

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

**CIVIL APPEAL No. 2 of 2015**

**Titus Kimondo Ndirangu & 6 Others – Appellants**

**-VERSUS –**

- 1. Retirement Benefits Authority – First Respondent.**
- 2. Teleposta Pension Scheme – Second Respondent.**

**RULING**

On 26<sup>th</sup> May, 2015 the Appellants took out a Notice of Motion which they filed in the Tribunal on 27<sup>th</sup> May, 2015. They sought two orders, namely:-

1. THAT the Appellants be granted leave to file its Memorandum of Appeal out of time.
2. THAT the Memorandum of Appeal be deemed as duly filed and served.

3. THAT the costs of this application be provided for.

The application is supported by the affidavit of the 1<sup>st</sup> Appellant, namely Titus Kimondo Ndirangu on his own behalf and that of the other Appellants. Mr. Ndirangu invokes the mandate of the Tribunal on the grounds that:-

- (a) The High Court by a Ruling delivered on 23<sup>rd</sup> January, 2015 (copy annexed to the affidavit) in HCCC No. 125 of 2013 directed that the matter between the parties in this Appeal be filed in the Tribunal; and
- (b) He has been advised by the Appellants' Advocate that the Tribunal acts liberally to achieve substantive justice and not held up by technicalities.

The proposed Memorandum of Appeal and Statement of Claim and other documents are annexed to the affidavit of Mr. Titus Kimondo Ndirangu.

On 15<sup>th</sup> June, 2015 the 2<sup>nd</sup> Respondent filed a Notice of Preliminary Objection on the following grounds that:-

1. The Tribunal has no jurisdiction to hear an application seeking leave to file an appeal out of time.
2. The Tribunal has no jurisdiction to grant the orders sought in the application and in particular grant leave for filing an appeal out of time.
3. The judgment delivered by the High Court in JR Misc. Application Number 223 of 2012, was binding on the Tribunal.
4. The application is an abuse of the process of the Tribunal.

On 7<sup>th</sup> July, 2015 the 2<sup>nd</sup> Respondent filed an affidavit sworn by Peter K. Rotich. In the affidavit, Mr. Rotich relying on advice given by the 2<sup>nd</sup> Respondent's Advocates asserts that the Appellants' application is incurably defective on the following grounds:-

- (a) The liquidator of KENEXTEL Pension Scheme namely, J.P.N. Simba made his decision on 29<sup>th</sup> October, 2009.
- (b) The Appellants failed to file an appeal within 14 days of the date of inspection of the preliminary accounts prepared by the liquidator.

- (c) The Appellants failed to file an appeal in the Tribunal against the decision of the liquidator.
- (d) By reason of the Appellants not having filed any objections with the 1<sup>st</sup> Respondent, the application is misplaced, null and void.

We note that except for the Replying Affidavit sworn on 7<sup>th</sup> July, 2015 by Peter K. Rotich, the 2<sup>nd</sup> Respondent has not filed any pleadings. The annexures to the affidavit are pleadings in HCCC No. 251 of 2013 which it is alleged to have been filed after the decision of the liquidator. The Appellants have annexed in their list of Documents dated 2<sup>nd</sup> May, 2015 copy of the Ruling delivered by the High Court in the case stated in the preceding sentence on 23<sup>rd</sup> January, 2015. In the Ruling, the High Court directed the Appellants to file their case in this Tribunal. The Appellants have done so.

Both the 1<sup>st</sup> Respondent and the Appellants filed their lists of authorities. The Appellants filed written submissions.

Mr. Moses Kurgat appeared for the Appellants and Mr. Bundotich for the 2<sup>nd</sup> Respondent.

Although Mr. Bundotich for the 2<sup>nd</sup> Respondent informed us at the start of hearing that the 2<sup>nd</sup> Respondent was not engaged in the Preliminary Objection, he associated himself to the submissions made on behalf of the 1<sup>st</sup> Respondent and made oral submissions in support of the 1<sup>st</sup> Respondent's case.

The Advocate for the 1<sup>st</sup> Respondent made oral submissions. The Advocate for the Appellants orally highlighted the written submissions.

We have read and considered the pleadings and submissions made by the parties. In our view, there are only 2 issues for determination. These are:-

- 1. Whether the Tribunal has jurisdiction to determine the Appellants' Application; and**
- 2. Whether the preliminary objection taken by the 1<sup>st</sup> Respondent is valid.**

We shall answer each issue separately.

