

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

**CIVIL APPEAL No. 1 of 2015**

**CPF Financial Services Limited – Appellants**

**-VERSUS –**

**Retirement Benefits Authority - Respondent**

**RULING**

This Ruling arises out of a Preliminary Objection taken by the Respondent in respect of the Appeal filed by the Appellant. It was heard on 7<sup>th</sup> August, 2015.

The grounds of objection are that:-

1. The proceedings before the Honorable Tribunal are **sub-judice** as a suit involving the same parties is pending in Nairobi High Court Judicial Review Number 343 of 2014 – Republic – versus – Retirement Benefits Authority ex-parte CPF Financial Services Limited.
2. The Tribunal has no jurisdiction to grant the orders sought in the appeal.
3. The Appeal is an abuse of the due process of the Court.

Mr. Njenga and Mr. Ochieng appeared for the Appellant and Respondent respectively and made submissions. Mr. Ochieng made oral submissions whereas Mr. Njenga relied on the Appellant's Written Submissions which he buttressed orally.

### **The Respondent's Case.**

In support of ground number one in its objection, the Respondent relied on the Supplementary Affidavit of Hosea Kimutai Kili (Managing Director of the Appellants) sworn on 25<sup>th</sup> February, 2015 and filed in Nairobi High Court Judicial Review Number 343 of 2014 – Republic – versus – Retirement Benefits Authority ex-

parte CPF Financial Services Limited. The affidavit is annexed to the Respondent's Statement of Facts filed on 1<sup>st</sup> April, 2015. The Respondent referred to paragraphs 33 to 37 inclusive in the affidavit and asserted that the matters stated therein are currently active in the High Court and are substantially the same as those raised in this appeal so as to render the same **sub-judice**.

With respect to ground number 2 in the objection, the Respondent referred to the Memorandum of Appeal and cited the 6<sup>th</sup> prayer sought by the Appellants. The Respondent submitted that the effect of the Memorandum of Appeal is to seek mandatory injunction against the Respondent and that the Tribunal does not have jurisdiction to grant such a relief. In support of its submission, the Respondent relied on the decision of the High Court in JR no. 381 of 2013, Republic – versus - Attorney General & Retirement Benefits Authority ex-parte Kenya Airports Authority. We have read the Judgment in the case.

On account of ground number 3, the Respondent submitted that by reason of the Appellant having raised in the Tribunal matters which are similar to those which are being instigated in the High

Court; it was engaged in forum shopping which act constitutes abuse of the process of court.

### **The Appellant's Case.**

The Appellant submitted that the matters raised by the Respondent do not constitute valid points to be taken by way of a preliminary objection.

On account of ground number 1, the Appellants denied that the matters raised in the Appeal are the same as those litigated in the High Court. In particular the Appellant asserted that:-

- (a) the matter before the High Court is judicial review proceedings relating to the deregistration and withdrawal by the Respondent of the Appellant's license as Administrator of retirement benefits schemes in the year 2014; whereas
- (b) the matter before the Tribunal is in relation to the failure by the Respondent to issue the Appellant with a license as Administrator of retirement benefits schemes in the year 2015.

With regard to ground number 2, the Appellant submitted that the authority, being High Court in JR no. 381 of 2013, Republic – versus - Attorney General & Retirement Benefits Authority ex-parte Kenya Airports Authority, cited by the Respondent does not state that the Tribunal has no powers to give the orders sought by the Appellant.

On the 3<sup>rd</sup> ground, the Appellant denied forum shopping and averred that the matters before the High Court and the Tribunal are different in content and substance.

### **Determinations**

We have read and considered the pleadings and submissions made by the parties. We have taken the 3 grounds of objection as valid issues for determination. We shall answer each issue separately.

But before we do so, we consider it appropriate to set out what a preliminary objection is and purpose.

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 what is 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.

We shall now answer the issues:-

**1. The proceedings before the Honorable Tribunal are sub-judice Nairobi High Court Judicial Review Number 343 of 2014 – Republic – versus – Retirement Benefits Authority ex-parte CPF Financial Services Limited.**

Section 6 of the Civil Procedure Act states- *“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed”.*

The Respondents relied on paragraphs 33 to 37 of the Supplementary Affidavit of Hosea Kimutai Kili to bring a nexus between this appeal and the proceedings in Nairobi High Court Judicial Review Number 343 of 2014 – Republic – versus – Retirement Benefits Authority ex-parte CPF Financial Services Limited. In our understanding, the contents of an affidavit

evidence on oath which may be disputed by any other party to the suit. It is not a pleading and is subject to analysis in the normal way by the court when assessing the evidence given in a case.

It may have been helpful perhaps, if the parties provided copies of the pleadings filed in Nairobi High Court Judicial Review Number 343 of 2014 – Republic – versus – Retirement Benefits Authority ex-parte CPF Financial Services Limited. A pleading includes Notice of Motion, Petition, Statement of Claim or Demand or Defence, Reply to Defence or Counter-claim all of which are subject to amendment, unlike an affidavit, which is evidence. These may have helped us to clearly know the issues before the High Court. The parties have not given us the privilege to peruse these important documents.

On the material placed before us, we are unable to find anything to conclude that the matters raised by the Appellants in Nairobi High Court Judicial Review Number 343 of 2014 – Republic – versus – Retirement Benefits Authority ex-parte

CPF Financial Services Limited are in issue or directly and substantially in issue in this Appeal.

We have perused a copy of an order of the court marked LCS 5(B) annexed to the Statement of Facts filed by the Appellant on 26<sup>th</sup> February, 2015. It does not relate to the matters set out in paragraphs 33 to 37 in the Supplementary Affidavit of Hosea Kimutai Kili.

Going by judicial authority of the High Court and this Tribunal, Judicial Review proceedings are not a suit as defined in the Civil Procedure Act to which the sub-judice rule would properly apply. Again, we do not have factual information as to the nexus of the two cases and the parties do not agree on the facts.

We decline the objection under this head.

**2. The Tribunal has no jurisdiction to grant the orders sought in the appeal.**

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.

Jurisdiction of the Tribunal is invoked upon the 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 cause number 2 above. On 26<sup>th</sup> January, 2015 the Respondent made a decision which is the subject of this Appeal as directed by Section 48 of the Retirement Benefits Act.

Quite a number of the prayers sought by the Appellant including the 6<sup>th</sup> one relied by the Respondent are discretionary.

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. We reject the same.

### **3. The Appeal is an abuse of the due process of the Court.**

The Respondent submitted that the Appellant was engaged in forum shopping thereby abusing the process of court.

In view of our finding on ground number one of the objection, this line of argument falls by the way.

In the upshot, the preliminary objection is hereby dismissed. The costs shall abide the outcome of the Appeal.

The parties are at liberty to take a date in the Registry for the hearing of the Appeal.

Orders are made accordingly.

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

Kakai Cheloti – Chairman

Simon Barmasai Arap Bullut – Member

Job Momanyi – Member

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

Mr. J.M. Njega for the Appellants.

Mr. Kabata holding brief for Prof. Mumma the Respondent.

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

Linda S. Mwanza – assisting Tribunal Tribunal Clerk.

Original Ruling on PO - 040915