

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

CIVIL APPEAL No. 8 of 2010

ELIAS MAINA MURIGI & 133 OTHERS - Appellants

-VERSUS -

- 1. RETIREMENT BENEFITS AUTHORITY - First Respondent.**
- 2. NATIONAL BANK OF KENYA STAFF RETIREMENT BENEFITS SCHEME - Second Respondent.**

AND

- 1. NATIONAL BANK OF KENYA STAFF PENSION FUND REGISTERED TRUSTEES - First Interested Party.**
- 2. ALEXANDER FORBES FINANCIAL SERVICES (EAST AFRICA) LIMITED - Second Interested Party.**

RULING

Introduction

This Ruling arises out of a Preliminary Objection taken on 9th April, 2015 by the 1st Interested Party therein named as 3rd Respondent following a Notice of Motion dated 2nd December, 2014 filed by the Appellants.

Background

After hearing the above case the Tribunal delivered judgment on 23rd February, 2012. The Tribunal made the following orders:-

- (a) The Appeal be and is hereby allowed;
- (b) The 2nd Respondent do within thirty (30) days from to-day calculate and give to each of the Appellants and/or beneficiaries a statement of account showing in detail how the benefits due are arrived at;
- (c) If a benefit is found not to have been accounted by the 2nd Respondent to any Appellant or beneficiary the same is appropriated within thirty (30) days from to-day in accordance with the Scheme Rules of the 2nd Respondent.
- (d) In default of the 2nd Respondent undertaking the activities stated in (b) and (c) above or any one of them within thirty (30) days from the date hereof the 1st Respondent do appoint an Interim Administrator to undertake the assignment at the cost of the 2nd Respondent;
- (e) There shall be liberty on either Party to apply.

On the alleged failure by the 1st and 2nd Respondents to comply with the orders made on 23rd February, 2012 the Appellants applied to the Tribunal for appointment of an independent actuary to compute the benefits payable to the successful Appellants. On 25th June, 2012 the Tribunal at the instance of the parties, *inter-alia*, made the following Order:-

By consent:-

“The 1st Respondent to appoint an independent actuary to scrutinize, assess, consider and compare all the calculations and taking into account what both sides have submitted. The report should be submitted to the Tribunal on or before the 24th July, 2012”.

The purpose of this exercise was to compare the amounts paid by the 2nd Respondent with those demanded by the Appellants on the basis of the calculations undertaken by the Appellants’ actuaries taking into account what both sides have submitted. This would have included the Rules of the Scheme made by the 2nd Respondent and a consideration of the legislation applicable at the date as well as any other information that would have been relevant to this matter.

On 1st July, 2013 the parties in respect of the Actuarial Report filed by **NBC Holdings Proprietary Limited** agreed by consent the issues in contention for determination by the Tribunal. After hearing, the Tribunal on 8th August, 2013 made the following orders:-

- (a) The Actuarial Report be and is hereby adopted as it is in accordance with the orders issued by the Tribunal on 25th June, 2012;
- (b) Subject to compliance with the Income Tax Act and/or any other statutory requirements and the variations in the Actuarial Report as set out below, the 2nd Respondent is hereby directed to settle the Appellants’ individual claim in the manner set out in Appendix 1

and Appendix 2 and 5 at pages 21 to 34 inclusive of the Actuarial Report. The variations are:-

1. Benefits Payable Under the Rules Dated 4th January, 1990.

- (i) **Voluntary Early Retirement** - *a commutation of a lump-sum not exceeding Kshs. 540,000.00 and the remainder be paid as a pension in periodical installments in accordance with Rule 13 of the Rules less what has so far been paid, if any;*
- (ii) **Normal Retirement** - *a commutation of a lump-sum not exceeding Kshs. 540,000.00 and the remainder be paid as a pension in periodical installments in accordance with Rule 13 less what has so far been paid, if any;*
- (iii) **Medical Retirement** - *a sum calculated in accordance with Rules 12 and 13 less what has so far been paid, if any;*
- (iv) **Death** - *a sum calculated in accordance with Rule 15 less what has so far been paid, if any;*
- (v) **Other Terminations (including Redundancies, Terminations, Resignations and Dismissals on or after 4th January, 1990** - *a sum calculated in accordance with Rule 16 less what has so far been paid, if any.*

(c) The 2nd Respondent within thirty (30) days from the date hereof to furnish each of the Appellants with a statement of account showing how the benefit paid or payable is calculated and arrived at;

(d) Paragraphs 14, 15.4, 16.3, 19, 22, 36, 39 and 56 of the Actuarial Report in so far as they refer to the 2nd Interested Party are hereby deleted from the records of the Tribunal;

(e) Each party shall bear its own costs.