## **1. Whether the Tribunal has jurisdiction to determine the Appellants' Application.**

By jurisdiction it 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 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.

It is common ground that:-

- (a) The Appellants were Members of Kenextel Pension Scheme.
- (b) Kenextel Pension Scheme was liquidated whereupon the liquidator vested the proceeds in and transferred the same to the 2<sup>nd</sup> Respondent.
- (c) The 1<sup>st</sup> Respondent concurred with the liquidator in vesting and transfer of the proceeds of liquidation to the 2<sup>nd</sup> Respondent.

Jurisdiction of the Tribunal is invoked upon the 1<sup>st</sup> Respondent:-

1. Making a decision in any matter referred to it relating to a dispute between any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme.
2. Exercising powers conferred upon it under the Retirement Benefits Act.

The Appellants' case takes both causes set out above. It would be appropriate to investigate the grievances of the appellants against the conduct of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The 2<sup>nd</sup> Respondent submitted that the Appellants have not cited any statutory provision in support of their case.

On the contrary, the Appellants cited Articles 40 and 57 relating to their proprietary rights and rights of older members of society respectively as a

basis for their constitutional right to retirement benefits. They also made reference to their contract of employment as the nexus of their entitlement to the retirement benefits being claimed.

We are not satisfied that the Respondents' objection lays a valid ground to affect jurisdiction of a court in the face of the Constitutional and legislative provisions relied by the Appellants.

We are satisfied that the Tribunal has jurisdiction to hear and determine the Appellants' application.

## **2. Whether the preliminary objection taken by the 1<sup>st</sup> Respondent is valid.**

A preliminary objection is a matter raised by a party in a lawsuit that objects to or challenges a pleading filed by an opposing party. It consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the suit.

Examples are an objection to the jurisdiction of the court, or a plea of (time) limitation, or a submission that the parties are bound by the contract giving parties to the suit to refer the dispute

to arbitration etc etc. 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 before determining the merits of the objection or where the relief sought is the exercise of judicial discretion.

The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of a matter in dispute because there is a point of law that will dispose of the matter summarily.

In the present case, there is no admission in the pleadings or by the parties that all the matters pleaded by the Appellants and the submissions they have made are correct.

For example, it requires an investigation as to whether following the order of the High Court in HCCC No. 251 of 2013 the Appellants are properly before the Tribunal.

We say so because the Appellants had recourse to the Tribunal following a direction of such course of action by the High Court. Consequently, it would

not be proper for the Tribunal to dispose of the matter summarily before affording the parties a hearing on the merits of their application.

Further, the Appellants have submitted that the monies vested by the liquidator and transferred to 2<sup>nd</sup> Respondent with the concurrence of the 1<sup>st</sup> Respondent was their salary and that by reason of the benefits having vested in them under the provisions of Article 40 of the Constitution of Kenya, they have proprietary rights thereon which were unlawfully abrogated by the Respondents. The effect of this submission is to elevate the Appellants' claim to a constitutional matter. The Respondents do not admit these assertions. In our view, such a weighty matter cannot be resolved at a preliminary hearing.

It is for the Tribunal to decide whether or not to grant any or all of the prayers made by the Appellants. We are not satisfied that this line of objection is merited as a Preliminary Objection.

The preliminary objection is hereby dismissed. The costs shall abide the outcome of the Appellants' Notice of Motion.

The parties are at liberty to take a date in the Registry for the hearing of the Appellants' Notice of Motion dated 26<sup>th</sup> May, 2015. Orders are made accordingly.

DATED at NAIROBI this 4<sup>th</sup> day of September, 2015.

Kakai Cheloti – Chairman

Veronica Owende (Mrs.) – Member

Simon Barmasai Arap Bullut – Member

Job Momanyi – Member

***Ruling delivered in the presence of:-***

Mr. Kurgat appearing with Ms. Beneka for the Appellants.

Mr. Kabata for the 1<sup>st</sup> Respondent.

Mr. Bundotich for the 2<sup>nd</sup> Respondent.

Boniface M. Mwangangi (ACILEx.) – Tribunal Clerk.

Linda S. Mwanza – assisting Tribunal Tribunal Clerk.