Republic v Retirement Benefits Appeals Tribunal & another; Retirement Benefits Authority & another (Interested Parties); Board of Trustees, Teleposta Pension Scheme (Exparte Applicant) (Judicial Review Application 141 of 2017) [2023] KEHC 21431 (KLR) (Judicial Review) (16 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21431 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION 141 OF 2017

JM CHIGITI, J

AUGUST 16, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE RETIREMENT BENEFITS APPEALS TRIBUNAL ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

RETIREMENT BENEFITS AUTHORITY ..... INTERESTED PARTY

BONIFACE MARIGA & 948 OTHERS ..... INTERESTED PARTY

AND

THE BOARD OF TRUSTEES, TELEPOSTA PENSION SCHEME ..... EXPARTE APPLICANT

(Retirement Benefits Appeals Tribunal made in Tribunal Civil Appeal No. 7 of 2011)

JUDGMENT

Brief Background

1. The Application before this Court is the Applicant's Notice of Motion dated 11th April, 2017--brought under Order 53 Rule 3(1) of the Civil Procedure Rules. The Application seeks the following orders:

1. An Order of Certiorari to remove into this Honourable Court and quash the judgment and orders of the Retirement Benefits Appeals Tribunal made in Tribunal Civil Appeal No. 7 of 2011 Boniface Mariga & 948 Others vs The Retirement Benefits Authority and the Board of Trustees Teleposta Pension Scheme and Provident Fund which judgment is dated the 13th February, 2017.

2. An Order of Prohibition to prohibit the 1st Respondent from any further dealing with the Tribunal Civil Appeal No. 7 of 2011, whether by way of any further order, enforcement, or otherwise, whatsoever.

3. That the costs of and occasioned by this Application be provided for.

The Applicant's Case

2. The Application is based on the grounds set out in the Statutory Statement, as well the facts set out in the Verifying Affidavit of Peter K. Rotich sworn on 28th March, 2017. It is the Applicant's case that the Retirement Benefits Appeals Tribunal (the tribunal) entertained an appeal from parties--who had neither been parties, nor presented their complaints before the Retirement Benefits Authority (the Authority)—who were not 'person aggrieved by the decision of the Authority' as provided for under the Act.

3. Further, that the Tribunal has without jurisdiction permitted the introduction of new issues that had not been raised by the Appellants in the original proceedings; and the jurisdiction granted to the Tribunal is to finally determine the appeals before, it in accordance with the law. However, that instead of determining the issues on the appeal and considering the reliefs claimed, the Tribunal decided to frame its own issue which in the event was not conclusive of the appeal before it.

4. Consequently, that by failing to finally determine the appeal before it, the tribunal has failed in exercise of its jurisdiction. Further, that the judgment granted--being interlocutory in nature and directing the Ex-parte Applicant to carry out certain activities and communicate the same to the Interested Parties--is contrary to the provisions of the Act and is otherwise a nullity.

5. Therefore, that the action of the tribunal was irrational, unreasonable, and disregarded the provisions of the Act, the Regulations, and the Rules, which the Tribunal claimed to be the basis of its judgment. Notably, that the tribunal ordered the trustees to pay benefits to the Appellants: otherwise than in accordance with the law, the Trust Deed, and/or the Rules of the Scheme.

6. To the Applicant, the decision was contrary to the provisions of the Act which required the Trustees to ensure that the scheme fund is at all times managed in accordance with the Act, the Regulations there under, the scheme rules, and any directions given by the Chief Executive Officer.

7. In particular, that the Ex-Parte Applicants are apprehensive unless the tribunal is prohibited from conducting any further proceedings, the 2nd Interested Parties are likely to procure further orders which will irretrievably prejudice the Ex-Parte Applicants, and other Pensioners under the Scheme as a rough computation of the amount likely to be computed, as directed by the Judgment and Orders of the Tribunal are in excess of Kenya Shillings Seven Billion (Kes.7 Billion); which order if implemented is likely to render the Ex-Parte Applicant unviable.

8. Also, the Appellants are apprehensive that they will be subjected to unnecessary process of computation without jurisdiction, and without a forum to resolve any dispute that may arise in respect thereof, the tribunal being functus officio, and currently having no members in the event. Accordingly, that it is in the interest of justice that the orders be granted.

9. Additionally, the Ex-parte Applicant, in further stating their case, filed a Supplementary Affidavit dated 12th October, 2022 deponed by Sundeep Raichura, (the FIA the Group Chief Executive Officer of Zamara Actuaries, Administrators and Consultants Limited), the appointed actuaries for the Ex-Parte Applicant (TelePosta Pension Scheme).

10. The deponent averred that in its Actuarial Report dated 30th September, 2020 (ascertaining the financial position of the Scheme, and more precisely ascertaining the assets and liabilities of the Scheme; and the effect of the additional liability earlier estimated at Kes. 7.2 billion--arising out of the Judgment of the Tribunal dated 13th February 2017) which was submitted to the Ex-parte Applicant, the Actuarial Report indicated that the additional liability arising out of the Judgment of the Tribunal increased to Kes. 11.511 billion to reflect the period since 13th February, 2017 to 30th June, 2020: and the more detailed and up to date information in relation to the Scheme membership and exits from membership that were obtained from the Scheme.

11. Also, it was the Ex parte Applicant's case that the additional liability is extremely material in the context of this Scheme, and would result in a massive actuarial deficit in the Scheme of Kes. 9.66bn; and that the additional liability is in fact higher than the total liabilities of the Scheme as at 30th June, 2020. That, as at 3rd October, 2022 the actuarial report estimated the additional liability arising from the Tribunal's Judgement at Kes. 13.928bn, which would have a further adverse impact on the financial position of the Scheme. Therefore, that the payment of this additional liability would significantly prejudice the financial security of all the members of the Scheme (including the Interested Parties herein who are among the more than 10,000 pensioners, deferred pensioners, and other members with outstanding benefits in the Scheme).

12. The Ex parte contended that in the event the Scheme were to be compelled to settle the additional liability (estimated at Kes. 13.928 billion) as directed by the Tribunal, it would have a very significant impact on the existence of the Scheme, with a very imminent possibility of the Scheme being put under insolvency.

13. Moreover, the Ex parte Applicant, in response to the 2nd Interested Party's Supplementary Affidavit sworn by Mr. Darshan Ruparelia; and in promoting their own (Applicant's) case; filed a Further Affidavit dated 1st February, 2023 similarly sworn by Sundeep Raichura, FIA.

14. The deponent reiterated that the 1st Respondent's Judgment would have the effect of rendering the Ex-parte Applicant insolvent to the detriment of the Interested Parties, and other pensioners who are not involved in the dispute herein. The Applicant further averred that the upshot of the Technical Report dated 17th December, 2018 is that the Judgment of the 1st Respondent is not in accordance with the Ex-parte Applicant's Trust Deed and Rules and is thus for quashing.

The Respondent's Case

15. Responding to, and opposing the Application, the 1st Respondents filed a Replying Affidavit dated 25th February, 2022 sworn by Mr. Fred Gekonde, the clerk of the 1st Respondent (Retirement Benefits Appeals Tribunal). The deponent averred that the 2nd Interested Party filed a complaint with the 1st Interested Party, alleging that the Ex parte Applicant had miscalculated and underpaid them their benefits upon retirement, and on leaving employment of the Ex Parte Applicant's Sponsor, namely Kenya Posts and Telecommunications Corporation.

16. Resultantly, that the 2nd Interested Party was not satisfied with the decision of the 1st Interested Party, and as such subsequently filed an appeal with the 1st Respondent being Civil Appeal No. 7 of 2011. The Appeal is said to have been filed on 16th May, 2011 against the 1st Interested Party's decision of 8th

June, 2009. The 2nd Interested Party in the Memorandum of Appeal contended that the 1st Interested Party failed to cause the Ex parte Applicant to enforce the provisions of the Trust Deed and Rules: in Permitting an illegality; Acting arbitrarily; Misdirecting itself on the then Appellants' complaint; Making a mistake of the facts presented to it, and being indecisive and in its failure to perform statutory duties.

17. It was averred that on 27th November, 2011 the Tribunal sent back the case to the 1st Interested Party, and directed the 1st Interested Party to determine the then Appellants' complaint and give a written decision, upon which if the then Appellants' were or any one of them was dissatisfied, they were at liberty to file an appeal in the same cause. That the 1st Interested Party determined the said complaint on 3rd October, subsequent to which an appeal was filed on 7th October,2012 raising the same grounds as those that were raised in the Memorandum of Appeal filed on 16th May,2011.

18. It is the 1st Respondent's case that a consent was recorded on 22nd July,2016 as follows; "By consent actuaries to meet and narrow down the issues. Any issues not agreed may be filed for determination by the Tribunal. Case stood over for mention on 9th September, 2016". The deponent avers that each of the two parties engaged an actuary and all the actuaries were heard and cross examined during the hearing. Further, that the Tribunal identified one issue for determination and that is what the proper method was to be used in calculating the benefits due to the 2nd Interested Parties.

19. It is averred by the deponent that the first point of departure by the actuaries was whether the 2nd Interested Parties could access their pensions at an age less than 55 years without a discounting factor being applied.

20. The Respondents' case is that Teleposta Pension Scheme is by design a defined benefit scheme that was commenced on 1st July,1997 and that what accrues as a right in a member of a defined benefit scheme is the right to receive a pension computed using a formula as stated in the Trust Deed, and Rules of the Scheme. Further that contributions by or on behalf of the beneficiary do not matter.

21. The 1st Respondent is said to have noted that in the 2nd Interested Parties, the right that vested in them whether at normal retirement date, deferred or after age 50 and before 55 years is the right to be paid and; therefore, the Tribunal adopted the NBC Holdings Proprietary(Pty) Limited report because according to it, the correct way of computing the benefits due to the Appellants was to apply the Rules on accrued rights expressed in the scheme rules which is; "a pension commencing on the Normal Pension Date equal to 1/480th of his Final Pensionable Salary for each complete month of pensionable service".

22. The right is said to be contained in the Trust Deed and Rules dated 1st July, 1997 of Teleposta Pension Scheme at Rules 10(c), (d), and (g) under the headings Pension on Retirement at Normal Retirement Date, Pension on Retirement Before Normal Retirement Date, and Deferred Pension payable from Normal Retirement Date, respectively.

23. The 1st Respondent's case is that any computations of benefits by application of a discounting factor at age 55 is contrary to Regulation 16(1) in so far as it reduces accrued rights and interests of the 2nd Interested Parties and the fiduciary obligation requiring a trustee to act in the best interest of a beneficiary and pay the right amount of benefits to the beneficiary.

24. The 1st Respondent is said to have gone further to indicate that although the Application of discounting factors, as provided by the Alexander Forbes Financial Services (E.A.) Limited, may be a practice in actuarial science, and that both actuaries having conceded that; However, that the Rules of the Ex Parte Applicant did not have a provision for application of a discounting factor in the

computation of pensions promised in the scheme--it did not find a basis for its application in the appeal when it was not stated in the Rules of the scheme.

25. It is also averred that on the issue of introduction of new Appellants, the grounds of appeal and particulars were the same as those in the Memorandum of Appeal filed on 16th May,2011 and that considering the full burden on the Tribunal to dispense justice on the merits as opposed to technicalities as stipulated under Article 159 of *the Constitution*, the Tribunal was of the view that allowing those new appellants would not cause any prejudice to any of the parties in the matter and that since all the 948 Appellants belong to the same scheme, they were all bound by one outcome of the Tribunal.

1st Interested Party's Case

26. The 1st Interested Party, (the Retirement Benefits Authority) through its Advocates on record, indicated that they would not be filing a response to the Application.

2nd Interested Party's Case

27. The 2nd Interested Party, in response to and also opposing the Application, filed their Replying Affidavit dated 29th November, 2019 and deponed by Boniface Mariga–on his behalf and behalf of the other 2nd Interested Party members. It was their case that they are persons who were former employees of Telkom Kenya, before they left service and were members of the Applicants Pension Scheme by virtue of their employment.

28. Accordingly, that as members of the Applicants Pension Schemes, they were entitled to their pension benefits as per the trust deed and rules of the scheme, but upon leaving service their pension benefits were not calculated in accordance with the scheme rules resulting to the filing of the complaint pursuant to section 46 of the *Retirement Benefits Act* with the 1st Interested Party.

29. That they (2nd Interested Party) were unsatisfied with the decision of the 1st Interested Party and pursuant to Section 48 of the Retirement Benefit Act No. 3 of 1997 filed an appeal with the 1st Respondent where upon hearing the case, the 1st Respondent delivered its Judgment on 13th February, 2017 allowing the 2nd Interested Party's Appeal against the Ex parte Applicants herein.

