Republic v Retirement Benefits Appeal Tribunal & 135 others; National Bank of Kenya Staff Retirement Benefits Scheme & another (Exparte) (Application E059 of 2024) [2024] KEHC 13837 (KLR) (Judicial Review) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13837 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E059 OF 2024

J NGAAH, J

OCTOBER 30, 2024

BETWEEN

REPUBLIC .... APPLICANT

AND

RETIREMENT BENEFITS APPEAL TRIBUNAL .... 1ST RESPONDENT

ELIAS MURIGI (3RD TO 135TH RESPONDENTS) .... 2ND RESPONDENT

RETIREMENT BENEFITS AUTHORITY & 133 OTHERS & 133 OTHERS & 133 OTHERS .... 3RD RESPONDENT

AND

NATIONAL BANK OF KENYA STAFF RETIREMENT BENEFITS SCHEME .... EXPARTE

NATIONAL BANK OF KENYA STAFF PENSION FUND REGISTERED TRUSTEES .... EXPARTE

JUDGMENT

1. The applicant's application is a motion dated 20 May 2024 in which the applicant seeks the following orders:

   "1. That an Order of certiorari be and is hereby issued to remove into this Honourable Court and quash the decree of the Retirements Benefits Appeals Tribunal issued on 30th April 2024;

2. That an order of prohibition be and is hereby issued restraining the Retirements Benefits Appeal Tribunal from conducting any further proceedings, taking any further action or making any further decision in Retirements Benefits Appeal Tribunal Appeal No.8 of 2010, the Tribunal long being functus officio;

3. That costs and further incidentals to this Application be provided for."

2. The application is expressed to be made under Orders 51Rule 1 and 53 Rule 3 of the Civil Procedure Rules. It is founded on a statutory statement dated 8 May 2024 and an affidavit verifying the facts relied upon sworn on even date by Mr. Stephen Oranga who has introduced himself as a trustee of the 2nd applicant and that he is authorised to swear the affidavit on behalf of the two applicants.

3. It is his evidence that on 21 March 2010 the applicants' pensioners numbering 134 lodged a complaint with the 2nd respondent. By a decision dated 28th October 2010, the 2nd respondent dismissed the complaint. The pensioners appealed against the decision to the 1st respondent in Retirement Benefits Appeals Tribunal Appeal No. 8 of 2010. In a ruling dated 23 February 2012, the appeal was allowed. The Retirement Benefits Appeals Tribunal, the 1st respondent in this applicant (which I will also hereinafter refer to as "the Tribunal") also ordered that each pensioner be given a statement of account demonstrating the tabulation of the benefits due. Those benefits that were found to be due were to be paid in accordance with what has been described as the "applicants' scheme rules".

4. Parties disagreed on the implementation of the Tribunal's ruling and more particularly on the amount to be paid taking into consideration pension that had already been paid by the applicants under the scheme rules and the applicable laws. However, by consent, on 25 June 2012, the 2nd respondent appointed an independent actuary to scrutinise, assess consider and compare all the calculations and submit a report to the Tribunal. In that regard, the 2nd respondent appointed the firm of NBC Holdings Pty Ltd (hereinafter "the actuary") as the independent actuary. On 28 August 2013 the actuary filed its report with the Tribunal.

5. On 8 August 2014, the Tribunal adopted the actuarial report and also determined that subject to compliance with the *Income Tax Act* or any other statutory requirements and, subject to the variations pointed out in the actuarial report, the applicants were directed to settle the individual pensioners claims in the manner set out in the actuarial report.

6. In compliance with the Tribunal's determination of 8 August 2014, the applicants made payments in full and final settlement of the dues due to the pensioners in accordance with the actuarial report. Further, the applicant's furnished each of the pensioners with the statement of account in proof of the tabulation of the pension dues.

7. By an application dated 2 December 2014, the pensioners moved the Tribunal for a further payment of Kshs. 137,951,510.00. They subsequently amended the claim through an application dated 17 September 2015. On 8 April 2016, when the pensioners application was scheduled for hearing, a consent order was recorded by the parties to the effect that the applicants were directed to settle within 15 days the pensioners' dues as set out in the individual pensioners' statements. The 2nd respondent was directed to validate within 30 days the pensioners individual statements supplied by the applicants to confirm if they were consistent with the trust deed and the actuarial report.

