Notice of Appeal on 21/2/2014. They were supplied with typed proceedings and judgment on 15/8/2014 to proceed with their appeal.

8. In the meanwhile a flood gate of applications opened. The claimants brought the Notice of Motion dated 29/8/2014 (Garnishee application) seeking Garnishee Order Nisi against CFC Stanbic Bank Ltd Digo Road Branch Mombasa, (Garnishee) to recover ksh.261,819,043.20 plus further costs and interest by attaching the respondents account number 0130063201 or any other bank account held by the respondent in the Garnishee's bank pending the determination of the Garnishee Application. The Motion also seeks for a Garnishee Order Absolute and order the execution of the said stated sum to satisfy the decree herein by paying the said sum through the claimants advocates bank account.

9. In response, the respondent opposed the Garnishee application by the Replying Affidavit by Justus Omae Nyarandi sworn on 8/9/2014. In brief the respondent urged that the court had no power to issue a Garnishee order against unspecified accounts. She also urged that this court lacked jurisdiction over the

dispute *ab initio* and as such it also lacked jurisdiction to issue any Garnishee order to enforce recovery proceedings. The Garnishee on her part filed a replying affidavit on 2/10/2014 admitting that she was holding ksh.532,658,641.56 on behalf of the respondent (JD). She however averred that Account number 0130063201 was not linked to the Garnishee

10. The second application was filed by the respondent being Notice of Motion dated 6/9/2014 seeking stay of execution of the decree by way of Garnishee proceedings pending the hearing and determination of the respondent's earlier Notice of Motion dated 22/3/2014. The said Motion dated 22/3/2014 basically sought for stay pending appeal and was prompted by the claimants Garnishee proceedings instituted on 17/3/2014 but which was later withdrawn. Thereafter the respondent never pursued the stay application until fresh Garnishee application was filed on 29/8/2014.

11. In response to the respondent's stay application dated 6/9/2014, the claimants have denied that the Garnishee order nisi has brought the respondents operations to a halt. According to the claimant the respondent has other accounts with other banks in addition to billions of shillings in the hands of Pine Bridge Investment E.A Ltd and Genesis Kenya Investment Management Ltd who are the respondents fund managers. The claimants believes that this court has the jurisdiction over the dispute herein.

12. The parties agreed to file written submissions on the Garnishee application and the respondents application dated 6/9/2014. In the meanwhile, the respondent's counsel filed another application dated 24/9/2014 on behalf of the respondents Fund Administrator as an Interested Party to the suit. The Fund Administrator is challenging the jurisdiction of this court over the suit and also to issue Garnishee order. In addition the Administrator prayed for variation of the Garnishee order so as to enable him to discharge his statutory duty.

13. In response the claimants have opposed the Administrator's application urging that the administrator is a stranger to the suit, the court has jurisdiction and that the Garnishee order ought to be made absolute and ksh.267,819,043.20 be released to them and the Administrator be left with the rest of the money to apply in his statutory obligations. As a result of the latter application, the parties filed further written submission and highlighted them on 9/10/2014 following the courts direction that the issue of jurisdiction should be dealt with to finality

Submissions on behalf of the Defence and Interested party

14. Mr. Kinyua, learned counsel for the defence and the interested party, submitted that the jurisdiction of the court over the dispute had been challenged under paragraph 23 of the defence and paragraph ix(a) – (e) of the written submissions after the close of the hearing. According to the defence counsel, the dispute ought to have been determined under the mechanism provided in the Retirement Benefits Act (RBA). He observed that the court made a finding in the impugned judgment that the dispute was not between employer and employees but between members and their pension scheme. The counsel urged the court to make a finding on the issue of jurisdiction because it was pleaded even if the matter was eventually transferred form the High Court.

15. The defence counsel further submitted that under Section 16 of the Industrial Court Act, this court can revisit its own decision and quash it if the court finds that it had breached a written law. In doing so, according to the counsel, the court will not be sitting on appeal over its own decision. In this case, the counsel submitted that the court acted without jurisdiction and as such the court should revisit the judgment and quash it. He submitted that the constitution is the supreme law and action including a judgment that contravenes the constitution is invalid. He cited Article 25 and 50 of the constitution to support his submissions that the right to fair trail includes right to hearing before a competent court. He contended that the dispute herein did not fall within the meaning of a dispute related to employment and labour relations over which Article 162 of the Constitution established this court. He maintained that the dispute herein was not between employer and employee or former employer and former employees as provided for under Section 12(1) of the Industrial Court Act.

16. According to the defence counsel RBA Act does not extend jurisdiction to this court but to the various

officers and appeals tribunal and the High Court in case of Judicial Review. According to the learned counsel, the reason for such jurisdiction is because the personnel have special skill and knowledge in the area. He cited Court of Appeal decision in **C.A NO. 236 OF 2012, KPA VS INDUSTRIAL COURT & 2 OTHERS** where the court held that Industrial court lacks jurisdiction to hear and determine disputes falling under the RBA Act. The court then held that such disputes are to be resolved through the RBA Act mechanism. The counsel however was quick to observe that the Industrial Court in the foregoing precedent was the defunct Industrial Court and not this court.