30. The 2nd Interested Party maintained that contrary to the Ex parte Applicant's assertions, the Appeal was properly filed by the same persons who filed the complaint; and in any case, the Applicant has not stated which particular persons that they allege to not have been proper parties in the Appeal.

31. As per the 2nd Interested Party, if the Ex parte Applicant was not satisfied by the decision of the Tribunal - by claiming that the orders were allegedly extraneous, such issues form a basis of any Appeal - the Ex parte Applicant ought to have filed an Appeal against such orders to ventilate such allegations.

32. To the 2nd Interested Party, the Tribunal had the jurisdiction to issue its orders on 13th February, 2017 - in accordance with the *Retirement Benefits Act* and which Orders were clear and proper in that the same directed the Applicant to properly compute and pay the 2nd Interested Parties dues in accordance with the Trust Deed and/or Rules of the scheme. That the orders issued were to be carried out by the Ex parte Applicant, who are the trustees of the Irrevocable Trust Deed; thus that it is improper for the Ex parte Applicant to claim that they will be the parties who will be greatly prejudiced, yet the aggrieved parties are the beneficiaries who are members of the 2nd Interested Party.

33. Further, that the Ex parte Applicant has come up with a figure of Kenya shillings Seven (7) Billion out of thin air which figure is completely unsupported. In any case, that justice must come to an end and

the 2nd Interested Party must reap the fruits of justice; therefore, that it is in the interest of justice that this Application should fail.

34. Moreover, to the 2nd Interested Party, the Ex parte Applicant has so far failed to adhere to the Judgment and are deliberately delaying the conclusion of this matter since it is yet to comply with the orders as issued by the Tribunal. That Article 57 of *the Constitution* protects the 2nd Interested Party's rights as older members of society with respect to pursue their personal development and to live in dignity and respect; instead the members are aged pensioners who are suffering an injustice that is being by far extended by the delay of the Applicants not adhering to the said Judgment - thereby causing financial and emotional turmoil to the 2nd Interested Party.

35. The 2nd Interested Party contended that the 1st Respondent is created under Article 169 of *the Constitution* and this Honourable Court has supervisory powers over the said Tribunals exercising dispute resolutions arising out of employment contracts; has jurisdiction to hear and issue the orders made under the powers granted by virtue of Section 49 of the Retirement Benefit Act.

36. According to the 2nd Interested Party, the 1st Respondent correctly interpreted the law- and its determination has created good precedent that abides by the rules on Natural Justice and is in support of Public Policy-by finding that the Applicants: (a) Relationship with the 2nd Interested Party – anchored on an irrevocable Trust Deed [subject to only lawful amendments from time to time] - is that of a Trustee and a beneficiary; (b) Never disclosed to the 2nd Interested Party the relevant provisions of the Trust Deed and Rules of the scheme relied on in computing their pensions, an act which was in breach of the Applicants fiduciary duties and was also in breach of the Trust Deed and Rules and was illegal, null and void; (c) Were expected to abide by the Trust Deed and Rules in computing the Interested Party's benefits.

37. Notably, the 2nd Interested Party averred that the grounds raised in this Judicial Review application are grounds which can only be raised on appeal as they touch on the merits of the case. As such, that the instant application is an Appeal disguised as a Judicial Review Application; and is thus incompetent, fatally defective, frivolous, vexatious, lacks merit, an abuse of the courts time, and ought to be dismissed.

38. The 2nd Interested Party position is that the 1st Respondent observed all procedural fairness-all the rules of natural justice were followed-by listening to both parties, operated within the confines of the laws, had the Jurisdiction to entertain the matter as under Section 48 of the *Retirement Benefits Act*, took into account all the relevant facts as stipulated under Section 49 of the Retirement Benefit Authority Act before arriving at its decision, and that did not act in excess of its Jurisdiction since it is legally empowered to determine pension disputes and to call for expert witness while hearing the cases.

39. Further, in response to and opposing the Application, and in particular response to Applicant's Supplementary Affidavit dated 12th October, 2022 and sworn by Sundeep Raichura, specifically on the annexed Actuarial Report annexed therein; the 2nd Interested Party through their Further Affidavit dated 14th October, 2022 and sworn by Boniface Mariga averred that the debt has continued to accrue due to the failure by the Trustees to settle the Judgement sum which continues to accrue interest until settled in full. That a mere fact that a judgement sum accrues interest due to non-payment is not a valid ground to set aside the Judgement nor to impute irregularity, the law allows for interest on decretal sum until settled in full and there is nothing unlawful about it.

40. As per the 2nd Interested Party, the pension benefits which has accrued to a beneficiary cannot be reduced nor taken away on the basis that if paid correctly, as adjudicated by a competent tribunal, then the liquidity of the scheme will be in problem or that the scheme will be in deficit. That the Retirement

Benefits Authority Act No. 3 of 1997 Retirement Benefits (Minimum funding level and winding up Scheme Rule 2020) provides for remedial measures where a scheme is in liquidity problem or in deficit and denial of a beneficiary his/her accrued pension rights is not one of the measurers allowed for as a remedial measure by the Retirement Benefits Authority.

41. To the 2nd Interested Party, the judgement of the Tribunal was sound and relied on the provisions of the Law, Trust Deed, and Rules in directing the Trustees to pay the 2nd Interested Party pension dues in accordance with the Scheme Rules, since the computations which had been made by the Trustees at the time of exit from the Employment was not in accordance with the Scheme Rules.

42. It was averred that pension benefits are one of the social protections accorded to the older members of the society by Article 43 and 57 of *the Constitution*, and thus it would be unfair, unjust, and unlawful to deny the retirees their accrued pension benefits-as a result of the Trustees own convenience, as propagated in the Report by their Actuary.

43. Notably, that the Actuary for the Scheme has produced a Report and made various alarming statements in the Report arising out of his own interpretation of the Judgement to defeat the benefits due to the pensioners and to erode what the law has already preserved for the pensioners. That the Trustees Actuary Report other than being alarmist offers no concrete solution within the law on payments of the retirees accrued pension benefits as provided for in the Scheme Rules.

44. That as correctly quoted in the Executive Summary of the Actuary Report by Sundeep Raichura at paragraph 2 and 3 the Tribunal directed computations to be done in accordance with the scheme Rules and even reproduced the Tribunal Judgement in respect thereof. That however, at paragraph 4 of the Executive Summary, the deponent misleads the court that the initial computations were done in similar manner, which is not true since that was the basis of the case in the Tribunal and that is why there are variances in the computations initially done and the Trust Deed and Rules of the Scheme.

45. That what the Scheme Actuary Sundeep Raichura is advocating for in his Report is that the benefits due to members be reduced by taking into account discounting factors not contained in the Scheme Rules. That this was addressed by the Tribunal with the concurrence of both parties' actuaries; that the Scheme Rules do not provide for reduction of benefits by use of discounting factors and that the same would be contrary to Regulation 16 (1) of the Retirement Benefits Authority Regulations which prohibits reductions of accrued rights.

46. The 2nd Interested Party argued that the computations which the Trustees paid to the Retirees on leaving service, was a refund or return of contributions plus interest which is contrary to the Scheme Rules 10(c), (d), and (g)-and as per the judgment-which provides for a formula for computations as opposed to returns. That the Tribunal has clearly explained this in the Judgement as well as at paragraphs 13-17 of the Replying Affidavit sworn by Fred Gekonde on 25th February, 2022 on behalf of the Tribunal which clearly at these paragraphs explains why the position propagated by the Trustees Actuary violates the Scheme Rules and the Retirement Benefit Authority Act.

47. Additionally, in response to and opposing the Application, the 2nd Interested Party filed a Supplementary Affidavit dated 28th November, 2022 sworn by Darshahn Ruparelia, the founder and Managing Director of Ruparelia Consultants Limited (RCL) Kenya; and computed and calculated the benefits of 65 members of the 2nd Interested Parties herein, and 589 members in Retirement Benefit Appeals Tribunal at Nairobi No. 8/2022 David Mathika James & 589 others Vs Retirement Benefit Authority & Another.

48. The 2nd Interested Party in response to the affidavit prepared by Sundeep Raichura FIA dated 12th October, 2022 and also an actuarial report assessing the impact on the scheme of the retirement benefits

tribunal ruling on Civil Appeal No. 7 of 2011 dated September 2020 and in reviewing the same averred that in interpretation of the Ruling, it would be reasonable for both Actuaries (Scheme's actuary) and him to have a common understanding of the practical application of the determination in the Ruling.

49. That he expects the technical paper by the Scheme's Actuary to set out how the Ruling affects the different classes of members (i.e. in-service members, deferred members, and pensioners/beneficiaries) based on their current status and the reason of exit from the Scheme.

50. On information on derivation of the additional liability, the 2nd Interested Party stated that additional information on the data and assumptions underlying the Report are needed as the Scheme's actuary report does not contain sufficient information on these 9,735 members, or any other members included in the additional liability, to be able to independently verify the additional liability.

51. And on Scheme insolvency, that the Scheme's actuary stated that if the Scheme was compelled to pay the additional liability, then there is a very imminent possibility of the Scheme being put under insolvency; and the 2nd Interested Party contended that other than the Report showing an estimate of the additional liability-due to the Ruling, the Report does not contain any other detail that would lead to the conclusion of a very imminent possibility of insolvency; and that the data underlying the Scheme actuary's report is already two years out-of-date.

Applicant's Submissions

52. In support of its Application, the Applicant filed their written submissions dated 21st September, 2022; and supplementary written submissions dated 28th November, 2022. The Applicant submitted the following issues for determination by this Honourable Court are as follows; (a) Whether the Tribunal's decision is ultra vires the Act? (b) Whether the Tribunal failed to determine the Appeal before it conclusively? (c) Whether the Tribunal's decision was irrational, unreasonable, and in complete disregard of the provisions of the Act, Regulations and the Scheme Rules? (d) Whether the Scheme is entitled to the reliefs sought in the Application? (e) Who should bear the costs of the Application?

53. The Applicant submitted that the scheme has invoked the inherent and unlimited jurisdiction of the High Court in terms of Articles 165 (6) and (7) of *the Constitution*, which sub-articles expressly provide that the High Court shall have supervisory jurisdiction over subordinate courts or over any person exercising judicial or quasi-judicial function, but not over a superior court. As for reliefs, the High Court is empowered to give any order or direction to ensure the fair administration of justice.

54. On whether the Tribunal's decision was ultra vires the Act, the Tribunal in countenancing the addition of 348 new entrants to the proceedings before it and allowing the admission of the NBC Actuarial Report into evidence, hence allowing the Appellants to raise new issues that were not raised before the Authority as the forum of first instance, is ultra vires the Act. That Section 48(1) provides thus, Appeals to the Tribunal (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 thereunder may appeal to the Tribunal within thirty days of the receipt of the decision. It therefore bears considering who an aggrieved person under the Act is as it is our submission that the 348 new entrants were not aggrieved by the decision of the Tribunal.

55. That the complaint dated 9th September, 2011 lists 600 complainants. With respect to these, the Authority made a finding that the complainants' benefits were properly calculated save for two members, who it specified as having had their benefits underpaid.

56. The Applicant avers that a perusal of the Memorandum of Appeal dated 19th October, 2012 indicates that there are 948 Appellants, 47 of which subsequently withdrew from the Appeal. Then over 300

new appellants were joined to the proceedings before the Tribunal and though the Scheme objected to their addition, the Tribunal nonetheless allowed them to be joined and continued with its proceedings. This is a grave procedural error on the part of the Tribunal since the additional appellants could not have been aggrieved by a decision that did not relate to them.

57. To the Applicants, no orders were made in relation to the 348 new entrants by the Authority, and even the reports submitted by the Scheme and the Independent Actuarial Consultants did not touch on their entitlement to their accrued pension under the Act and Trust Deed and Rules. Therefore, that the tribunal's jurisdiction was not properly invoked by the additional appellants as there was no decision pertaining to them for the Tribunal to consider on appeal. Therefore, the Tribunal acted ultra vires its jurisdiction under sections 48 and 49 of the Act.

58. The second limb of this issue is that the Tribunal allowed the Appellants to produce an actuarial report by NBC Holdings Limited, which was new evidence that had not been adduced before the Authority. This allowed the Appellants to re-litigate the matter before the Tribunal, yet they had been heard and the matter concluded by the Authority. On appeal, the Tribunal ought not to have allowed the Appellants to produce new evidence and on that basis raise new issues that had not been raised before the Authority. Relying on the case of Joseph Gichuhi Kariuki and 3 others v Robert Kimani eKLR (2020).