8. The applicants delivered the individual statements in respect of each pensioner and were ready and willing to settle the pensioners' dues. As a matter of fact, the applicants had made the payments prior to the consent but agreed to the exercise to confirm that the calculations were accurate and that the

payments were in order. Further to the consent of 8 April 2016, the 2nd respondent submitted a report to the 1st respondent confirming that the statements prepared by the applicants and the payments made were consistent with the applicants' trust deed, the actuarial report and the Tribunal's ruling.

9. On 15 April 2016, the pensioners filed an application seeking to vary the terms of the order of 8 April 2016. However, they did not prosecute the application. Instead, the pensioners sought leave from the Tribunal to prosecute the amended application of 17 September 2015 which was filed prior to the consent of the parties. The Tribunal, granted the pensioners leave to not only prosecute the application filed two years earlier but also to prosecute an application that had been superseded by the consent order of 8 April 2016. In addition, the Tribunal directed parties to ventilate the application through highlighting of written submissions previously filed prior to the consent of 8 April 2016.

10. On 13 February 2017, the Appeal's Tribunal forwarded its ruling to the parties by way of email. According to the ruling, the applicants were to pay each individual pensioners the sums stated in the ruling taking into account any sums that had previously been paid. The applicants were also to pay costs and interest.

11. The applicants are aggrieved that, in this ruling, the Tribunal sat on its own appeal and rewrote its initial rulings of 23 February 2012 and 8 August 2014 and that it is in conflict with the applicant's trust deed and the scheme rules. The pensioners attempt to have the court adopt the ruling of 13 February 2017 as an order of the court failed in Employment and Labour Relations Court Miscellaneous Application No. 27 of 2020 and High Court Miscellaneous Application No. 3 of 2021.

12. Nonetheless, the pensioners reverted to the Tribunal seven years later seeking a degree and warrant of execution against the applicants. On 30 April 2024, the Tribunal purported to give a decree under the hand and seal of the Tribunal on 23 February 2012 yet the decree was issued on 30 April 2024. According to the applicants, the 1st respondent does not have any authority to issue a decree or warrants of execution and, therefore, the decree dated 30 April 2024 is ultra vires the powers of the Tribunal.

13. Following the impugned decree, the applicants have been issued with a demand letter dated 30 April 2024 in which the petitioners demand payment of Kshs. 144, 489, 319/= and the applicants are apprehensive that if the orders sought are not granted the petitioners shall proceed with the execution of what they term as "unconstitutional and unprocedural decree".

14. Mr. Jack Leonard Gwallah swore a replying affidavit on behalf of the 3rd to 135th respondents opposing the application. He has sworn the affidavit on his own behalf and on behalf of the rest of the 3rd to 135th respondents. I will henceforth refer to this category of respondents as "the pensioners".

15. According to the pensioners, the judgment out of which the impugned decree was extracted was rendered more than twelve years ago and, therefore, the order for certiorari cannot issue. They contend that they were former employees of National Bank of Kenya which they describe as the "ex parte applicants' sponsor". They are said to have been members of the ex parte applicants before they left employment.

16. As members of the aapplicants' pension scheme, the pensioners were entitled to their pension benefits as per the trust deed and rules of the pension scheme. However, upon leaving service, their pension benefits were not calculated in accordance with the scheme as a result of which the pensioners lodged a complaint pursuant to section 46 of the *Retirement Benefits Act*. The matter escalated to the Tribunal under Section 48 of the *Retirement Benefits Act*. The Tribunal delivered its judgment on 23 February 2012.

17. According to the judgment aforesaid, the petitioners' appeal was allowed and the Trustees were directed to compute the benefits under the Scheme and pay to the pensioners. The Scheme Trust Deed and Rules as well as the Regulations under the *Retirement Benefits Act* (Computational Retirement Benefits Schemes) places the duty of pension computations upon the Trustees as the custodian of the records of the members of the Scheme.