17. In conclusion, the counsel contended that even if the suit was transferred from the high Court to this court by consent, that did not mean that the defence waived the right to raise preliminary objection. According to the counsel, the court was under a duty to determine its jurisdiction under Cap 8 whether the defence raised the issue or not.

Submissions for the Claimants

18. Mr. Tindika, counsel for the claimants submitted that the objection on ground of jurisdiction is being prosecuted too late after the judgment. The claimants counsel submitted that objection on ground of jurisdiction ought to be prosecuted by the party who pleads it before the close of the hearing and not after. He cited the **LILIAN S. CASE** to support his contention that a question of jurisdiction ought to be raised at the earlier opportunity. According to the claimants counsel, the burden of raising objection of jurisdiction is on the party disputing it and not the trial court. The counsel opined that the objection being raised now is calculated to frustrate the judgment of the court.

19. The counsel further urged that this court is seized of the jurisdiction over the dispute herein because it is related to employment and labour relationship. According to the counsel, the pension scheme was negotiated between the claimants union and the employer (KPA) as part of the employment contract and KPA proceeded to establish the scheme for the benefit of the claimants. It is this negotiated document which was altered prompting the claimants to file suit in the High Court based on breach of a constitutional right to property, provided for under Section 70 and 75 of the repealed Constitution of Kenya, by the respondents. The counsel cited the definition of Retirement Plan and Pension Trust from Blacks Law Dictionary. The former means employees benefits plan while the latter means an employer funded plan.

20. According to the counsel, the mechanism provided under the RBA Act cannot determine a question of breach of constitutional right to property as provided under the constitution. The counsel maintained that this court is the right court to deal with constitutional interpretation on disputes related to employer and labour relations. He cited **DANIEL N. MUGENDI vs KENYATTA UNIVERSITY AND 3 OTHERS [2013] e KLR p.9** where the court held that this court has jurisdiction to deal with dispute under Article 41 of the Constitution and all other rights ancillary to the employment and labour relations.

21. In that respect the claimants counsel submitted that the jurisdiction of the court is not limited to the class of disputes listed under Section 12(1)

(a) -(i) of the Industrial Cort Act. According to the counsel, the disputes “include” but are not limited to the matters listed under the said Section 12(1) of the Act. Indeed, according to the counsel, under Section 12(3) (v) and (viii) the court can award the reliefs sought herein and even more as the court may deem fit.

22. In conclusion the claimant's counsel submitted that the respondents as trustee owed fiduciary duty to the claimants as the beneficiaries of the pension money which arose due to the employment relationship between KPA and the claimants.

REJOINDER BY THE DEFENDANTS

23. The defence counsel submitted that retirement benefits and wages are different and maintained that the dispute here was outside the provisions of Section 12 of the Industrial Court Act. He contended that in **LILIAN S. CASE** the court held that objection on ground of jurisdiction can be raised at any stage.

He contended that the pension Scheme was not an agent of KPA.

ANALYSIS AND DETERMINATION

24. The court has carefully read through the various Motions, affidavits, submissions and the pleadings that led to the judgment dated 14/2/2014. The court has also considered the oral arguments made by the counsel on 9/10/2014. It is common knowledge that this dispute was filed first in the High Court in 2007 much earlier than the establishment of this court under the current Constitution. There is also no dispute that the defence never disputed the jurisdiction of the High Court *per se* but only in relation to the determination of certain matters as pleaded under paragraph 23 of the defence. It is further not in dispute that the defence participated in all the proceedings before the High Court and never prosecuted the said objection pleaded in paragraph 23 of the defence. There is also no dispute that the defence consented to transfer of the suit to this court as the court with jurisdiction over the dispute because it “emanated” (to quote Mwongo J.) from employment and labour relations. There is also no dispute that the defence participated in the trial of the dispute before this court and even called a witness to testify without raising any objection on the jurisdiction of this court. There is further no dispute that the Pension Fund Administrator is not a party to the suit and has not applied to be enjoined yet he is seeking substantive orders in these proceedings. There is also no dispute that the Garnishee is holding ksh.532,658,641.56 on behalf of the respondents which is more than the judgment debt.

25. The issues for determination are whether the court lacked the jurisdiction to hear and determine this suit *ab initio* and if not whether the court can now revisit the judgment it delivered on 14/2/2014 and quash it. Secondly, the court has to determine whether it has jurisdiction to issue a Garnishee order nisi and if yes, whether the court should vary the Garnishee Order Nisi so as to enable the fund Administrator to discharge his statutory obligation of paying pension to the respective pensioners.