59. According to the Applicant, in admitting new evidence and allowing the Appellants to raise new points that would have the effect of changing their entire case, the Tribunal erred as it was effectively re-trying the matter afresh, arrogating to itself the jurisdiction of the Authority instead of confining itself to its appellate jurisdiction as provided for under the Act. Citing the case of Securicor (K) Limited v E.A. Drappers Limited and another [1987] KLR 528.

60. As a Tribunal sitting to consider an appeal from a decision of the Authority, the Tribunal ought to have considered the import of the new evidence being adduced by the Appellants and whether it would have the effect of completely changing the case of the Appellants, making it completely different from what was presented to the Authority. This is exactly what happened and is an eventuality that the Tribunal ought not to have allowed.

61. The Applicant further submitted that it cannot have been the intention of Parliament to establish an Authority to hear matters in the first instance and have the Tribunal re-try the same matters as if they had not been heard by the Authority. If that were the intention of Parliament, then it would have been an easy matter to merge the Authority and the Tribunal into one body and not create two bodies; one to hear a matter in the first instance, and another to hear the matter on appeal. As this was not the case, the Tribunal acted ultra vires its powers under the Act by acting as a tribunal of first instance, which it is not.

62. On whether the Tribunal failed to determine the Appeal before it conclusively, that the Applicant restated the written submissions of the Appellants, dated 8th February 2017. That outlined the specific issues that the Appellants wanted the Tribunal to determine. The Applicant contends that instead of determining the issues raised above by the parties and considering the reliefs claimed, the Tribunal decided to frame its own issues, which in the event were not conclusive of the appeal before it. That the Tribunal therefore completely ignored the issues raised by the Appellants and all the issues raised by the Scheme as indicated in the foregoing. Having framed its issues in the manner stated above, the Tribunal proceeded to grant.

63. The Applicant submitted that the Tribunal issued orders that were interlocutory in nature, requiring the Scheme to recalculate the entitlements of the Appellants. Making the decision not conclusive of the dispute before it, and as such, the Tribunal spurned its mandate under the Act. The Tribunal, being

a quasi-judicial body, ought to have given a final decision on the matter before it to settle the dispute between the parties, at which point it would have been functus officio, having fulfilled its mandate. Relying on the holding of the Court in Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR,

64. Further, by requiring the Scheme to compute the benefits owed to the Appellants, the Tribunal effectively abdicated its role and delegated its role to the Scheme. The orders of the Tribunal would also have required further supervision by the Tribunal as disputes and disagreements are likely to have arisen between the parties as to the computation of benefits had this Honourable Court not issued an order staying the decision. Such an action would constitute a procedural impropriety and a further indication that the Tribunal did not conclusively determine the Appeal. Further relying on the Mitu-Bell Case (Supra).

65. The Applicant averred that it was quite the opposite of a final and binding decision that would render the Tribunal functus officio as per the Mitu-Bell Case (Supra) quoted in the foregoing. The Appellants went to the Tribunal to get a determination on the computation of their benefits but went away without a final determination.

66. Further, in rendering its decision, the issues raised by the Appellants and the Scheme were not addressed as indicated in a perusal of the Judgment of the Tribunal. The Tribunal neither referred to nor considered the submissions of the parties in the Appeal and also did not apply its mind to the hotly contested issue of the impact of the application of the NBC computation to the Scheme. This was a grave concern of the parties such that they asked the Tribunal to determine the said issue. On deciding on the correct method of computation to be used by the Scheme, the Tribunal did not address its mind to the effect that the said computation method would have on the Scheme and the entitlements of the members of the Scheme. Had the Tribunal applied its mind to this issue it would have reached the inevitable conclusion that an award of the magnitude proposed by the Appellants would render the Scheme unviable.

67. On whether the Tribunal's decision was irrational, unreasonable, and in complete disregard of the provisions of the Act, Regulations and the Scheme Rules, it was the Applicants case that to set out the parameters of the grounds of irrationality, unreasonableness and illegality, the Applicant relied on the Wednesbury principle as set out in Associated Provincial Picture House Ltd v Wednesbury Corporation (1948) 1 KB 223.

68. According to the Applicant, one of the issues raised by the parties, including the 2nd Interested Party, was the effect of the calculation of the benefits as set out in the NBC Final Report. This issue went to the purposes of the Act establishing the Tribunal i.e. the promotion of retirement benefits schemes and the development of the retirement benefits sector as well. By failing to even consider the question, the Tribunal failed to assuage the concerns of the 2nd Interested Party, the Scheme and to protect the members of the Scheme as well.

69. Resultantly, that the Tribunal therefore rendered a decision that would result in the insolvency of the Scheme to the detriment of all its members, including the 2nd Interested Party. This is in contravention of the Act, starting with its preamble. That the main issue on appeal was the basis for computation of the lump sum payment in lieu of retaining a deferred pension in the Scheme for the deferred pensioners leaving service. However, despite noting that the right that vested in the pensioners, (including deferred pensioners), is a right commencing from the Normal Retirement Date (.i.e. 55 years), the Tribunal proceeded to purport to vary the provisions of the Trust Deed and the Rules for purposes of computation of the pension benefits by stating as follows, "We find that the correct way of computing the benefits due to the Appellants is to apply the Rules on accrued rights expressed in

the scheme rules which is: - "...a pension equal to 1/480"s of a beneficiary's Final Pensionable Salary for each complete month of Pensionable service."

70. The Scheme Rules upon which they relied however only applied to those eligible for Early Retirement with the agreement of the Employer or Normal Retirement Date as provided by Rule 10 thereof: (a). Retiring on or after attaining the age of 50 years (Early Retirement) with the agreement of the Employer; (b). Retirement at the Normal Retirement Age which was defined as 55 years.

71. That with respect to the members who resigned or left employment before the Normal Retirement Age but having completed five (5) years of service or retired before attaining the age of 50 under specified circumstances, the Scheme Rules, specifically Rule 10(g) provided for a Deferred Pension payable from the Normal Pension Date. As per the Applicant, the Tribunal failed to consider or apply the Rules with respect to "Deferred Pension payable from the Normal Pension Date" which provide as follows: "An employee having served for at least a period of 5 years and leaving employment before attaining the age of 50 years:- "shall be entitled to a Deferred Pension commencing on the Normal Pension Date equal to 1/480 of his final Pensionable Salary for each complete month of Pensionable Service"

72. The Applicant claimed the Tribunal, contrary to the Trust Deed, then proceeded to make a finding that the accrued rights of each of the Appellants, being persons entitled to deferred pension benefits and who had received cash equivalent in respect thereof, should have their accrued benefits computed on the basis of;"...a pension equal to 1/480th of each appellant's Final Salary for each complete month of Pensionable Service."

73. That by so doing, the Tribunal disregarded the provisions of the Trust Deed and the Rules made thereunder which required the Deferred Pensions to be computed on the basis prescribed, but only take effect from the Normal Pension Date which is defined in the Trust Deed as 55 years.

74. Further, that the Tribunal erroneously and unlawfully found that computation of the Appellants' benefits by application of a discounting factor at age 55 was contrary to the Trust Deed. In arriving at that finding, the Tribunal fettered its discretion by disregarding the only provision providing for the same under Rule 15 of the Trust Deed which prescribed for the manner of computing the entitlement for lump sum payment for members who leave before attaining the age of 50 years.

75. In this regard, Rule 15(b) of the Rules provide as follows: "If a member leaves service before attaining the age of 50 years but having five or more years' pensionable service, he may elect to receive a cash sum in lieu of his benefits under rule ... equal to greater of his own contribution accumulated with interest at a rate agreed by the Trustees on the cash equivalent of his deferred on a basis agreed by the Trustees in consultation with the actuary."

76. That in order to justify its actions, the Tribunal purported to invoke the provisions of Rule 10 dealing with computation of pension benefits and Rule 16 dealing with the right of the Trustees to amend the Rules, which were in the event irrelevant in the circumstances. That the Tribunal further proceeded to exercise a discretion that it did not have, by prescribing that a factor for 55 years should not be used when computing the amount due to the pensioners when the same was expressly provided for in the Trust Deed and the Rules made there under, and without providing for an alternative age and their basis for so finding.

77. The Applicants asserts that the finding on the discounting factor was in any event in breach of and contrary to the express provisions of the Trust Deed and the law, an indication that the Tribunal acted contrary to the law and exceeded its jurisdiction in so doing. Further, that there was no discretion vested on the Tribunal to provide a basis for computation of a lump sum for deferred pension or at

all. That to the contrary, the Trust Deed conferred such right expressly by election on the Appellants if they opted to receive a cash sum in lieu of their benefits under Rule 10 equal to the greater of their own contributions accumulated with interest at a rate agreed by the Trustees of the Scheme or the cash equivalent of their deferred rights determined on a basis agreed by the Trustees of the Scheme in consultation with the actuary.

78. To the Applicant, that to purport to provide a basis for computation for a matter expressly provided for in the Trust Deed was beyond the Tribunal's jurisdiction and ultra vires its power. The Tribunal's actions are thus irrational and unreasonable and in complete disregard of the provisions of the Act, the Regulations and the Rules, which in the event were misrepresented in the Judgment as the basis of the Tribunal's finding.

79. On Whether the Scheme is entitled to the reliefs sought in the Application, the Applicant posited that from the foregoing, the Tribunal's decision is ultra vires the Act as it entertained an appeal that was not properly before it, having been filed partially by parties that were not before the Authority and so no decision with regards to them was made that could be reconsidered by the Tribunal. The Tribunal also exceeded its jurisdiction as an appellate body by admitting new evidence, leading to the raising of new issues that were not raised before the Authority, hence making the Tribunal rehear the matter afresh rather than consider it as an appellate body. The Tribunal also failed to determine the appeal before it by framing its own issues and completely disregarded the issues raised by the parties, more so the Appellants themselves, including the effect of the computation by NBC Holdings Ltd on the Scheme.

80. According to the Applicant, the Tribunal's decision frustrated the purposes of Act by breaching Wednesbury's principles of reasonableness, to wit, making a decision that it is irrational, illegal and wholly unreasonable as it was contrary to the provisions of the Act, Trust Deed and Rules.

81. From the foregoing, the Applicant contends that the Scheme is entitled to the reliefs sought in the Application, being an order of certiorari quashing the decision of the Tribunal and prohibiting the Tribunal from enforcing its decision or entertaining any other proceedings in relation to the dispute between the parties herein. Relying on the holding of the Court in Esther Victoria Wanjiku Mahoro v Mary Wambui Githinji & 3 others [2021] eKLR,

82. On who should bear the costs of the Application, the general rule flowing from section 27 of the *Civil Procedure Act*, Cap 21 is that costs should follow the event. That is to say, the successful party should be awarded its costs.

83. In its Supplementary submissions, the Applicant avers that Regulation 25(1) of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 ('the RBA Regulations") provides that the formula for computation of retirement benefits for members of a scheme shall be set out in rules of the scheme. This regulation specifically states that; "The formula for the commutation of the retirement benefits which may be paid to a member who has attained the normal retirement age or persons entitled to receive a benefit under the scheme, shall be provided for in the scheme rules and such formula shall be recommended by an actuary..."

84. To the Applicant, the trustees of the Scheme are therefore obliged to act in accordance with the rules of the Scheme. If they deviate from the rules of the Scheme, they act ultra vires their power and any such act will be invalid. This obligation is stipulated in section 40(a) of the *Retirement Benefits Act* ('the Act") which states that: "The trustee, manager, custodian or administrator of a scheme shall ...ensure that the scheme fund is at all times managed in accordance with this Act, any regulations made thereunder, the scheme rules and any directions given by the Chief Executive Officer;

85. That the obligation is also restated in regulations made in terms of section 55 of the Act. Regulation 8(2)(a) of the RBA Regulations, which in terms of Regulation 2, applies to occupational retirement benefit schemes and provides as follows: "(2) The duties of the trustees shall include ... administering the scheme in accordance with the provisions of the Act, these regulations and scheme rules"

86. The Applicant submitted that it is therefore clear beyond any doubt that the Trustees of the Scheme are by law, required to pay benefits only in accordance with what is prescribed in the trust deed and the rules and any payment made otherwise than in accordance with the trust deed and rules of the Scheme would be irrational, unreasonable and illegal.

