

**IN THE RETIREMENT BENEFITS APPEALS TRIBUNAL
AT NAIROBI**

CIVIL APPEAL No. 3 of 2010

ANNE WANGUI NGUGI & OTHERS - Appellants

- VERSUS -

1. Retirement Benefits Authority - 1st Respondent
2. Kenya Commercial Bank Staff Retirement Benefits Scheme - 2nd Respondent
3. Kenya Commercial Bank DC Scheme - 3rd Respondent

And

**IN THE RETIREMENT BENEFITS APPEALS TRIBUNAL
AT NAIROBI**

CIVIL APPEAL No. 1 of 2011

Peter Paddy A. Mwangi & Others - Appellants

-Versus -

1. Retirement Benefits Authority - 1st Respondent
2. Trustees of Kenya Commercial Bank Staff Pension Fund - 2nd Respondent

3. Kenya Commercial Bank Staff Pension Fund - 3rd Respondent

Background

On 4th September, 2013 the parties agreed by consent that the outcome of the issues settled for determination in Civil Appeal Number 3 of 2010 will bind Civil Appeal Number 1 of 2011.

We shall, therefore, proceed with the issues agreed by the parties in Civil Appeal Number 3 of 2010.

Introduction

The Appellants filed this appeal on 14th July, 2010 against the decision made on 16th June, 2010 by the 1st Respondent in respect of their retirement benefits allegedly due from the 2nd and/or 3rd Respondents. The Appellants allege that the 1st Respondent relied on a report prepared by Alexander Forbes Financial Services (East Africa) Limited and ignored that of the Appellants' actuary. The Appellants have set out 6 grounds of appeal. The 1st, 2nd and 3rd Respondents have in their Statement of Defence and Statement of Facts disputed the grounds of appeal set out by the Appellants.

On 7th August, 2012 the Tribunal ordered the 1st Respondent to appoint an independent actuary who should file a report in the Tribunal on or before 28th September, 2012. The actuary's report is on account of calculations of benefits due to the Appellants.

On 29th October, 2012 an actuarial report (hereinafter referred to as “**the Actuarial Report**”) prepared by Mr. Robert Oketch (hereinafter referred to as “**the Actuary**”) of NBC Holdings (Pty) Limited was filed in the Tribunal.

On 4th September, 2013 the parties agreed by consent that the issues set out below be determined by the Tribunal:-

1. Does the Tribunal have the jurisdiction to hear the appeal of the individuals who did not file a complaint with 1st Respondent?
2. Are the Appellant who were paid and signed discharges, estopped from making a claim against the 2nd and 3rd Respondents?
3. Should the Tribunal adopt the independent actuarial report?

All the parties appeared on 20th June, 2014 for the hearing of the case. Their advocates informed the Tribunal that they had agreed on 3 issues for determination, filed written submissions and were ready to highlight submissions on the 3 issues.

The Appellants’ Case

Mr. Titus Koceyo appeared for the Appellants, made oral submissions and relied on the Appellants’ written submissions filed on 12th September, 2013. The Appellants sought to answer the issues in the following manner:-

1. Does the Tribunal have the jurisdiction to hear the appeal of the individuals who did not file a complaint with 1st Respondent?

The Appellants submitted that they all filed their case with the 1st Respondent as required by the law and that their appeal is against the decision of the 1st Respondent dated 16th June, 2010. The Appellants asserted that the jurisdiction of the Tribunal arises in these circumstances.

2. Are the Appellant who were paid and signed discharges, estopped from making a claim against the 2nd and 3rd Respondents?

The Appellants submitted that their claim is made individually on the basis of equity so much so that any discharge voucher signed by them is only an acknowledgement of the sum paid and not any other. The Appellants denied that estoppel applies to them or anyone of them until all the benefits properly due to them is fully paid.

3. Should the Tribunal adopt the independent actuarial report?

The Appellants submitted that the bottom line of their claim is individual calculation of benefits due to them and that the Actuarial Report is incomplete and therefore not useful for a fair and final determination of their claim. The Appellants concluded that the Actuarial Report is a generalised overview of their claim generally as opposed to being specific on what is payable individually to each one of them.