Jurisdiction over the suit generally

26. As stated above, the conduct of the parties during the trial did not suggest that they were objecting to the jurisdiction of the of the court to determine the dispute generally. In fact the defence raised objection to the jurisdiction of the High Court under paragraph 23 of the defence only in respect of certain matters and not the suit generally. The matter was made more obvious by the fact that the parties consented to have the suit transferred to this court because it “emanated” from employment and labour relations. Firstly, the dispute was involving a right which accrued under a contract of service to the claimants as employees and were now enforcing it as former employees of KPA against the employers trustees. Secondly, the suit was founded on a breach of a right protected under the Bill of rights as enshrined in the Constitution of Kenya (now repealed). Paragraph 8 of the plaint stated that

“8. The plaintiffs shall aver and contend that the said decision was contrary to Section 75 of the constitution of Kenya and thus breached the plaintiffs' constitutional rights in the property benefits of the scheme and thus the decision cannot be implemented either as proposed and/or as purported or at all.”

In addition to the foregoing prayer (a) in the plaint sought for a declaration that the amendment of the Trust Deed and the rules thereunder was illegal, fraudulent and unconstitutional *ab initio*. As a consequence of the foregoing pleadings and the relations of the dispute to employment and labour relations, the court was never in any doubt that it was seized of the jurisdiction to determine the dispute after it was referred to it from the High Court by the consent of the two sides.

27. When the parties referred the suit to this court they did not confer any jurisdiction to it but they appreciated the jurisdiction conferred to the court by article 162(2) of the Constitution and Section 12 of the Industrial Court Act because the dispute related to employment and labour relations. As at the time the court tried the suit and delivered the impugned judgment, the Court of Appeal had not made the decision in **C.A NO. 236 OF 2012 KENYA PORTS AUTHORITY VS INDUSTRIAL COURT OF KENYA AND 2 OTHERS**. The said decision was delivered on 31/7/2014, which was over 5 months after this court had pronounced itself in this suit and as such this court did not act against the said

precedent.

28. This court is alive to the fact that the defence has already exercised her right of appeal against the impugned judgment. This court is however not aware of the grounds relied upon in the said appeal and it will therefore be very careful not to venture into matters which are already before the appellate court. The issue of jurisdiction is a legal issue which is appealable to the Court of Appeal. This court will therefore not reopen trial to determine the issue of jurisdiction which to it was obvious and not raised at the appropriate time. That is not to say that there can be *estoppel* against the law. What the court is saying is that if the defence feels that the court erred on the issue of jurisdiction, logic dictates that an appeal be preferred as the respondent has already done. The counsel for the defence has however received instructions from the Administrator of the respondent as an Interested Party to challenge the jurisdiction of the court through some unorthodox procedure. First the Administrator is not a party to the suit and possibly not a party in the said appeal proceedings. The court will therefore not grant the orders sought by the Fund Administrator. The court will also not enjoin him to the suit because it is already concluded and the court rendered *functus officio*. In addition the court is not seized with any jurisdiction to quash its own judgment or to declare it invalid for lack of jurisdiction. Even if such jurisdiction existed, which is not the case here, the court cannot be moved by a stranger to the suit to make such substantive orders and in the procedure invoked by the defence and the Fund Administrator.

Jurisdiction to issue Garnishee Order

29. In view of the finding above that this court has at material times to this suit been seized with the jurisdiction to determine the suit, the court makes a further finding that it has the jurisdiction to enforce its judgment /decree by way of Garnishee orders under the civil procedure rules as requested by the claimants in their Garnishee application. Rule 31(2) of the Industrial Court (Procedure) Rules provides that execution of a decree of this court shall be done in accordance with the rules applicable for execution of a decree in the High Court. It follows therefore that this court has jurisdiction to issue a Garnishee order under Order 23 of the Civil Procedure Rules just as it has done in this case. The court can only be barred from doing so by a stay order given by the appellate court. As at the time the claimants moved the court for Garnishee order nisi on 29/8/2014, no such stay order had existed. Consequently the court was free to issue a garnishee order nisi. If the defence wishes to stop execution in this case, they should serve this court with stay order from Court of Appeal and stop filing numerous applications on strategic moments. The Notice of Motion dated 6/9/2014 and 24/9/2014 are therefore declined and dismissed because they are all grounded on alleged lack of jurisdiction for the court.

DISPOSITION

30. For reasons and findings stated above, the court hereby dismisses the Notice of Motion by the Interested Party and the respondent dated 24/9/2014 and 6/9/2014 respectively and maintains that it was never deficient of the jurisdiction to determine this suit or issue Garnishee orders as the dispute related to Employment and Labour relations. The court further grants Garnishee Order Absolute against the Garnishee to forthwith pay the claimants **ksh.267,819,043.20** plus costs of this suit and the Garnishee proceedings from the Ksh.532,658,641.56 held on behalf of the respondents herein as deposed in paragraph 8 of the Affidavit of Patrick Mukhongo sworn on behalf of the Garnishee on 2/10/2014. The claimant will also have costs of the Notice of Motion dated 29/8/2014, 6/9/2014 and 24/9/2014.

Orders accordingly.

Dated, Signed and delivered this 7th November 2014.

O. N. Makau

Judge