87. That the Amended Trust Deed & Rules expressly provide that they were supplemental to the Trust Deed & Rules and that the latter are deleted in their entirety and replaced with the Amended Trust Deed & Rules without prejudice to any benefits existing or increases granted before the effective date thereof. The specific provisions of the Trust Deed & Rules and the Amended Trust Deed & Rules (hereinafter collectively referred to as "the Scheme Rules") that are material and relevant to the computation of pension benefits and therefore relevant and material to the determination of the matters raised by the 2nd Interested Parties (the Complainants).

88. According to the Applicant the import of the above rules is that a member of the Scheme could only retire from service at or after age 50 before the age of 55 with the employer's consent and did not have an automatic right to receive an unreduced pension at 50 years of age. Additionally, the Scheme Rules expressly provide that on leaving service for any reason before the age of 50 years, the benefit entitlement was a deferred pension payable from the Normal Pension Date (age 55) based on the formula set out in the Rules. The Tribunal clearly agreed with this interpretation of the Scheme Rules as it (Tribunal) stated as follows: "In the case of the Appellants, the right that vested in them whether at normal retirement date, deferred or after age 50 and before 55 years is the right to be paid "a pension commencing on the Normal Pension Date equal to 1/480th of his Final Pensionable Salary for each complete month of pensionable service". This right is stated in the Trust Deed and Rules dated 1st July, 1997 of Teleposta Pension Scheme at Rules 10(c), (d) and (g) under the headings Pension on Retirement at Normal Retirement Date and Deferred Pension payable from Normal Retirement Date respectively."

89. The Tribunal therefore accepted that the right that vested in the Scheme's members was the right to be paid a pension commencing on the Normal Pension Date. This is exactly what was done by the Trustees of the Scheme. In particular that :

    (a) Those who retired at age 55 were paid a pension in accordance with the formula from their date of retirement which was the Normal Pension Date;

    (b) Those who retired after age 50 and before age 55 were paid a pension in accordance with the formula from their date of retirement, but this was because retirement was after age 50 and was with the Employer's consent;

    (c) Those who left service for any reason before age 50 were entitled to a pension from the normal pension date (age 55) in accordance with the same formula.

90. To the Applicant, notwithstanding the foregoing, the Tribunal ordered that the benefits in respect of the Scheme members be computed by:

> "...Applying the Rules of the Scheme on accrued rights stated in the Judgment which is, "a pension equal to 1/480th of each Appellant's Final Pensionable Salary for each complete month of Pensionable Service".That however, this was not what the Scheme Rules

provide. The Tribunal disregarded, ignored or failed to consider that what the Scheme Rules provided to its members is a right "to a pension commencing on the Normal Retirement Date equal to 1/480" of each members' Final Pension Salary for each complete month of Pensionable Service."

91. According to the Applicant, having found at paragraph 21 of its decision that the right that vested in the Scheme's members was a right to be paid pension benefits commencing from the Normal Pension Date being 55 years, the Tribunal contradicted this finding by ordering the Trustees of the Scheme to pay its members pension dues in accordance with the actuarial report of NBC Holdings Ltd ('the NBC Report') which computed them from the age of 50 years.

92. That the point of departure between the Scheme's computation and that contained in the NBC Report was that the NBC calculations, which the Tribunal approved of, used a lower age of 50 years whereas the computations by the Scheme were on the basis of the Normal Pension Date, which is defined in the Scheme Rules as 55 years. This was done because this was the vested right of the members as clearly stated by the Tribunal.

93. The Applicant submitted that by applying a lower age of 50 in computing the pension benefits of the Scheme's members as provided in the NBC Report was to give more than the vested right to the member and would have the effect of conferring an additional benefit to the Scheme's members which is not provided for in the Scheme Rules.

94. That statements in the Judgment that on the one hand accurately confirm the accrued vested rights of members of the Scheme, but then contradict the same by directing payments over and above these vested rights rendering the said Judgment unreasonable and irrational. Further the Applicant contended that there was no discretion vested in the Tribunal to provide a basis for computation of a lump sum for deferred pension outside the provisions of Rule 13 (b) of the Scheme Rules. It was therefore erroneous for the Tribunal to find that Rule 13(b) was not applicable and further, that the Scheme Rules had no provision for a discounting factor to be applied in computation of benefits to the Appellants.

95. The Applicant posited that the Tribunal failed to appreciate that the right to pension commences at the Normal Retirement age of 55 years, that there was no conflict with the Scheme Rules in application of the discounting factor more so on matters deferred pension, and that in misapprehending the issue of lump sum computation of deferred pension the Tribunal's finding in effect constitutes an unlawful and illegal variation of the Scheme's Rules.

96. The Judgment contravened clause 10(d), 10(g) and 15(b) of the 1997 Trust Deed and Rules as well as clause 8(d), 8(g) and 13(b) of the 2004 Amended Trust Deed and Rules which required that actuarial cash equivalents of benefits for members of the Scheme accessing their benefits before attaining the age of 50 years be computed from the Normal Pension Date (55 years) and not from the age of 50 years as provided in the NBC Report.

97. That trustees of the Scheme are bound by the Rules. The Judgment negates the sanctity of the rules of the Scheme by ordering the Trustees to make payments otherwise than in accordance with its terms. Further, that the Trustees have a fiduciary to be loyal to, act in the best interest of a beneficiary and pay the right amount of benefits to the beneficiary. The Trustees cannot be obligated to pay greater benefits than are provided in the Scheme Rules or the law. To do so would exceed the powers conferred upon them by the Scheme Rules.

98. That by directing the Trustees of the 2nd Respondent to compute pension benefits otherwise than in accordance with Trust Deed and Rules of the Scheme, the 1st Respondent breached section 40(a) of

the Act which requires the trustees of a scheme to ensure that the scheme fund is at all times managed in accordance with the Act and the regulations thereunder, the scheme rules and any directions given by the Chief Executive Officer appointed under the said Act.

99. The Tribunal ought to have exercised its judicial authority as provided under section 48 of the Act and calculated the pension benefits payable to the Scheme's members. The parties could not themselves exercise this judicial function which in any event, was a function which the Tribunal itself could not delegate. This is the cornerstone of the principle of Delegata potestas non potest delegari, meaning "that which has been delegated cannot be further delegated."

100. The Applicant submitted that in July 2016, it was agreed by consent before the Tribunal that the two actuaries, Alexander Forbes and IAC meet to narrow down areas of difference and present a joint report. Instead of relying on the reports by IAC, which was the basis of the claim by the complainants, the complainants abandoned their original claim and introduced and sought to rely on an entirely different set of calculations prepared by another firm of actuaries, NBC.

101. That the only difference between the computations prepared by AF and NBC was a new issue that had never been raised before and related to the assumed commencement age of deferred pensions for deferred pensioners of the Scheme and contrived to try and replicate the flawed calculations of IAC but using an entirely different approach.

102. The Applicant claimed that the new issues raised in the NBC Report must be viewed for what they were—an afterthought to breathe life into an otherwise unmeritorious appeal which never had any merits from the outset. It was submitted that the Tribunal should never have permitted the Scheme's members to change their cause in the course of the proceedings before it through the introduction of the new evidence and issues contained in the NBC Report.

103. The Tribunal considered the basis upon which the Scheme was funded as a material factor in computing and determining the pension dues payable to its members. However, the funding basis of a Scheme (which is adopted purely for purposes of actuarial valuations of the Scheme) cannot confer a benefit or entitlement to a member. Benefit entitlements are set out only in the Trust Deed and Rules.

104. That the funding basis adopted by the actuaries was merely a prudent approach aimed at ensuring solvency of the Scheme and was irrelevant to the determination and computation of the pension benefits of the Scheme's members. Even if funding was a relevant factor, which is clearly not the case, no provision was made for deferred pensions to be paid early in the actuarial valuations.

105. The Applicant averred that a member's benefit entitlement depends on the Scheme Rules and the benefits promised in terms of those rules and not on the funding of the Scheme. Accordingly, the funding of a Scheme was not a relevant factor that ought to have been considered by the Tribunal or at all when making the Judgment.

106. As per the Applicant the payment of this amount of Kshs 13.928 billion would significantly prejudice the financial security of all the members of the Scheme who currently comprise more than 10,000 pensioners, deferred pensioners and other members with outstanding benefits in the Scheme. That if the Scheme were to be compelled to settle the decretal sum of Kshs. 13.928 billion together with interest as directed by the Tribunal, it would have a very significant impact on the existence of the Scheme with a very imminent possibility of the Scheme being put under insolvency. This would deprive over 10,000 current beneficiaries of the Scheme of their pension benefits.

107. In the end, the Applicant urged this Honourable Court to set aside the Judgment of the Tribunal, on the basis of the principle of proportionality and on grounds that it is irrational in view of the adverse impact that it would have on the Scheme; and in the alternative, and without prejudice,

that if this Honourable Court finds that the benefits were not computed in accordance with the Trust Deed and Rules of the Scheme, it prays that the matter be remitted to the Tribunal and be computed in accordance with the correct formula as per the Trust Deed and Rules of the Scheme; and make a determination therewith, which is a power vested in this Honourable Court in exercise of its supervisory jurisdiction in judicial review.

1st and 2nd Respondent's case

108. Opposing the application, and promoting their case, the 1st Respondent also filed written submissions dated 29th November,2022 in which they submit that what the Ex parte Applicant is seeking is not available in judicial review as it seeks to correct the decision of the 1st Respondent made on 13th February,2013.

109. The Ex parte Applicant is said to allege that the Tribunal failed to determine the Appeal and instead of computing the amount due to each of the Appellants, the Tribunal has in excess of its jurisdiction, proposed a formula and directed the it not only to compute the amount due to each Appellant, but also interest to be paid. This statement it is submitted indicates that the Applicant is challenging the merits of the decision by the 1st Respondent.

110. The Respondent's submit that it is not the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the Court. The case of Republic v. Public Procurement Administrative Review Board & Another Ex-Parte Express DDB Kenya Limited [2018] eKLR is cited where the Court reiterated that judicial review is about the decision-making process and not the decision itself and further that it also involves determining whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. The cases of Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR and Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another [2014] eKLR are also referred to on the purpose of judicial review.

111. The High Court's jurisdiction in judicial review, it is submitted, is circumscribed by the provisions of the *Law Reform Act* to issue any of the three judicial review orders that is Mandamus, Certiorari, and Prohibition which is said to have led to the development of a fairly well settled criteria for issuance of the orders; these include illegality, impropriety of procedure, and irrationality as seen in the case of RE Bivac International SA (Bureau Veritas) (2005) 2 EA 43. These grounds are also said to be elucidated in the case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 referred to by the Respondents. It is their submission that a party who seeks orders of judicial review must prove breach of any of the criteria provided under the above cases.

112. The Tribunal is said to be established under Section 47 of the *Retirement Benefits Act* No. 3 of 1997 and its powers contained under Section 49 of the said Act. The Respondent also submits that contrary to the Ex parte Applicant's averments that the 1st Respondent permitted the introduction of new issues that had not been raised by the Appellants in the original proceedings and that it also entertained an appeal from parties who had neither been parties nor presented their complaints before the Retirement Benefits Authority section 49(3) of the *Retirement Benefits Act* allows the Tribunal to take any evidence which it considers relevant to the subject of an appeal before it, notwithstanding that the evidence would not otherwise be admissible under the law relating to admissibility of evidence.

113. On the Applicant's argument that in framing the issues for determination, the Tribunal was bound to only address the issues that were presented before it by the parties, it is submitted that the position has since changed and that pursuant to Order 15 Rule 2 the court/tribunal/Board now has a wide discretion when it comes to framing issues for determination. The case of Veronica Gathoni Mwangi & Another vs. Samuel Kagwi Ngure & Another [2020] eKLR is referred to support this submission where the court had the jurisdiction to frame and determine its own issues held thus:

> " 12. Under Order 15 Rule 1 of the Civil Procedure Rules, an issue arises when one party makes a material proposition of fact or law which is denied by the other party. Order 15 Rule 2 which deals with the framing of issues provides as follows;
>
> 2) The court may frame the issues from all or any of any of the following materials –
>
> a. Allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;
>
> b. Allegations made in the pleadings or in answer to interrogatories delivered in the suit;
>
> c. The contents of documents produced by either party.
>
> 13. From the foregoing, it is clear that the trial Court had the right to exercise its discretion as provided under Order 15 rule 2 of the Civil Procedure Rules to frame its own issues as derived from the contents of the documents produced by either party as was the case herein."

114. The Respondents submit that the 1st Respondent's mandate and jurisdiction is provided for under Sections 47, 48 and 49 of the *Retirement Benefits Act* and further that the assertion that the 1st Respondent did not have jurisdiction to hear and determine the Appeal before it is unfounded and should be dismissed forthwith with costs.