The Appellants submitted that the Actuary should have made a clear comparison of the reports prepared by their actuary and the other prepared by Alexander Forbes Financial Services (East Africa) Limited. In conclusion the Appellants asserted that both reports of Alexander Forbes Financial Services (East Africa) Limited and the Actuary are unreliable and contradictory in that they did not do individual calculations and take into account that the 2nd Respondent being a Defined Benefit scheme the Sponsor guaranteed pension to Appellants. The Appellants urged the Tribunal to adopt Appellants' report and allow appeal and ward costs to them.

The 1st Respondent's Case.

Mr. Isaac Kiche appeared for the 1st Respondent, made oral submissions and relied on the 1st Respondent's written submissions dated 9th October, 2013. The 1st Respondent sought to answer the issues in the following manner:-

- 1. Does the Tribunal have the jurisdiction to hear the appeal of the individuals who did not file a complaint with 1st Respondent?**

The 1st Respondent relied on Sections 46 and 48 of Retirement Benefits Act and asserted that jurisdiction of the Tribunal is appellate which comes into being after a party has had its issue(s) determined by the 1st Respondent. The 1st Respondent concluded that any Appellant who did not present his case first for determination by the 1st Respondent has no locus stadi before the Tribunal.

2. Are the Appellant who were paid and signed discharges, estopped from making a claim against the 2nd and 3rd Respondents?

The 1st Respondent relied on the authority of *Doge - versus - Kenya Cannery Limited 1989 KLR 127* and submitted that the Appellants having executed appropriate discharge vouchers on account of the benefits paid to them by 2nd and 3rd Respondents such act was a representation by them that they have been fully paid and they are, therefore, estopped from making further claims. The 1st Respondent asserted that the burden of proof lies on the Appellants on the claim that they were not properly paid and that the doctrine of res-judicata applied as the Tribunal had conclusively resolved the dispute.

3. Should the Tribunal adopt the independent actuarial report?

The 1st Respondent submitted that the Appellants' claim is global in nature and the Actuarial Report covers all 597 Appellants and that the Appellants have not given any data for comparison. The 1st Respondent added that the Actuary considered the report given by the Appellants' actuary together with that of the 2nd and 3rd Respondent's actuary and gave his opinion.

The 1st Respondent urged the Tribunal to dismiss the Appeal with costs it.

The 2nd and 3rd Respondent's Case

Mr. Fred Ojiambo appeared with Mrs. Christina Mutisya for the 2nd and 3rd Respondent.

Mr. Ojiambo made oral submissions and relied on the 2nd and 3rd Respondent's written submissions filed on 6th November, 2013. The 2nd and 3rd Respondent sought to answer the issues as follows:-

1. Does the Tribunal have the jurisdiction to hear the appeal of the individuals who did not file a complaint with 1st Respondent?

The 2nd and 3rd Respondents relied on Sections 46 and 48 of Retirement Benefits Act, their Statement of Defence. They asserted that the Appellants not having contested the allegation that they have not filed their claim with the 1st Respondent for determination before filing this appeal, the same is deemed to be admitted as a fact. The 2nd and 3rd Respondents submitted that in these circumstances the Tribunal lacks jurisdiction to hear and determine the appeal in respect of the Appellants listed in the Statement of Defence and in the written submissions. These are the Appellants numbered:- 8th, 12th, 30th, 41st, 50th, 149th, 165th, 166th, 172nd, 174th, 177th, 182nd, 185th, 188th, 189th, 200th, 201st, 202nd, 212th, 216th, 222nd, 225th, 230th, 237th, 240th, 242nd, 243rd, 244th, 250th, 254th, 259th, 263rd, 279th, 291st, 293rd, 295th, 298th, 306th, 310th, 314th, to 320th, 322nd, 324th, 325th, to 330th, 333rd, to 338th, 346th, 358th, 368th, 378th, 379th, 381st, 402nd, 408th, 415th, 416th, 419th, 421st, 422nd, 424th, 428th, 429th, 433rd, to 436th, 441st, 442nd, 457th, 458th, 466th, 467th, 477th, 478th, 482nd, 483rd, 490th, 502nd, 597th, 586th, 588th and 595th.