In the Notice of Motion, the Appellants urge the Tribunal to issue a decree and warrant of execution for Kshs. 137,951,510.00 against the 2nd Respondent and the 1st Interested Party named therein as the 2nd and 3rd Respondent. It is alleged that the said decree would be in satisfaction of both the Judgement and Ruling of the Tribunal dated 23rd February, 2012 and 8th August, 2014 respectively.

The parties filed written submissions. On 5th June, 2015 the parties appeared for hearing before the Tribunal. They all informed the Tribunal that they will rely on their pleadings and written submissions in relation to the Preliminary Objection taken by the 1st Interested Party.

The 2nd Respondent and 1st Interested Party's Case

The 1st Interested Party filed four grounds in its objection, namely that:-

1. The Tribunal has no jurisdiction to entertain the Application because the Appellants have not cited any valid statute to support their application;
2. In its Ruling of 8th August, 2014 the Tribunal did not give an award of liquidated claim for the Appellants;
3. The Rules do not permit the Tribunal to review its Ruling as sought by the Appellants;
4. The Ruling dated 8th August, 2014 cannot legally implemented in the manner sought by the Appellants.

Although the Preliminary Objection was taken by the 1st Interested Party alone, the Written Submissions dated 3rd June, 2015 are filed on behalf of

the 2nd Respondent and the 1st Interested Party, named therein as the 2nd and 3rd Respondent. They have cited the orders made by the Tribunal on 23rd February, 2012, 25th June, 2012 and 8th August, 2014. These orders are quoted verbatim above.

The 2nd Respondent and the 1st Interested Party reiterated their grounds of objection. They added that the right thing for the Appellants to do would have to file an application in regard to whether or not they (2nd Respondent and the 1st Interested Party) have or not complied with previous orders and seek relief.

The 2nd Respondent and the 1st Interested Party asserted that the Appellants' application is incurably defective and improperly before the Tribunal. They urged the Tribunal to dismiss the application with costs.

The 1st Respondent's case

The 1st Respondent filed its Written Submissions on 22nd May, 2015. It sought to answer the 1st Interested Party's Preliminary Objection on two grounds, namely:-

1. The Tribunal has jurisdiction to determine the Appellants' application; and
2. Orders sought by Appellants abrogate the order made by the Tribunal on 8th August, 2014.

On ground 1 relating to jurisdiction, the 1st Interested Party cited Article 159(2)(d) of the Constitution of Kenya as read together with Order 51 Rules 1 and 10 of the Civil Procedure Rules. It submitted that the

Appellants' failure to quote statutory provisions in support of their application does not affect its substance and the application cannot be defeated on technicalities.

The 1st Respondent rolled into one the 2nd Respondent and 1st Interested Party's grounds of objection numbers 2, 3 and 4. It then sought to respond to the same under the head that the orders urged by the Appellants abrogate from the Ruling of 8th August, 2014 by the Tribunal. The 1st Respondent referred to the orders made by the Tribunal and submitted that they relate to individual claims made by each Appellant and that the global claim now advanced by the Appellants flies in the face of the Tribunal orders.

The 1st Respondent added that if the orders sought by the Appellants were granted:-

- (a) It would become impossible for the 2nd Respondent to comply with the Income Tax Act and any other statutory requirements;
- (b) Raise an impossible huddle with respect to statements sought by the Appellants; and
- (c) The 2nd Respondent has no way of telling how the calculation in the Appellants' application was done.

In conclusion, the 1st Respondent submitted that it would be a distortion to say that the decree now prayed for follows the Tribunal's Ruling of 8th August, 2014 in which case the prayer for decree and warrant of execution fails.

The Appellants' case.

The Appellants relied on a Replying Affidavit of one of the Appellants, namely, Jack Leonard Gwallah sworn on 15th April, 2015 and their Written Submissions filed on 3rd June, 2015.

With respect to jurisdiction, the Appellants relied on case law and statute. They submitted that the overriding objective in litigation is to do justice to the parties. So much so that their failure to cite any statute in support of their application does not affect the substance of their application or prevent the Tribunal from effecting its orders.

On the matters primarily relating to the 2nd, 3rd and 4th grounds of objection, the Appellants submitted that their claim against the 2nd Respondent and the 1st Interested Party is liquidated and that the 2nd Respondent and the 1st Interested Party being fiduciaries have a duty to give an absolute account in respect of the benefits due to the Appellants. They added that both the Judgment and Ruling dated 23rd February, 2012 and 8th August, 2014 respectively of the Tribunal bind the 2nd Respondent and the 1st Interested Party in that neither has been appealed, stayed or set aside.