115. On the prayer of certiorari, it is submitted the case of Republic vs. Kenya Revenue Authority & Another Ex-parte Bear Africa (K) Limited is cited where the court quoted with approval the case of Republic vs. Commissioner of Customs Services Ex-parte Africa K-Link International Limited Nairobi HC Misc. JR NO. 157 of 2012] eKLR where the court stated that "Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates".

116. On judicial review orders being discretionary the case of Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Express DDB Kenya Limited [2018] eKLR is referred to where the court held as follows;

> " The grant of the orders or certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought."

117. The Halsbury's Laws of England Treatise 4th Edition Vol 1(1) at paragraphs 84 and 86 are referred to on exercise of discretionary power and instances when a court would interfere to quash a decision

respectively. Lord Reid in the watershed case of Animistic vs. Foreign Compensation Commission [1969] 1 All ER 208 is also cited on grounds when the decision of a Tribunal can be quashed or set aside by the Court.

118. It is the Respondents' submission that the Retirement Benefits Appeals Tribunal's decision cannot be faulted merely because the Ex Parte Applicant feels that the Tribunal made a wrong decision in failing to uphold their position. Further that the grounds raised in the Chamber Summons should have been raised as grounds for Appeal as opposed to the instant Judicial Review Application.

119. On the Order of Prohibition, it is submitted that there is no other body or Tribunal that is duly gazetted and mandated to hear appeals emanating from the Decision of the Retirement Benefits Authority other than the 1st Respondent herein and thus issuing the said order cannot issue as who then would issue any orders or enforce the decision of the Tribunal. The Respondents also contend that the Applicant has not demonstrated any breaches of the Law or procedure which would entitle this court to intervene in this matter and grant the orders sought.

2nd Interested Party's case

120. In advancing their case–opposing the Application–the 2nd Interested Party filed their written submissions dated 20th September, 2022 wherein they submitted that the Retirement Benefit Appeals Tribunal had jurisdiction to entertain the appeal from the Retirement Benefits Tribunal. Relied on the Supreme courts case of Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR.

121. The 2nd Interested Party posited that as members of the Applicants Pension Schemes, they were entitled to their pension benefits as per the trust deed and rules of the scheme; but upon leaving service, their pension benefits were not calculated in accordance with the scheme rules resulting to the filing of the complaint-pursuant to section 46 of the *Retirement Benefits Act*-with the 1st Interested Party.

122. That being dissatisfied with the decision of the 1st Interested Party, the 2nd Interested Party-pursuant to Section 47, 48, and 49 of the Retirement Benefit Act No. 3 of 1997-preferred an Appeal with the 1st Respondent, where Judgment was delivered on 13th February, 2017 allowing the 2nd Interested Party's Appeal against the Ex parte Applicants. That to date, the Ex parte Applicant has so far failed to comply with the Judgment and are deliberately delaying the conclusion of this matter.

123. On orders sought in the Application, the 2nd Interested Party submitted that the orders should not be granted, as the 1st Respondent is a statutory body with a public duty imposed on it to perform the task of determining Appeals from the Retirement Benefits Authority by a dissatisfied party. That in the case before the Honourable Court, the 1st Respondent's Judgment is reasonable as it is within the law, the Trust Deed and Rules and *the Constitution*, 2010; was made reasonably by the tribunal upon hearing both parties, scrutiny of documents, and submissions by both parties, within the law and independently delivered its judgement on the 13th February, 2017; and that the orders of the 1st Respondent were reasonable and rational based on the circumstances surrounding the orders.

124. That the Respondent is clothed with jurisdiction to perform the task of determining the complaint pursuant to Section 48 of the *Retirement Benefits Act*, hence it is only in the interest of Justice for this Honourable Court to uphold the decision of 13th February, 2017. Relied on Kenya National

Examination Council -vs Republic Ex-parte Geoffrey Gathenji Njoroge & Others (1997) eKLR, and Abdi Kadir Salat Gedi -vs- Principal Registrar of Persons & Another JR 15 of (2014) eKLR cases.

125. The 2nd Interested Party contended that judicial review is concerned with the decision -making process, not with the merits of the decision itself. The court would only be concerned with the process leading to the making of the decision. That the Applicants are questioning the procedural impropriety by the Respondent, and in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. The cases of Municipal Council of Mombasa Petition No. 185 of 2001, Pastoli vs. Kabale District Local Government Council and Others (2008] 2 EA 300, Council of Civil Unions vs. Minister for the Civil Service (1985] AC 2, and an Application by Bukoba Gymkhana Club [1963] EA 478 were relied.

126. To the 2nd Interested Party, there is no doubt that the Applicants are in a mere fishing expedition and are intent on delaying the payments of the 2nd Interested Party pension dues. That previously, the Ex Parte Applicant filed Blasio Ondiek v Retirement Benefits Appeals Tribunal & 950 others; Retirement Benefits Authority (Interested party) [2021) eKLR seeking similar orders herein and the same was dismissed by His Lordship Mrima J with costs on the 22nd July, 2022.

127. In the end, the 2nd Interested Party submitted that the instant application is an Appeal disguised as a Judicial Review Application, and is thus incompetent, an abuse of the Court process, and fatally defective; thus, the same ought to be with costs to the 2nd Interested Party.

Issues for Determination:

1. Whether this court has jurisdiction.
2. Whether the orders sought can be issued.

Analysis and Determination

128. I must first determine whether I have the jurisdiction to issue the orders as sought by the Applicant being;

    1. An Order of Certiorari to remove into this Honourable Court and quash the judgment and orders of the Retirement Benefits Appeals Tribunal made in Tribunal Civil Appeal No. 7 of 2011 Boniface Mariga & 948 Others vs The Retirement Benefits Authority and the Board of Trustees Teleposta Pension Scheme and Provident Fund which judgment is dated the 13th February, 2017.
    2. An Order of Prohibition to prohibit the 1st Respondent from any further dealing with the Tribunal, Civil Appeal No. 7 of 2011, whether by way of any further order, enforcement or otherwise whatsoever.

129. Jurisdiction is defined in Halsbury's Laws of England (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". Black's Law Dictionary, 9th Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.

130. In Words and Phrases Legally Defined Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

> "By jurisdiction 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 as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

131. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

> "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...
>
> Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -
>
> 29. On the source of a Court's jurisdiction, the Supreme Court of Kenya in Constitutional Application No. 2 of 2011 In the Matter of Interim Independent Electoral Commission (2011) eKLR held that: -
>
> 29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid down in judicial precedent ...."
>
> 30. Later, in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others (2012) eKLR Supreme Court stated as follows: -
>
> A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its

authority to prescribe the jurisdiction of such a court or tribunal by statute law.

32. From the foregoing, it is sufficiently settled that a Court's jurisdiction is derived from *the Constitution*, an Act of Parliament or a settled judicial precedent.

132. The 2nd interested party submitted that this court lacks jurisdiction by dint of Section 48 (1) of The *Retirement Benefits Act* which provides that 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 thereunder may appeal to the Tribunal within thirty days of the receipt of the decision. Section 48(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.

133. What is before me is not a challenge to the decision of the Chief Executive Officer, but the decision of a Tribunal that was comprised of a Chair and competent members who sat and presided over Tribunal Civil Appeal No. 7 of 2011 Boniface Mariga & 948 Others vs The Retirement Benefits Authority and the Board of Trustees Telposta Pension Scheme and Provident Fund culminating in the judgment dated the 13th February, 2017.

134. The 2nd Interested Party relies on The Supreme Court in Albert Chaurembo Mumba & 7 others (sued on their own half and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) (2019) where it was held that the Retirement Benefits Authority Appeals Tribunal is established under Section 47 of the RBA Act. Its mandate is to hear appeals from the decision of the Authority or the CEO.

135. The jurisdiction of the tribunal is donated by Section 48 of the RBA Act. The section provides that: -

"(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."

Section 49 of the *Retirement Benefits Act* provides for powers of appeals tribunal;

"(1) On the hearing of an appeal, the Tribunal shall have all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents. [Emphasis ours].

(2) where the Tribunal considers it desirable for the purpose of avoiding expense or delay or any other special reason so to do, it may receive evidence by affidavit and administer interrogatories and require the person to whom the interrogatories are administered to make full and true reply to the interrogatories within the time specified by the Tribunal

(3) In its determination of any matter, the Tribunal may take into consideration any evidence which it considers relevant to the subject of an appeal before it, notwithstanding that the evidence would not otherwise be admissible under the law relating to admissibility of evidence."

1113) By dint of sections 46, 47 and 48 of the RBA Act, the jurisdiction of the Retirement Benefits Appeals Tribunal arises only after a matter has been acted on by the Authority or its CEO in the first instance. The tribunal exercises appellate jurisdiction. [1201 On the foregoing basis, we are in agreement with the submissions of the learned counsel for the appellants, and further fault the learned Judges of Appeal and hold that the in-built review and appellate mechanisms established under sections 46 and 48 respectively of the RBA Act should have been exhausted first by the respondents before any other recourse is taken to the superior courts.

In our view, section 46 of the RBA Act therefore vests original jurisdiction upon the CEO; thus, the proper forum for the respondents to launch their case was to first write to the CEO then if dissatisfied with the decision of the CBO appeal to the Retirement Benefits Appeals Tribunal."

136. According to it the 2nd Interested party consists of persons who were former employees of Telkom Kenya, before they left service and were members of the Applicants Pension Schemes by virtue of their employment.

137. I have perused the record and confirmed that indeed the firm of Koceyo and Co. Advocates lodged a complaint addressed to the Chief Executive Officer of the Retirement Benefits Authority on 12th September, 2011.This is letter is marked as annexure PKR 2 to the verifying Affidavit of the Applicant. The challenge of jurisdiction fails.

138. I am satisfied and I so hold that this Court has jurisdiction over the Tribunal's finding under Article 165 (3) (c) of *the Constitution* which provides that The High Court shall have jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144.

The next issue that this court must address its mind to is whether the Applicant is entitled to the orders sought.

In the Ugandan case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 in which the Court citing Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and an Application by Bukoba Gymkhana Club [1963] EA 478 at 479 held that:

> "In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.
>
> While determining whether the Applicant has shown that the judgment dated the 13th February, 2017 as issued by the Tribunal in Civil Appeal No. 7 of 2011 Boniface Mariga & 948 Others vs The Retirement Benefits Authority and the Board of Trustees Telposta

Pension Scheme and Provident Fund is tainted with illegality, irrationality and procedural impropriety I have reminded myself that this court must strictly adhere to the principles that have been settled by the Supreme Court's recent judgment in Petition No. 6(E007) of 2022 Edwin Dande & Others v The Inspector General, National Police Service & Others where the Supreme court addressed the issue of 'Whether the scope of judicial review has evolved to include determination of merit review of an administrative decision' [page 29].The summary is as follows:

(a) Prior to the promulgation of *the Constitution* in 2010, judicial review was found in Sections 8 & 9 of the *Law Reform Act* and Order 53 of the CPR that addressed the procedural basis [see paragraph 77-page 30].

(b) Judicial review was entrenched in *the Constitution* of 2010 to a substantive and justiciable right under Article 47 [see paragraph 78-page 301. The court concluded at paragraph 85 [see page 33]and held as follows:

> 'It is clear from the above decisions that when party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the Court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se.

139. The Applicant in the instant case has moved the court through the provisions of Order 53 of The Civil Procedure Rules as a result of which this Court has to limit itself to the process, procedure and manner in which the decision complained of was reached or arrived at.

140. The Court of Appeal in Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd [2002] eKLR as follows:

> "Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

141. On concert around structural interdicts,it is the Applicants case that the Tribunal issued orders that were interlocutory in nature, requiring the Scheme to recalculate the entitlements of the Appellants making the decision not conclusive of the dispute before it, and as such, the Tribunal spurned its mandate under the Act.

142. The Applicant argues that being a quasi-judicial body, the Tribunal, ought to have given a final decision on the matter before it to settle the dispute between the parties, at which point it would have been functus officio, having fulfilled its mandate.

143. To buttress this argument,the Applicant relied on the holding of the Court in Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR, wherein the Court of Appeal rendered itself thus:

> " We have stated that a judgment brings to an end the jurisdiction of the court that delivers the same. In our considered view, the concept of partial judgment or interim judgment after hearing of the parties is unknown to the Kenyan law. A court of law in delivering its judgment must determine the rights and liabilities of parties. Save for the limited exceptions provided for in law, delivery of judgment marks the end of litigation and marks the end of jurisdictional competence of the court. If a court is inclined to grant or make interim orders, it is within its powers to do so. However, a court cannot deliver judgment and invite further pleadings to be filed or reserve contested matters for its consideration and determination."