2. Are the Appellant who were paid and signed discharges, estopped from making a claim against the 2nd and 3rd Respondents?

The 2nd and 3rd Respondents referred the Tribunal to a copy of indemnity attached to the Memorandum of Appeal filed by the Appellants.

Relying on case law the 2nd and 3rd Respondents submitted that these are matters of fact and the Appellants are bound by their conduct which they cannot run away from it.

3. Should the Tribunal adopt the independent actuarial report?

The 2nd and 3rd Respondents the Actuarial Report is the correct basis for settlement of the Appellants' claim. They pointed out that the Actuary considered the reports filed by the Appellants, Alexander Forbes and gave his expertise opinion thereon. The 2nd and 3rd Respondents added that an actuary namely, Mr. Adil Suleiman gave oral evidence, was cross-examined by Appellants and his evidence concurs with the finding of the Actuary and Alexander Forbes. The 2nd and 3rd Respondents submitted that in these circumstances, therefore, no departure may easily be made from the Actuarial Report as it gives the basis and method of calculation of benefits covering all the Appellants.

Relying on case law, the 2nd and 3rd Respondents stated that the qualifications or credentials of the Actuary, Alexander Forbes and Mr. Adil Suleiman not having been challenged or other evidence brought forward, the Tribunal should accept the Actuarial Report as a basis for settlement of the Appellants' claim.

The 2nd and 3rd Respondents urged the Tribunal to dismiss the appeal with costs.

Determination.

We have considered all the documents filed and submissions both oral and written by the parties in support of their case. Our determination of the issues is set out below.

1. Does the Tribunal have the jurisdiction to hear the appeal of the individuals who did not file a complaint with 1st Respondent?

Although the Appellants submitted that they all first filled their case with the 1st Respondent for determination before filing this Appeal, they have not laid any material before us for such action. These are the Appellants the 2nd and 3rd Respondents allege have not had their cases first determined by the 1st Respondent before filing this Appeal as required by the law. The Appellants have not objected to or countered the list given by the 2nd and 3rd Respondents. We are bound to accept it.

The 2nd and 3rd Respondents submitted that the Tribunal lacks jurisdiction to entertain the appeal lodged by these Appellants. Jurisdiction is the authority which a judicial forum has to do a particular thing. Its 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.

A court of law draws tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction to hear and determine case in dispute.

By jurisdiction it is clearly 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 like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which jurisdiction shall extend, or it may partake both these characteristics. If for example, the jurisdiction of an inferior court depends on the existence of a particular state of facts, the court must inquire into the existence of the facts in order to decide whether it has jurisdiction. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction, therefore, must be acquired before judgment is given.

The jurisdiction of the Tribunal is donated by Section 48 of the Retirement Benefits Act. The Act provides:-

- (1) Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made there-under may appeal to the Tribunal within thirty days of the receipt of the decision.*
- (2) Where any dispute arises between any person and the Authority as to the exercise of the powers conferred upon the Authority by this Act, either party may appeal to the Tribunal in such manner as may be prescribed.*

In this case, the important fact to verify is whether the Appellants availed themselves to the 1st Respondent and a decision on their claim made. By dint of the statutory provisions cited above, jurisdiction of the Tribunal arises only after a matter has been acted on by the 1st Respondent. It is an appellate jurisdiction. It can only be exercised upon a decision of the 1st Respondent. The Appellants listed by the 2nd and 3rd Respondents did not present their claim to the 1st Respondent. These are the Appellants numbered:- 8th, 12th, 30th, 41st, 50th, 149th, 165th, 166th, 172nd, 174th, 177th, 182nd, 185th, 188th, 189th, 200th, 201st, 202nd, 212th, 216th, 222nd, 225th, 230th, 237th, 240th, 242nd, 243rd, 244th, 250th, 254th, 259th, 263rd, 279th, 291st, 293rd, 295th, 298th, 306th, 310th, 314th, to 320th, 322nd, 324th, 325th, to 330th, 333rd, to 338th, 346th, 358th, 368th, 378th, 379th, 381st, 402nd, 408th, 415th, 416th, 419th, 421st, 422nd, 424th, 428th, 429th, 433rd, to 436th, 441st, 442nd, 457th, 458th, 466th, 467th, 477th, 478th, 482nd, 483rd, 490th, 502nd, 597th, 586th, 588th and 595th.