The Appellants' Written Submissions are lengthy. They almost go into the merits of the application. We have extracted therefrom matters which may dispose of the 1st Interested Party's Preliminary Objection.

Determinations

We have read and considered the pleadings and submissions filed 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 prayers sought by the Appellants are consistent with the Ruling made by the Tribunal on 8th August, 2014.

We shall answer each issue separately.

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

By jurisdiction it 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 Appellants are a party in this case. In their application, they seek issuance of a decree and execution of an alleged sum of money due to them from the 2nd Respondent and the 1st Interested Party under a judgment of the Tribunal. The 2nd Respondent and the 1st Interested Party objection is that the Appellants have not stated any statutory provision in support their case. This cannot be a valid ground to affect jurisdiction of a court in the face of the Constitutional and legislative provisions relied by the Appellants and the 1st Respondent. Surely, it would be preposterous for the Tribunal to shy from investigating such allegation. We say so because the ends of justice will not be met if the orders made by the Tribunal are not complied with by the parties.

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

2. Whether the prayers sought by the Appellants are consistent with the Ruling made by the Tribunal on 8th August, 2014.

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.

In the present case, there is no admission in the pleadings or by the parties that the matters pleaded by the Appellants are correct. It requires an investigation which cannot be settled by implication. It can be done in a full hearing of the application.

We are not satisfied that this line of objection is merited as a Preliminary Objection. We reject the same.

We have disposed of the two issues relating to the 2nd Respondent and 1st Interested Party's Preliminary Objection. There is, however, a mundane issue we have noticed.

The parties in this case appear to have deviated from the norm of achieving justice to matters which are counter to attainment of justice. A claim by the Appellants which clearly requires an account of their benefits to be given by the 2nd Respondent and the 1st

Interested Party under supervision of the 1st Respondent, has sadly has dragged for in excess of the last three years after the Tribunal delivered judgment on 23rd February, 2012. The process is held ransom to inaction and numerous applications by the 1st Respondent, 2nd Respondent and the 1st Interested Party. Even after the Tribunal on 8th August, 2014 adopted the Actuarial Report prepared by NBC Holdings Proprietary Limited in March, 2013 as a basis for settlement of the Appellants' claim and gave directions thereon, the 1st Respondent, 2nd Respondent and the 1st Interested Party have not acted on it.

Except for their appearance to prosecute and/or resist the Preliminary Objection, the 1st Respondent, 2nd Respondent and the 1st Interested Party have not responded to the Appellants' allegations. We are certain that had the 1st Respondent, 2nd Respondent and the 1st Interested Party acted on the orders given in the Judgement and Ruling dated 23rd February, 2012 and 8th August, 2014 there would have been a settlement of the Appellants' claim and that the present or other application would have been obviated.

The 1st Respondent, 2nd Respondent and the 1st Interested Party are represented by able Advocates. But in view of the matters stated above, we find it usual to draw attention of Counsel and the parties to specific provisions of our Constitution and the Civil Procedure Act.

Article 159 of the Constitution of Kenya states:-

159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles:—

- (a) justice shall be done to all, irrespective of status;
- (b) justice shall not be delayed;
- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- (d) justice shall be administered without undue regard to procedural technicalities; and
- (e) the purpose and principles of this Constitution shall be protected and promoted.

(3) Traditional dispute resolution mechanisms shall not be used in a way that:—

- (a) contravenes the Bill of Rights;
- (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
- (c) is inconsistent with this Constitution or any written law.

Sections 1A and 1B of the Civil Procedure Act states:-

1A. Objective of Act

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims:—

- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the Court;
- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology.

We should expect loyalty and co-operation from the parties to achieve the ends of justice. We have said enough on the conduct of the parties.

The preliminary objection is hereby dismissed with costs assessed at Kshs. 20, 000.00 to the Appellants.

The parties are at liberty to take a date in the Registry for the hearing of the Appellants' Notice of Motion dated 24th December, 2014.

Orders are made accordingly.

DATED at NAIROBI this 31st day of July, 2015.

Kakai Cheloti - Chairman

Veronica Owende (Mrs.) - Member

Simon Barmasai Arap Bullut - Member

Job Momanyi - Member

Ruling read and signed in the presence of:-

Titus Koceyo for the Appellants.

No appearance for 1st and 2nd Respondents

No appearance for the 1st Interested Party.

Boniface M. Mwangangi (ACILEx.) - Tribunal Clerk

Linda Mwanza - Assisting Tribunal Clerk

Later 1035 hours:-

John Ohaga for the 1st Respondent

Kale Bundotich for the 2nd Respondent and 1st Interested Party.

PO Ruling 310715