144. It argues that, by requiring the Scheme to compute the benefits owed to the Appellants, the Tribunal effectively abdicated its role and delegated it to the Scheme.

145. According to the Applicant, the orders of the Tribunal would also have required further supervision by the Tribunal as disputes and disagreements are likely to have arisen between the parties as to the computation of benefits had this Honourable Court not issued an order staying the decision. Such an action would constitute a procedural impropriety and a further indication that the Tribunal did not conclusively determine the Appeal.

146. The Applicant also relied heavily on the Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others (Supra), in which the Court rendered itself thus:

> " ..... Post-judgment supervision of implementation of judgments is not a function of the trial court. Implementation and execution of judgments is governed by specific rules and it is to these rules that resort must be made."

147. The Applicant argued that it was quite the opposite of a final and binding decision that would render the Tribunal functus officio as per the Mitu-Bell Case (Supra) quoted in the foregoing. The Appellants went to the Tribunal to get a determination on the computation of their benefits but went away without a final determination.

148. It is my finding that the Supreme Court overturned the Court of Appeal decision in Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR which the Applicant is relying on to front its arguments under this limb. This was in the judgement in Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae).

149. I am bound by The Supreme Court's decision where in paragraph118, the Supreme Court had occasion to consider the scope of Article 23 (3) of *the Constitution*, as read with Article 165 (3) (d) of *the Constitution* in Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others; Petition No. 14, 14A, 14B and 14C of 2014 (Consolidated); The Court stated:

> " ... a close examination of these provisions (Article 23 (3) and 165 (3) (d) of *the Constitution*) shows that *the Constitution* requires the Court to go even further than the U.S Supreme Court did in the Marbury, and that Article 23 (3) grants the High Court powers to grant appropriate relief "including" meaning that this is not an exhaustive list.
>
> The Court went further to observe as follows: [Para 412] "It is emerging already, in this Court's path of jurisprudential development, that we have endeavored to enhance and,

as far as possible, stabilize the objective normative yardsticks that assure certainty and predictability in the application of *the Constitution* and the law to the merits of particular cases.

The Court then issued the following Orders Inter-alia:

(d) The 1st Appellant shall, in exercise of its statutory powers, and within 90 days of the date hereof, consider the merits of applications for a BSD license by the 1st, 2nd, and 3rd respondents, and of any other local private sector actors in the broadcast industry, whether singularly or jointly.

(e) The 1st appellant (CAK) shall, in exercise of its statutory powers, ensure that the BSD license issued to the 5th appellant herein, is duly aligned to Constitutional and statutory imperatives.

(f) The 1st appellant (CAK), in exercise of its statutory authority, shall, in consultation with all the parties to this suit, set timelines for the digital migration, pending the International Analogue Switch-Off Date of 17th June, 2015.

(g) Upon the course of action directed in the foregoing Orders (d & e) being concluded, the 1st appellant (CAK) shall notify the Court through the Registry; and the Registrar shall schedule this matter for mention on the basis of priority, before a full Bench.

119. There can be no doubt, that in issuing the foregoing Orders, this Court was well aware of their interim nature, and that in doing so, it was giving effect, to Articles 23 (3) and 165 (3) (d) of *the Constitution* pursuant to Section 3 of the *Supreme Court Act*. However, the Court of Appeal merely stated, without more, that it was cognizant of our Orders in the Communication Commission Case [Supra]. The Appellate Court also took note of two High Court decisions, to wit, Satrose Ayuma & 11 Others v. The Registered Trustees of the Kenya Railways Staff Retirment Pension Scheme & 2 Others Nairobi HC Petition No. 65 of 2010; (Lenaola, J, as he then was); and Kepha Omondi Onjuro & Others v. Attorney General & 5 Others; Nairobi HCC Petition No. 239 of 2014; (Odunga J) wherein orders similar to the ones issued by the trial Court, in the instant case had been granted.

In Muruatetu (Supra), this Court made the following orders, inter alia;

(b) This matter is hereby remitted to the High Court for re-hearing on sentence only, on a priority basis, and in conformity with this judgment

(c) The Attorney General, the Director of Public Prosecutions and other relevant agencies, shall prepare a detailed professional review in the context of this judgment and Order made with a view to setting up a framework to deal with sentence-re-hearing of cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same" (see para 112).

120. By not clearly distinguishing our decisions in the Communication Commission and Muruatetu Cases, and by finally faulting the High Court's approach in the three cases, we can only conclude that, the Court of Appeal, simply disregarded our signal, concerning interim reliefs that a Court may issue to redress the violation of a fundamental right. Instead, the Appellate Court was categorical that a Court of law becomes functus-officio once it has delivered Judgment. The Court placed critical emphasis on Order 21 of the *Civil Procedure Act*, which can be regarded as the embodiment of the functus- officio doctrine. (see paras 68-72 of the Court's Judgment). The Court appeared to have shut the door, to the use of interim reliefs or structural interdicts, in human rights and other Constitutional litigation when it declared that: "...the concept of partial Judgment or interim Judgment after hearing of the parties is unknown to the Kenyan law."

121. We are however, in agreement with the submissions of the appellant and Amicus Curiae, to the effect that Article 23 (3) of *the Constitution* empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right. As this Court has already made an authoritative pronouncement on this matter, we shall say no more. While we acknowledge the fact that the functus-officio doctrine retains its validity, even vitality, in the majority of cases, both criminal and civil, it is our view that in certain situations, this doctrine ought to give way, albeit on a case by case basis. To subject Article 23 of *the Constitution* to the limitations of Rule 21 of the *Civil Procedure Act*, would stifle the development of Court-sanctioned enforcement of human rights as envisaged in the Bill of Rights. Where a Court of law issues an order, whose objective is to enforce a right, or to redress the violation of such a right, it cannot be said to have abdicated its judicial function as long as the said orders are carefully and judicially crafted.

122. Having stated thus, we hasten to add that, interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the Courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a Constitutional or statutory mandate to enforce the order. Most importantly, the Court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy. The orders should not be couched in general terms, nor should they be addressed to third parties who have no Constitutional or statutory mandate to enforce them. Where necessary, a court of law may indicate that the orders it is issuing, are interim in nature, and that the final judgment shall await the crystallization of certain actions."

150. It is my finding, and I so hold that the Tribunal did not abdicate nor delegate its statutory power when it issued its orders directing the scheme to compute the entitlements. By reading the orders of it would appear that when issuing the impugned orders, the tribunal was driven by the its duty to ensure that the pensioners' rights to redress were realized.

151. The Tribunal cannot be said to have abdicated its judicial function when its orders were carefully and judicially crafted which to me appears to be the case. In any event, the Trustees of the scheme are the

trusted custodians of the records of the scheme as result of which they would be the right outfit that would help bring closure to the computation.

152. In any event scheme is not a stranger to the parties herein and to the matters that were before the Tribunal as a result of which I am satisfied that they fall within the framework of the kind of outfit that the Supreme Court contemplated in the Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) judgment when it issued the aforementioned guidelines.

153. I have looked at the trust deed from where it is clear that the main purpose of the Scheme as set out in Clause 3 of the trust deed marked as Annexure PKR-1 is the provision of pensions and other periodical payments to members upon their retirement at the specified age and the provision of pensions and other benefits for dependants of deceased members and for that purpose the Trustees shall establish and maintain a Fund (hereinafter called the "the Fund" which expression includes all investments from all income earned by such investments consisting of :- Contributions to be made by the members and by the Employer as herein provided, and monies raised by borrowing as herein provided. The Trustees shall hold upon trust the scheme assets in accordance with the provisions hereof and the Rules and all pensions and other benefits payable thereunder for the respective persons for whose benefit such pensions and other benefits are expressed to be payable.

154. According to Clause 5 of the Deed of Amendment dated 3rd December, 2004 the main purpose of the scheme is the provision of pension and other retirement benefits for employees of the Founder upon their retirement from the Founder's service and relief for the Dependant or deceased employees and for that purpose the Trustees shall hold the contributions paid to them by the Founder and the members and any other sums investments net income and all lump sums representing the same upon trust for the respective persons for whose benefit such sums and other benefits are expressed to be payable in accordance with the provisions of this Deed and the Rules.

155. I have looked at the Preamble of the Deed which is categorical that the Trustees are a statutory body corporate tasked with the power and the mandate to run the affairs and in particular the entitlements and benefits of retirees of the of the scheme. They are not strangers to the issues that were before the Tribunal. The abovementioned clauses in the deeds are in plain language, and I have nothing useful to add past content therein which is in plain English. The Applicants argument on this front also fails and I so hold.

156. To me, the persons who the scheme was set up for are none other than the pensioners in the suit before this court. It is my finding and I so hold that orders of the Retirement Benefits Appeals Tribunal made in Tribunal Civil Appeal No. 7 of 2011 Boniface Mariga & 948 Others vs The Retirement Benefits Authority and the Board of Trustees Telposta Pension Scheme and Provident Fund dated the 13th February, 2017 were very specific, appropriate, clear, effective, and directed at a State Agency vested with a statutory mandate to enforce the order.

157. In the case of Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 1996 Former Employees of Telkom Kenya Ltd)[2014] eKLR the Court pronounced itself thus:

> " There is also the obvious misdirection on the part of the learned Judge in imposing upon the appellant the very obligation that by law resides in the courts, to conduct computations and declare the entitlement of claimants before them. It is not a task that can, without a species of violence to the judicial tradition, be placed upon defendants. The assessment of damages is purely a judicial function that cannot be delegated."

158. The Court in Kenya Revenue Authority vs Menginya Salim Murgani [2010] eKLR stating, inter alia:

> " Both the award and level or quantum of damages is in our view, judicial functions which the superior court cannot rightfully delegate.... a judgment must be complete and conclusive when pronounced and therefore it cannot be left to the deputy registrar to perfect it. Assessment of damages is not a ministerial act as envisaged by Order 48 (Currently Order 49) of the Civil Procedure Rules and a direction to "assess" or "calculate" damages would be contrary to the requirements of Order 20 (currently Order 21) of the Civil Procedure Rules because it would be incomplete without assessment and would patently be a nullity."

159. It is my finding that The Supreme Court has the given guidance in The Mitubell judgment to situations like the one obtaining in the judgments in Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 1996 Former Employees of Telkom Kenya Ltd)[2014] and Kenya Revenue Authority vs Menginya Salim Murgani [2010] which they must adhere to the principle of stare decisis as the doctrine that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction and in this case the Mitubell Judgment.

Whether the Tribunal's decision was ultra vires the Act.

The Applicant is also very aggrieved by the fact that The Retirement Benefits Appeals Tribunal entertained an appeal from parties who had neither been parties nor presented their complaints before the Retirement Benefits Authority (the Authority) and were therefore not a 'person aggrieved by the decision of the Authority' as provided for under the Act.

160. It is the Applicants case that:

a. The Tribunal in countenancing the addition of 348 new entrants to the proceedings before it and allowing the admission of the NBC Actuarial Report into evidence hence allowing the Appellants to raise new issues that were not raised before the Authority as the forum of first instance, is ultra vires the Act.

b. Section 48(1) provides thus: "Appeals to the Tribunal (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 thereunder may appeal to the Tribunal within thirty days of the receipt of the decision."

c. It therefore bears considering who an aggrieved person under the Act is as it is our submission that the 348 new entrants were not aggrieved by the decision of the Tribunal.

d. The Complaint dated 9th September 2011 (See pages 90 - 96 of the Verifying Affidavit's Annexures) lists 600 Complainants. With respect to these, the Authority made a finding that the Complainants' benefits were properly calculated save for two members, who it specified as having had their benefits underpaid. (See page 243 of the Verifying Affidavit's Annexures).

e. A perusal of the Memorandum of Appeal dated 19th October 2012 indicates that there are 948 Appellants, 47 of which subsequently withdrew from the Appeal. (See pages 245 - 255, and 484 — 485 respectively of the Verifying Affidavit's Annexures)

f. Over 300 new appellants were joined to the proceedings before the Tribunal and though the Scheme objected to their addition, the Tribunal nonetheless allowed them to be joined and continued with its proceedings. This is a grave procedural error on the part of the Tribunal since the additional appellants could not have been aggrieved by a decision that did not relate to them.

g. No orders were made in relation to the 348 new entrants by the Authority, and even the reports submitted by the Scheme and the Independent Actuarial Consultants did not touch on their entitlement to their accrued pension under the Act and Trust Deed and Rules. How then can they be aggrieved parties for purposes of an appeal before the Tribunal?

h. The Tribunal's jurisdiction was not properly invoked by the additional appellants as there was no decision pertaining to them for the Tribunal to consider on appeal. Therefore, the Tribunal acted ultra vires its jurisdiction under sections 48 and 49 of the Act.