18. The applicants are said to have declined to comply with this judgement to do the requisite computations payable to the members of the pension scheme in accordance with the judgment. At the time of delivery of the judgment, there were 133 petitioners. The applicants are said to have declined, refused or neglected to comply with the Tribunal's judgement of 22 February 2012 in which they were ordered to compute and pay the 3rd respondents' dues within thirty days from the date of the judgment.

19. Due to the inaction on the applicants' part, the pensioners approached the Tribunal for further orders for implementation and compliance with the judgment. The 3rd respondent then made an application for appointment of an independent actuary to undertake the calculations of pension benefits payable to them. The Tribunal's judgment provided that in case of default on the Trustees part, the Retirement Benefits Authority would be mandated to appoint an administrator to do the computations.

20. On 25 June 2012, all the parties entered into a consent at the Tribunal to authorise the Retirement Benefits Authority, as the Regulator, to appoint an independent actuary to compute the dues due to the 3rd respondent's member and make a report on the same. Accordingly, the Retirement Benefits Authority appointed M/S NBC Holdings Proprietary Limited Actuaries to undertake the exercise of computations. All the parties supplied the actuary with their bundles of documents to enable calculations to be undertaken.

21. NBC Holdings Proprietary Limited Actuaries did the computations and filed their report at the Tribunal. The Tribunal allowed parties to submit on the report. In its ruling of 8 August 2014, the Tribunal effectively adopted the computations by the actuary which determined the correct and proper benefits payable to the pensioners. Following the ruling of 8 August 2014, the Trustees were again directed to pay to the pensioners their pension benefits as computed by the actuary.

22. Out of the 133 pensioners, the Trustees paid 49 of them but declined to pay the rest without any justifiable reason. As a result of what the pensioners have regarded as blatant violation and disregard of the Tribunal orders, the 84 unpaid members applied for a decree in order to enforce the payments due to them. A ruling on this application was delivered by the Tribunal on 13 February 2017 according to which the Trustees were once again directed to make the payments. The trustees failed to pay and instead filed suits in the Employment and Labour Relations Court challenging the order of the Tribunal. The suits were, however, dismissed. The pensioners are said to be elderly and suffering injustice as a result of failure by the applicants to comply with the Tribunal's ruling.

23. On 11 June 2024, the court gave directions on, among other things, the manner of disposal of the applicants' application. To be precise the following directions were issued:

> " 1) the respondents are granted 14 days to file and serve their response.
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> 2) The application shall be disposed of by way of written submissions.
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> 3) The applicants' submissions shall be filed and served within 7 days of the date of service of the respondents' response.
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> 4) The respondents' submissions shall be filed and served within 7 days of the date of service of the applicants' submissions.

5) Highlighting of submissions on 10 July 2024.

6) Meanwhile stay against the order/decision of the Tribunal made on 30 May 2024 and 30 April 2024 is granted pending the hearing of the substantive motion."

24. On 10 July 2024, when the matter was supposed to come up for highlighting of submissions, the applicants had not filed their submissions. Instead, Mr. Bundotich, the learned counsel for the applicants informed the court as follows:

> "A similar matter is before this court as JR. 122/2024 involving the same parties. The impugned decision is the same. The matter is coming up for hearing on 30 July 2024. This matter is before Justice Chigiti. I am yet to file my submissions."

25. The court adjourned the application for highlighting of submissions on 24 July 2024. In the meantime, the applicants were given seven more days within which to file and serve their submissions. On 24 July 2024, the applicants had not yet filed their submissions. Mr. Bundotich asked for two more days to file the submissions. I reserved the judgment for 25 October 2024. By this date only the pensioners' submissions had been filed.

26. An application for judicial review, like any other application before court, must be heard before the court makes it determination. "Hearing" may take either of the two forms; by way of oral submissions or by written submissions. Whichever form it takes, the applicant must prosecute his application at the hearing. As a matter of fact, under Order 53 Rule 5 of the Civil Procedure Rules. the applicant is entitled to begin before the rest of the parties can be called upon to respond. This rule reads as follows:

> "5. On the hearing of any such motion as aforesaid, the applicant shall have the right to begin."