We decline to make any order for these Appellants who did not present their case to the 1st Respondent for consideration before entering this case as parties.

2. Are the Appellant who were paid and signed discharges, estopped from making a claim against the 2nd and 3rd Respondents?

The 2nd and 3rd Respondents have submitted that the Appellants having signed appropriate indemnity and/or discharge vouchers are stopped from making further claims. The 2nd and 3rd Respondents are fiduciaries and the makers of the indemnity and/or discharge vouchers being relied to allege estoppels. The documents were presented to the Appellants by the 2nd and 3rd Respondents.

In our understanding, an indemnity and/or discharge voucher without more represents a meeting of minds between the parties thereto. Ideally, it binds the parties. Nevertheless, if a circumstance arises at a later date in indicating that one of or both parties were mistaken or wrong in the assumption of the facts relied at the time the indemnity and/or discharge voucher was signed, the party or parties may not thereby be bound.

In the case of the Appellants, the 2nd and 3rd Respondents it is clear to us that the sum of monies stated in the indemnity and/or discharge voucher would form a basis for full and final settlement if the right amount of benefits was paid to the correct recipient (Appellants). Save as aforesaid we decline to affirm the issue.

3. Should the Tribunal adopt the independent actuarial report?

The Appellants have rejected the Actuarial Report on the basis that it is incomplete on details relating to the Appellants' individual claims and urged the Tribunal to accept the report of the Appellants' actuary as a fair and reasonable basis for settlement of the Appellants' case.

We have read and considered the report of the Appellants' actuary, the report by Alexander Forbes Financial Services (East Africa) Limited for the 1st Respondent, the Actuarial Report and analysed the evidence of Mr. Adil Suleiman. We concur with the 1st Respondent that the report of the Appellants' actuary is not a correct version of calculation of benefits due to the Appellants. This is more so because the report does not:-

- (a) Take into account the funding basis of the 2nd Respondent as a defined benefits scheme;

- (b) Have detailed data of the 2nd Respondent in regard to salary progression and actuarial valuations when the Appellants were in employment of the Sponsor;
- (c) Disclose the actuarial assumptions permitted for the funding of the 2nd Respondent;
- (d) Give the assumptions applicable for pension increases permitted in the Rules of the 2nd Respondent.

On the contrary, the report prepared by Alexander Forbes Financial Services (East Africa) Limited and the evidence of Mr. Adil Suleiman give a clear direction on all the matters set out above and more. The Actuary examined the 2nd Respondent's Rules, the reports of both the Appellants' actuary and Alexander Forbes Financial Services (East Africa) Limited and concluded that the Appellants' benefits were properly calculated.

The qualifications, experience and credibility of the actuary has not been challenged by any of the parties. The Actuary's findings being that of an expertise we are persuaded, in the absence of other evidence, to accept the Actuarial Report as a fair and reasonable means of settling the Appellants' claim.

In the upshot, we make the following orders:-

- (a) The Actuarial Report prepared by Mr. Robert Oketch of NBC Holdings (Pty) Limited and filed in the Tribunal on 29th October, 2012 be and is hereby adopted;
- (b) The Appeal be and is hereby dismissed.
- (c) We award costs to the Respondents.

Orders are made accordingly.

DATED at NAIROBI this 19th day of September, 2014.

Kakai Cheloti - Chairman

Amb. Simon Barmasai Arap Bullut - Member

Job Momanyi - Member

NB: Judgment read and signed in the absence of Member, Veronica Owende (Mrs.) who has concurred.