161. On the issue of introduction of new Appellants, the grounds of appeal, and particulars were the same as those in the Memorandum of Appeal filed on 16th May,2011; and that considering the full burden on the Tribunal to dispense justice on the merits as opposed to technicalities as stipulated under Article 159 of *the Constitution*, the Tribunal was of the view that allowing those new Appellants would not cause any prejudice to any of the parties in the matter and that since all the 948 Appellants belong to the same scheme, they were all bound by one outcome of the Tribunal.

162. In determining this question, I have looked at Page 3 of the judgment which reads as follows: Pursuant to the order made by the Tribunal 27th November 2011 the 1st Respondent on 3rd October 2012 determined the Appellants' complaint. Following the decision of the 1st Respondent stated above, an appeal against the decision was filed on 17th October 2012. It appears that other persons joined as Appellants in their complaint against the 2nd Respondent. We say so because the number of Appellants raised to 948. Nevertheless, the grounds of appeal Particulars are the same as those in the Memoradum of Appeal filed on 16th May 2011.

163. Habiba W. Ramadhan & 7 others v Mary Njeri Gitiba (2017) eKLR; Nairobi High Court ELC Case No. 119 of 2014 the Court stated as follows;

> "As already observed by the Court, under Order 1 Rule 10(2) the Court has discretion to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the Court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute...."

164. An order to admit parties who were not parties at the trial phase at an appeal stage is a legal issue that calls for the court to be moved. The court before whom such an application is placed must consider the rival arguments and the merits and the applicable law before arriving at a determination on whether or not to allow the addition of such applicants at the appeal level. Many a times parties have to file submissions. The court has to be guided by settled legal principles in determining such issues.

165. In the of Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another [2015] eKLR.

> A large number of 128 people had applied for the leave of the court to be joined as plaintiffs in this suit. Their application is a Motion dated 19th January 2015 which is expressed to be made under Order 9 Rule 8(3), Order 8 Rule 3 and Order 51 Rule of the Civil Procedure Rules, Section 1A, 1B and 3A of the *Civil Procedure Act*, Articles 48 and 159 of *the Constitution* of Kenya, 2010. The application also seeks for leave to amend the Plaint as is necessary after the joinder.
>
> Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly,

severally; or in the alternative, where if such persons brought separate suits, any common question of law of fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rule. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties. This is the test I shall apply in this case.

166. In its judgment, The Tribunal simply indicated that... "It appears that other persons joined as Appellants in their complaint against the 2nd Respondent. We say so because the number of Appellants raised to 948."

167. The fact that the Tribunal failed to pronounce itself or make a finding on the issue, is a point that only the court of appeal can determine. It is a weighty issue that has an impact on the quantum of damages which is at the heart of the Appeal. It is an issue that calls for a merit analysis. It is not within the purview of this court sitting as a judicial review court and I decline to determine the issue of the additional parties. This limb of the application is not allowed.

The Applicant is also aggrieved that the Tribunal allowed the Appellants to produce an actuarial report by NBC Holdings Limited, which was new evidence that had not been adduced before the Authority.

168. According to the Applicant, this allowed the Appellants to re-litigate the matter before the Tribunal, yet they had been heard and the matter concluded by the Authority and the Tribunal ought not to have allowed the Appellants to produce new evidence and on that basis raise new issues that had not been raised before the Authority.

169. The Applicant relies on the case of Joseph Gichuhi Kariuki and 3 others v Robert Kimani eKLR (2020).

170. In admitting new evidence and allowing the Appellants to raise new points that would have the effect of changing their entire case, the Tribunal erred as it was effectively re-trying the matter afresh, arrogating to itself the jurisdiction of the Authority instead of confining itself to its appellate jurisdiction as provided for under the Act citing the case of Securicor (K) Limited v E.A. Drappers Limited and another [1987] KLR 528.

171. As a Tribunal sitting to consider an appeal from a decision of the Authority, the Tribunal ought to have considered the import of the new evidence being adduced by the Appellants and whether it would have the effect of completely changing the case of the Appellants, making it completely different from what was presented to the Authority. This is exactly what happened and is an eventuality that the Tribunal ought not to have allowed.

172. The Applicant further submitted that it cannot have been the intention of Parliament to establish an Authority to hear matters in the first instance and have the Tribunal re-try the same matters as if they had not been heard by the Authority. If that were the intention of Parliament, then it would have been an easy matter to merge the Authority and the Tribunal into one body and not create two bodies; one

to hear a matter in the first instance, and another to hear the matter on appeal. As this was not the case, the Tribunal acted ultra vires its powers under the Act by acting as a tribunal of first instance, which it is not.

173. It is the Applicants case that in July, 2016 it was agreed by consent before the Tribunal that the two actuaries, Alexander Forbes and IAC meet to narrow down areas of difference and present a joint report.

174. Instead of relying on the reports by IAC, which was the basis of the claim by the complainants, the complainants abandoned their original claim and introduced and sought to rely on an entirely different set of calculations prepared by another firm of actuaries, NBC.

175. Accordingly, as stated above the Appellant submits that, the only difference between the computations prepared by AF and NBC was a new issue that had never been raised before and related to the assumed commencement age of deferred pensions for deferred pensioners of the Scheme and contrived to try and replicate the flawed calculations of IAC but using an entirely different approach.

176. I have perused Page 21 to Page 26 of the proceedings, and Page 5 and 6 of the judgment. Mr. Robert Oketch was led in evidence in chief by Mr. Titus Koceyo for the Appellants, and cross examined by Mr. Isaac Kiche for the 1st Respondent and Mr. Leonard Aloo for the 2nd Respondent.

177. It is clear from Page 13 of the judgment, that during cross-examination by Mr. Aloo for the for respondent, Mr. Oketch stated that, 1. the genesis of the matter was the report of International Actuarial Consultants. 2. He does do not work for International Consultants. 3. He has seen pages 26, 36, 37 and 38 of the International Kanarial Consultants report. 4 He was not aware of the free in the books of notational Actuarial Consultants 5. He did not know the International Actuarial consultants were involved. He stated that Section 10(a) of *Retirement Benefits Act* requires that everyone follows the scheme rules and regulations.

178. Page 5 to 19 sets out the details, the steps and procedure followed during the examination of the witnesses. I am satisfied that the foregoing created an opportunity in law for the Applicant to challenge the evidence it seeks to attack through the judicial review process before this court which cannot avail.

179. The Applicant herein participated in the cross examination of the NBC Holdings witness. The Applicant did not raise the issue of the report then.

180. On its part, the 2nd interested party argued that the 1st Respondent acted within the provisions of the *Retirement Benefits Act* in the Appeal following the rules of Natural Justice and fairness, coming to a decision of allowing the appeal on the 13th February, 2017.

181. It argues that the Applicant was accorded a fair trial in accordance with Article 50 of *the Constitution* thereby ruling out the aspect of unfairness as per grounds for a judicial review. The 1st Respondent had jurisdiction to determine the matter as per Section 48 of the *Retirement Benefits Act*. With regards to the illegality aspect, they contend that the 1st Respondent decided the matter in accordance with the *Retirement Benefits Act* and *the Constitution* of Kenya, thus ruling out the aspect of illegality.

182. Section 49 (3) of The *Retirement Benefits Act* provides that in its determination of any matter, the Tribunal may take into consideration any evidence which it considers relevant to the subject of an appeal before it, notwithstanding that the evidence would not otherwise be admissible under the law relating to admissibility of evidence.

183. From the wording of Section 49 (3), it is my finding that the rules of admission of evidence before the Tribunal are more flexible than those under the *Evidence Act* as invoked in the regular court. In

the circumstances, it is this court's finding that Tribunal did not allow the Appellants to re-litigate the matter before the Tribunal. I dismiss the Applicants argument.

The next limb for my determination is whether the Tribunal's decision was irrational, unreasonable, and in complete disregard of the provisions of the Act, Regulations and the Scheme Rules.

To set out the parameters of the grounds of irrationality, unreasonableness and illegality, the Applicant relied on the Wednesbury principle as set out in Associated Provincial Picture House Ltd v Wednesbury Corporation (1948) 1 KB 223.

184. One of the issues raised by the parties, including the 2nd Interested Party, was to the effect of the calculation of the benefits as set out in the NBC Final Report. This issue went to the purposes of the Act establishing the Tribunal i.e. the promotion of retirement benefits schemes and the development of the retirement benefits sector as well. By failing to even consider the question, the Tribunal failed to assuage the concerns of the 2nd Interested Party, the Scheme and to protect the members of the Scheme as well.

185. The Tribunal therefore rendered a decision that would result in the insolvency of the Scheme to the detriment of all its members, including the 2nd Interested Party. This is in contravention of the Act, starting with its preamble.

186. The main issue on appeal was the basis for computation of the lump sum payment in lieu of retaining a deferred pension in the Scheme for the deferred pensioners leaving service. However, despite noting that the right that vested in the pensioners, (including deferred pensioners), is a right commencing from the Normal Retirement Date (i.e. 55 years), the Tribunal proceeded to purport to vary the provisions of the Trust Deed and the Rules for purposes of computation of the pension benefits by stating as follows:

> " We find that the correct way of computing the benefits due to the Appellants is to apply the Rules on accrued rights expressed in the scheme rules which is: -
>
> "...a pension equal to 1/480"s of a beneficiary's Final Pensionable Salary for each complete month of Pensionable service."

187. The Scheme Rules upon which they relied however only applied to those eligible for Early Retirement with the agreement of the Employer or Normal Retirement Date as provided by Rule 10 thereof:

a. Retiring on or after attaining the age of 50 years (Early Retirement) with the agreement of the Employer;

b. Retirement at the Normal Retirement Age which was defined as 55 years.

188. With respect to the members who resigned or left employment before the Normal Retirement Age but having completed five (5) years of service or retired before attaining the age of 50 under specified circumstances, the Scheme Rules, specifically Rule 10(g) provided for a Deferred Pension payable from the Normal Pension Date.

189. The Tribunal failed to consider or apply the Rules with respect to "Deferred Pension payable from the Normal Pension Date" which provide as follows: "An employee having served for at least a period of 5 years and leaving employment before attaining the age of 50 years: - "shall be entitled to a Deferred Pension commencing on the Normal Pension Date equal to 1/480 of his final Pensionable Salary for each complete month of Pensionable Service"

190. The Tribunal, contrary to the Trust Deed, then proceeded to make a finding that the accrued rights of each of the Appellants, being persons entitled to deferred pension benefits and who had received cash equivalent in respect thereof, should have their accrued benefits computed on the basis of; "...a pension equal to 1/480th of each appellant's Final Salary for each complete month of Pensionable Service."

191. By so doing, the Tribunal disregarded the provisions of the Trust Deed and the Rules made thereunder which required the Deferred Pensions to be computed on the basis prescribed, but only take effect from the Normal Pension Date which is defined in the Trust Deed as 55 years.

192. Further, the Tribunal erroneously and unlawfully found that computation of the Appellants' benefits by application of a discounting factor at age 55 was contrary to the Trust Deed. In arriving at that finding, the Tribunal fettered its discretion by disregarding the only provision providing for the same under Rule 15 of the Trust Deed which prescribed for the manner of computing the entitlement for lump sum payment for members who leave before attaining the age of 50 years.

193. In this regard, Rule 15(b) of the Rules provide as follows: "If a member leaves service before attaining the age of 50 years but having five or more years' pensionable service, he may elect to receive a cash sum in lieu of his benefits under rule ... equal to greater of his own contribution accumulated with interest at a rate agreed by the Trustees on the cash equivalent of his deferred on a basis agreed by the Trustees in consultation with the actuary."

194. In order to justify its actions, the Tribunal purported to invoke the provisions of Rule 10 dealing with computation of pension benefits and Rule 16 dealing with the right of the Trustees to amend the Rules, which were in the event irrelevant in the circumstances.

195. The Tribunal further proceeded to exercise a discretion that it did not have, by prescribing that a factor for 55 years should not be used when computing the amount due to the pensioners when the same was expressly provided for in the Trust Deed and the Rules made there under, and without providing for an alternative age and their basis for so finding.

196. The finding on the discounting factor was in any event in breach of and contrary to the express provisions of the Trust Deed and the law, an indication that the Tribunal acted contrary to the law and exceeded its jurisdiction in so doing.