27. Two important steps are embedded in this rule the first of which is that the application must be heard and secondly, at the hearing, the applicant has the right to begin. In the instant application the application was to be heard by way of written submissions although, over and above the written submissions, a window was opened for the parties to highlight their written submissions.

28. In the absence of the applicants' written submissions, the applicants can be deemed to have not only disregarded the court's directions on the hearing of their motion but they also failed to prosecute their application. Without belabouring the point, the applicants' application would fail for want of prosecution.

29. The learned counsel for the applicants brought to the attention of court the information that there exists an application similar to the instant application, being application no. 122 of 2024, before Chigiti, J.. Parties in that application are the same parties in the instant application and the decision being challenged in these proceedings is the same decision that is subject to challenge in the application before Chigiti, J. It could be because of this reason that, despite having been accorded opportunity to file written submissions on more than one occasion, the applicants deliberately chose not to file the submissions. I say deliberately because no reason whatsoever has been given why the applicants did not comply with the court's directions and file the written submissions.

30. If it is true, as Mr. Bundotich informed the court, and there is no reason to doubt him, that the subject matter in application no. 122 of 2024 is the same subject matter in this suit and that the parties are

common in both suits, it would mean one of either suits may be sub judice and probably falls on the wrong side of section 6 of the *Civil Procedure Act*. This section reads as follows:

6. Stay of suit

> No court shall proceed with the trial of any suit or proceeding 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 any other court having jurisdiction in Kenya to grant the relief claimed.

31. The Case Tracking System portal shows that this suit was filed in May 2024 but suit no. 122 of 2024 was filed in June 2024. Save to say that the applicant in no. 122 of 2024, or any other party in that matter, was enjoined to inform the court of the existence of the instant application which seeks to quash the same decree that is sought to be quashed in suit no. 122 of 2024, I would not want to make any further remarks on this latter suit considering that it is pending before a court of coordinate jurisdiction. All I can say is that the pendency of suit no. 122 of 2024 is not a reason enough for the applicants to have failed to file their written submissions.

32. As much as the applicants have targeted the decree issued on 30 April 2024, for the relief of certiorari their grievances appear to be stemming, not necessarily from the decree but, from the decision out of which the decree was extracted. I gather this from paragraphs 17, 18, 19, 21 and 22 of the affidavit verifying the facts relied upon where the deponent has sworn as follows:

> " 17. On 11 February 2017, following the aforementioned highlighting, the Tribunal directed that the ruling shall be delivered on notice. Whereas the Tribunal had previously issued the parties with prior notice of impending ruling and had subsequently delivered the ruling in open court, on 13th February 2017, the Tribunal merely forwarded its ruling ("third ruling") to the parties via email without prior notice, thereby denying the parties an audience with the Tribunal in the event of extenuating circumstances.
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> 18. Indeed, extenuating circumstances and suit, the tribunal made in the earlier the following determination and the pensioners swiftly thereafter demanded settlement in this partisan terms:-
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> a. The applicants herein to pay individually to each of the 83 pensioners in the application the sum in the 1st column set out against their respective names;
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> b. The sum payable to each of the pensioners in (a) above be reduced by any sum paid after 8th of August 2014;
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> c. The applicants herein to collect all the tax, if any is due on such payments;
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> d. The applicants herein to pay interest on the outstanding balance due to each pensioner at the rate by the scheme in each financial year until payment in full.
>
> e. The pensioners to have costs of the application at Kshs. 10,000 payable by the applicants herein.

(Annexed hereto and marked "SO-15" is a copy of the tribunal's ruling of 13th February 2017

19. I am reliably informed by the counsels (sic) on record that in effect, by the Tribunal's third ruling of 13th February 2017, the Tribunal sat on its own appeal and rewrote its initial rulings of 23rd February 2012 and 8th August 2014. In fact, the decision of the Tribunal of 13th February 2017 reads (sic) in direct conflict with applicant's trust deed and rules and therefore a nullity.

21. I am further advised by counsel on record that the tribunal reviewed and set aside the parties consent order of 8th April 2016 suo moto notwithstanding full compliance by the applicants of the previous rulings of the tribunal the consent by the parties and affirmation of the same by the 2nd respondent.

22. Most significantly I am advised by counsel on record that, the tribunal delivered a ruling for prayers that were never sought by the pensioners in the application of 17th September 2013. The tribunal by the back door granted the prayers of the pensioners in the application dated 15th April 2016 an application that was never prosecuted. The tribunal went on to hold that the applicants never filed a response to the petitioners application of 17th September 2013, when a clear replying affidavit was filed on 19 November 2015 in response to the application. Thus, the applicants were as well condemned unheard."

33. It is, therefore, obvious from the applicants' own dispositions that as much as they are complaining about the decree, it is the ruling of the Tribunal that is the source of their grievances. In any event, a decree is merely a summary of an adjudication; the two are inseparable. This is apparent from the definition given to it in section 2 of the *Civil Procedure Act*, cap. 21 which reads as follows:

> " decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final..." (Emphasis added).

34. Section 25 of the *Civil Procedure Act* is also to the effect that a judgment and a decree are interlinked and one flows from the other. The pertinent part of this provision reads as follows:

> 25. Judgment and decree
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> The court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

35. As to whether the Tribunal can be deemed "the court" in this context, as to be able to grant and issue a decree, one need look any further than Article 169 (1) of *the Constitution* which defines subordinate court to include a tribunal established by an Act of Parliament. The Article reads as follows:

> 169.
>
> (1) The subordinate courts are—
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> (a) the Magistrates courts;
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> (b) the Kadhis' courts;

(c) the Courts Martial; and

(d) any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2).(Emphasis added).

36. The applicants cannot, therefore, hide behind the fact that the decree was extracted in April 2024 yet, legally speaking, it was granted in 2017 but was only issued in 2024. As to whether the decree can be executed in the same court, section 30 of the *Civil Procedure Act* says that it can so execute or the decree may be sent to another court for execution.

37. The question that therefore follows is, if the tribunal's ruling was tainted as proffered in the affidavit verifying the facts relied upon, why it had taken the applicants more than seven years to raise these concerns against the ruling. Without the reasons for this delay which, no doubt is inordinate, isn't the court entitled to assume the application is filed merely to circumvent the enforcement of the Appeal Tribunal's decision and therefore it is mala fides?

38. It is not in dispute that the time within which an application for judicial review ought to be filed to challenge an appeal Tribunal's decision is not specified in *Retirement Benefits Act* but, generally speaking, an application for judicial review ought to be made promptly.

39. As matter for fact under section 9(3) and Order 53 (7) of the Civil Procedure Rules an application for the relief of certiorari can only be made within six months of the date of the decision. These provisions of the law read as follows:

9. Rules of court

(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

This section is echoed in Order 53 Rule 2 of the Civil Procedure Rules which reads as follows:

2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

40. There is no doubt that in light of section 9 (3) of the *Law Reform Act* and Order 53(2) of the Civil Procedure Rules, the applicants' application has been made well beyond the limitation period and, in these circumstances, the judicial review relief of certiorari would not be available to them.

41. For the same reason of delay, the relief of the order of prohibition would not be available to the applicants. Unlike the relief of certiorari for which the statute expressly provides for the timeline within which it should be applied, the relief of prohibition is not subject to statutory timelines. But it does thereby follow that an applicant for these reliefs need not act promptly.

42. There are circumstances when it is necessary that the application for judicial review be filed as soon as the grounds for review arise. It has been held that wherever there is a failure to act promptly in such circumstances there is 'undue delay'. And where there has been undue delay in making an application for judicial review, the court may refuse permission for the application to be brought or may refuse a remedy at the substantive hearing, if it considers that granting the remedy sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. (See Caswell v Dairy Produce Quota Tribunal for England and Wales (1990) 2 AC 738).

43. In exercising its discretion whether or not to grant a judicial review remedy, the court will take account such factors as the conduct of the party applying, and consider whether it has been such as to disentitle him to relief. Besides undue delay other factors including unreasonable or unmeritorious conduct (R v Crown Court at Knightsbridge, ex p Marcrest Ltd [1983] 1 All ER 1148), acquiescence in the irregularity complained of (R v Secretary of State for Education and Science, ex p Birmingham City Council (1984) 83 LGR 79) or waiver of the right to object (R v Williams, ex p Phillips [1914] 1 KB) may all result in the court declining to grant relief.

44. A delay of seven years to raise a complaint against a decision is not just inordinate delay but it is a combination of all these factors- it denotes acquiescence, assuming there was any irregularity in the Tribunal's decision, unreasonable or unmeritorious conduct and waiver of the right to object.

45. One final issue that I have noted from the pleadings and affidavits filed in support of and in opposition to the applicant's application is that there is an obvious dispute on facts material to the application and which, for this reason, require this Honourable Court to go beyond affidavit evidence and ascertain whether, the pensioners were paid all their dues, and if so, whether the contentious decree was even necessary in the first place. I say so because while, on the one hand, the applicants claim that they paid the pensioners all their dues, the latter, on the other hand, have denied having been paid as ordered by the Appeals Tribunal. In paragraphs 13, 14 and 27 of the affidavit verifying the facts relied upon, for instance, the applicants have sworn as follows:

> " 13. Having attended the individual statements of accounts in respect of each pensioner, the applicants herein were ready able and willing to settle the patient use in that accordance. In fact, the applicants had already done so prior to the consent but undertook an exercise to confirm once again that the tabulations were accurate and the payments made were in order.
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> 14. Further, in tandem with the consent of 8th of April 2016, the 2nd respondent here in submitted a report to the 1st respondent confirming that the statement prepared by the applicant's here in and the payments made that were in accordance with the applicant's trust deed, the actual report on the tribunal's ruling. (Annexed hereto and marked "SO-12" is a copy of the authority's report)
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> 27. I am further advised by counsel on record that although the ruling of the tribunal dated 13th February 2017 remains in contestation in civil appeal number E365 of 2020, the purported decree issued by the tribunal on 30th

April 2024, reads contrary to the tribunal's own decision of 13 February 2017 been a further variation and division from its previous rulings and directions."

46. In denying that they have been paid, the pensioners have sworn as follows:

> "18. That out of the 133 members who are the 3rd respondents the trustees paid to 49 of them the benefits and refused, neglected and declined to pay the remaining 84 without any justifiable cause but out of blatant bravado and disregard of the tribunal orders and the rule of law.
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> 19. That as a result of this blatant violation and disregard of the tribunal orders, the 84 members applied for a decree to execute as per the dues which were payable to them as computed by the actuary and adopted by the tribunal. The application was done through an amended notice of motion dated 15th September 2015. This was execution proceedings to realise the judgement.
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> 20. The ruling on this application was delivered by the tribunal on 13th February 2017 again directing the trustees to pay to the remaining 84 members the benefits. The tribunal was lenient to the ex parte applicants in that instead of ordering for the seizure and sale of its assets it allowed them to pay voluntarily.
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> 21. That again the trustee refused to pay and engaged in filing of various suits at the High Court and the Employment and Labour Relations Court to challenge the tribunal orders which suits were dismissed with the resultant consequence that the tribunal judgement still stood legally."

47. The court cannot ascertain these diametrical positions from the affidavit evidence. In order to ascertain the truth, one has to interrogate such evidence as the pension scheme and the rules applicable to the parties, the actuary report and the payments made and to whom thy were made. Affidavit evidence may not be sufficient to prove these facts.

48. A judicial review court is ordinarily not ideally placed to interrogate conflicting affidavit evidence. It was so held in R versus Secretary of State for the Home Department, ex p Khawaja (1984) AC 74 where the court noted as follows:

> "The migration officer, whether at this stage of entry or at that of removal, as to consider a complex of statutory rules and non-statutory guidelines. He has to act upon documentary evidence and such other evidence as inquiries may provide. Often there will be documents was genuineness is doubtful, statements which cannot be verified, misunderstandings as to what was said, practices and attitudes in a foreign state which have to be estimated. There is room for appreciation, even for discretion. The Divisional Court, on the other hand, on judicial review of a decision to remove and detain, is very different situated. It considers the case on affidavit evidence, as to which cross-examination, though available, does not take place in practice. It is, as this case well exemplifies, not in a position to find out the truth between conflicting statements-did the applicant receive notes, did he read them, was he incapable of misunderstanding them, what exactly took place at the point of entry? Nor is it in a position to weigh the materiality of personal or other factors present, or not present or partially present, to the mind of the immigration authorities. It cannot possibly act as, in effect, a court of appeal as to the facts on which the migration officer decided. What it is able to do, and this is the limit of its powers, is to see whether there was evidence on which

the immigration officer, acting reasonably, would decide as he did. (Per Lord Wilberforce at p. 949B-D). (Emphasis added).

49. Though this case related to immigration and the questions are pertinent to the immigration issues that had been raised, the principle applied as to the limits of a judicial review court entertaining disputes on factual issues is applicable in this case. It relies on the affidavit before it and, for this very reason, it is not in a position to tell the truth between conflicting depositions.

Lord Woolf was more apt in R versus Derbyshire County Council, ex p Noble (1990) ICR at p. 813C-D where he stated:

> " The present application is one which is unsuitable for disposal on an application for judicial review-unsuitable because it clearly involves a conflict of fact and conflict of evidence which would require investigation and would involve discovery and cross examination. Cross-examination and discovery can take place on application for judicial review, but in the ordinary way judicial review is designed to deal with matters which can be resolved without resorting to those procedures."

50. On the same point, Lord Diplock at p.316G in Hoffmann-La-Roche (F) & Co AG versus Secretary of State for Trade and Industry (1975) AC 295 was of the view that the procedure on a judicial review motion is unsuited to enquiries into disputed facts. Oral evidence and discovery, although catered for by the rules are not part of the ordinary stock in trade of the prerogative jurisdiction.

51. And in a judgment delivered by the Supreme Court of England on 16 October 2024, In the matter of an application by Noeleen McAleenon for Judicial Review Appellant) (Northern Ireland) [2024] UKSC 31, the court revisited this issue and held as follows:

> " 41. Judicial review is supposed to be a speedy and effective procedure, in respect of which disputes of fact which have a bearing on the legal question to be determined by the court - that is, whether the public authority has acted lawfully - do not generally arise. A public authority is subject to a duty of candour to explain to the court all the facts which it took into account and the information available to it when it decided how to act.
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> 42. Given the nature of the legal question to be determined by the court and the duty of candour, the usual position is that a judicial review claim can and should be determined without the need to resort to procedures, such as cross-examination of witnesses, which are directed to assisting a court to resolve disputed questions of fact which are relevant in the context of other civil actions, where it is the court itself which has to determine those facts. In judicial review proceedings the court is typically not concerned to resolve disputes of fact, but rather to decide the legal consequences in the light of undisputed facts about what information the public authority had and the reasons it had for acting. (This is not to say that such procedures are not available in judicial review: cross examination is available and will be allowed "whenever the justice of the particular case so requires": O'Reilly v Mackman [1983] 2 AC 237, 283 per Lord Diplock; but usually, given the issues which arise in a judicial review claim, the justice of the case does not require it)". (Emphasis added).

52. Our very own Supreme Court has also addressed this question in Saisi & 7 others *v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019* (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment). In that case the court noted as follows:

> (76) Be that as it may, it is the Court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in Section 11 (1) and (2) of the Fair Administrative Actions Act. Third, the Court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in Section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this Court held in the case of Kenya Vision 2030 Delivery Board v. The Commission on Administrative Justice, the Attorney General and Eng. Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised." (Emphasis added).

53. It follows that even if the applicant's application was properly before court, it was bound to fail to the extent that it demands of this court to inquire into disputed facts.

In the final analysis, and for reasons I have given, the inevitable conclusion I come to is that the applicant's application is misconceived and an abuse of the process of this Honourable Court. It is hereby dismissed with costs. Orders accordingly.

SIGNED, DATED AND POSTED ON THE CTS ON 30 OCTOBER 2024

NGAAH JAIRUS

JUDGE