197. Further, there was no discretion vested on the Tribunal to provide a basis for computation of a lump sum for deferred pension or at all. To the contrary, the Trust Deed conferred such right expressly by election on the Appellants if they opted to receive a cash sum in lieu of their benefits under Rule 10 equal to the greater of their own contributions accumulated with interest at a rate agreed by the Trustees of the Scheme or the cash equivalent of their deferred rights determined on a basis agreed by the Trustees of the Scheme in consultation with the actuary.

198. To purport to provide a basis for computation for a matter expressly provided for in the Trust Deed was beyond the Tribunal's jurisdiction and ultra vires its power. The Tribunal's actions are thus irrational and unreasonable and in complete disregard of the provisions of the Act, the Regulations and the Rules, which in the event were misrepresented in the Judgment as the basis of the Tribunal's finding.

199. The Applicant also submitted that in July 2016, it was agreed by consent before the Tribunal that the two actuaries, Alexander Forbes and IAC meet to narrow down areas of difference and present a joint report. Instead of relying on the reports by IAC, which was the basis of the claim by the complainants, the complainants abandoned their original claim and introduced and sought to rely on an entirely different set of calculations prepared by another firm of actuaries, NBC.

200. The only difference between the computations prepared by AF and NBC was a new issue that had never been raised before and related to the assumed commencement age of deferred pensions for deferred pensioners of the Scheme and contrived to try and replicate the flawed calculations of IAC but using an entirely different approach.

201. The new issues raised in the NBC Report must be viewed for what they were — an afterthought to breathe life into an otherwise unmeritorious appeal which never had any merits from the outset. It was submitted that the Tribunal should never have permitted the Scheme's members to change their cause in the course of the proceedings before it through the introduction of the new evidence and issues contained in the NBC Report.

202. In its Supplementary submissions, the Ex-parte Applicant submits that:

> Upon considering the said issues, the Tribunal in a decision dated 13th February 2017 ("the Judgment) made the following pertinent observations and findings; namely that:
>
> a) The point of departure by the actuaries is whether the Appellants can access their pensions at an age of less than 55 without a discounting factor being applied. A discounting factor means that the pension payable is calculated as though the beneficiary was 55 years and then an actuarial factor is applied to reduce the pension to the present age." (See pages 20-21 of the Judgment)
>
> b) In the case of the Appellants, the right that vested in them whether at normal retirement date, deferred or after age 50 and before 55 years is the right to be paid "a pension commencing on the Normal Pension Date equal to 1/480th of his Final Pensionable Salary for each complete month of pensionable service". This right is stated in the Trust Deed and Rules dated 1st July, 1997 of Teleposta Pension Scheme at Rules 10(c), (d) and (g) under the headings Pension on Retirement at Normal Retirement Date and page 21 of the Judgment) Deferred Pension payable from Normal Retirement Date respectively. "We are satisfied that the amendment made on 234 December 2004 does the Appellants. (See page 23 of the Judgment) not invalidate, reduce, vary or diminish the accrued rights or interests of if We do not find the relevance sears lying Rule 13(6) of the Rules of Teposta Pension Scheme because if is depended on election of a member of the Scheme." (See page 23 of the Judgment).
>
> e) The Rules cited above do not make provision for a discounting factor to be applied in the computation of benefits to the Appellants. (See page 24 of the Judgment)
>
> f) In our view, any computations of the Appellant's benefits by application of a discounting factor at age 55 is contrary to: 1. Regulation 16 (1) in so far as it reduces accrued rights and interests of the Appellants. 2. Fiduciary obligation requiring a trustee to act in the best interest of a beneficiary and pay the right amount of benefits to the beneficiary." (See page 24 of the Judgement)
>
> g) We find that the correct way of computing the benefits due to the Appellants is to apply the Rules on accrued rights expressed in the Scheme rules which is; "a pension equal to 1/480th of a beneficiary's Final Pensionable Salary for each complete month of Pensionable Service." (See page 25 of the Judgment)

h) Although application for discounting factors may be a practice in actuarial science .. in view of the concession by both actuaries in their evidence that the Rules of the 2nd Respondent do not have provision for application of a discounting factor in the computation of pensions promised in the Scheme, we do not find a basis for its application in this appeal when it is not stated in the Rules of the Respondent. To do so would be to negate the application and binding effect of the 2nd Respondent's Rules." (See page 25 of the Judgment)

Based on the foregoing findings, the Tribunal made the following orders, namely that:

a) The appeal be and is hereby allowed;

b) The Trustees of the 2nd Respondent shall compute and pay to each of the Appellants the benefits due to each of the Appellants by applying the Rules of the Scheme on accrued rights stated in the judgement which is: ... a pension equal to 1/480ths of each Appellant's Final Pensionable Salary for each complete month of Pensionable Service".

c) The Trustees of the 2nd Respondent may offset from any monies found due to each Appellant any amount of benefits so far paid.

d) The Trustees of the 2nd Respondent shall prepare and submit to each of the Appellants a statement of account showing how the benefit payable is calculated and arrived at.) The Trustees of the 2nd Respondent shall pay interest on the sum found unpaid in (b) above from the date it fell due until payment in full which shall not be less than the investment interest declared by the 2nd Respondent in the years that the benefit has remained due;

f) The 144 members of the Teleposta Provident Fund who have been paid their benefits in accordance with the Rules of the Fund have exhausted all their accrued rights and have no further claim against the 2nd Respondent.

g) Either party shall pay its own costs.".

It is submitted that the Judgment was illegal, irrational and tainted with procedural impropriety and ought to be quashed or set aside by an order of Certiorari and the Respondents restrained from implementing it by an order of Prohibition. The Scheme will in the subsequent sections of these submissions, set out the grounds in support of this proposition. › Prior to that however, it may be worthwhile to consider how the courts have defined the terms "illegality, irrationality and procedural impropriety" which are all grounds for setting aside administrative actions or decisions of judicial or quasi-judicial bodies such as the Tribunal in the context of a judicial review application.

In the case of Pastoli vs. Kabale District Local Government Council & Others [2008] 2 EA 300, the Court held that

> "In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. illegality is when the decision making authority commits an error of law in the process of making the act the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instance of illegality. irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable

> authority, addressing itself to the facts and the law before it would have made such a decision. such a decision is in defiance of logic and acceptable moral standards... procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural unfairness towards one to be affected by the decision. It may also involve failure to adhere to and observe procedural rules expressly laid down in statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

203. On the part of The 1st Respondent, it is the 1st Respondent's case that a consent was recorded on 22nd July,2016 as follows; "By consent actuaries to meet and narrow down the issues. Any issues not agreed may be filed for determination by the Tribunal. Case stood over for mention on 9th September, 2016".

204. The deponent avers that each of the two parties engaged an actuary and all the actuaries were heard and cross examined during the hearing. Further, that the Tribunal identified one issue for determination and that is what the proper method was to be used in calculating the benefits due to the 2nd Interested Parties.

205. It is averred by the deponent that the first point of departure by the actuaries was whether the 2nd Interested Parties could access their pensions at an age less than 55 years without a discounting factor being applied.

206. The Respondents' case is that Teleposta Pension Scheme is by design a defined benefit scheme that was commenced on 1st July,1997 and that what accrues as a right in a member of a defined benefit scheme is, the right to receive a pension computed using a formula as stated in the Trust Deed and Rules of the Scheme. Further that contributions by or on behalf of the beneficiary do not matter.

207. The 1st Respondent is said to have noted that in the 2nd Interested Parties, the right that vested in them whether at normal retirement date, deferred or after age 50 and before 55 years is the right to be paid and therefore the Tribunal adopted the NBC Holdings Proprietary(Pty) Limited report because according to it, the correct way of computing the benefits due to the Appellants was to apply the Rules on accrued rights expressed in the scheme rules which is; "a pension commencing on the Normal Pension Date equal to 1/480th of his Final Pensionable Salary for each complete month of pensionable service".

208. The right is said to be contained in the Trust Deed and Rules dated 1st July, 1997 of Teleposta Pension Scheme at Rules 10(c), (d) and (g) under the headings Pension on Retirement at Normal Retirement Date, Pension on Retirement Before Normal Retirement Date and Deferred Pension payable from Normal Retirement Date respectively.

209. The 1st Respondent's case is that any computations of benefits by application of a discounting factor at age 55 is contrary to Regulation 16(1) in so far as it reduces accrued rights and interests of the 2nd Interested Parties and the fiduciary obligation requiring a trustee to act in the best interest of a beneficiary and pay the right amount of benefits to the beneficiary.

210. The 1st Respondent is said to have gone further to indicate that although the application of discounting factors as provided by the Alexander Forbes Financial Services (E.A.) Limited may be a practice in actuarial science, and that both actuaries having conceded that the Rules of the ex parte Applicant did not have a provision for application of a discounting factor in the computation of pensions promised in the scheme it did not find a basis for its application in the appeal when it was not stated in the Rules of the scheme.

211. I have looked at page 23 to 25 of the impugned Judgment keenly and the testimonies of PW-1 and 2 running from Page 21 to 30 of the proceedings and is clear to me that the dispute was around the formula to be adopted to compute the pensioners' entitlements.

212. The rival arguments and reasoning of the parties herein are around the question of whether or not the statutory tribunal erred in applying the wrong provisions of the law in arriving at the judgment.

213. This issue can only be settled by the Court of Appeal and not this court owing to the legal nature and magnitude of the issue. It calls for a merit analysis and in-depth examination of the reports and the provisions of the schemes. That is beyond this court's jurisdiction and I so hold.

214. In arriving at this conclusion, I have relied on the case of Republic v Public Procurement Administrative Review Board Ex-parte Giant Forex Bureau De' Change Limited & 2 others [2017] eKLR where the Court opined that: "That misapprehension, or error of law or fact, however, is not an issue within the judicial review purview of this court.

215. I am also guided by the Court of Appeal judgment in the case of Republic Vs Kenya Power & Lighting Company Limited & Another [2013] eKLR the learned Judge quoting a decision of the Court of Appeal stated:

> " The Board considering all the arguments of the Applicant and made findings on each of these issues. The Board may have been wrong in its decision but this Court would be usurping the statutory function of the Board were it to substitute its own views for those of the Board"

The principle of proportionality

216. In another limb, The Applicant has also advanced a very robust argument that the payment of this amount of Kshs 13.928 billion would significantly prejudice the financial security of all the members of the Scheme who currently comprise more than 10,000 pensioners, deferred pensioners and other members with outstanding benefits in the Scheme.

217. It is the Applicants case that if the Scheme were to be compelled to settle the decretal sum of Kshs. 13.928 billion together with interest as directed by the Tribunal, it would have a very significant impact on the existence of the Scheme with a very imminent possibility of the Scheme being put under insolvency. This would deprive over 10,000 current beneficiaries of the Scheme of their pension benefits.

218. Based on the foregoing, the Scheme urges this Honourable Court to set aside the Judgment on the basis of the principle of proportionality and on grounds that it is irrational in view of the adverse impact that it would have on the Scheme.

219. The Ex-Parte Applicants are apprehensive unless the tribunal is prohibited from conducting any further proceedings, the 2nd Interested Parties are likely to procure further orders which will irretrievably prejudice the Ex-Parte Applicants, and other Pensioners under the Scheme as a rough computation of the amount likely to be computed, as directed by the Judgment and Orders of the Tribunal are in excess of Kenya Shillings Seven Billion (Kes.7 Billion); which order if implemented is likely to render the Ex-Parte Applicant unviable.

220. The Appellants are apprehensive that they will be subjected to unnecessary process of computation without jurisdiction, and without a forum to resolve any dispute that may arise in respect thereof, the

tribunal being functus officio, and currently having no members in the event. Accordingly, that it is in the interest of justice that the orders be granted.

221. They also rely on the Supplementary Affidavit dated 12th October, 2022 deponed by Sundeep Raichura, (the FIA the Group Chief Executive Officer of Zamara Actuaries, Administrators and Consultants Limited), the appointed actuaries for the Ex-Parte Applicant (TelePosta Pension Scheme).

222. The deponent averred that in its Actuarial Report dated 30th September, 2020 (ascertaining the financial position of the Scheme, and more precisely ascertaining the assets and liabilities of the Scheme; and the effect of the additional liability earlier estimated at Kes. 7.2 billion--arising out of the Judgment of the Tribunal dated 13th February 2017) which was submitted to the Ex-parte Applicant, the Actuarial Report indicated that the additional liability arising out of the Judgment of the Tribunal increased to Kes. 11.511 billion to reflect the period since 13th February, 2017 to 30th June, 2020: and the more detailed and up to date information in relation to the Scheme membership and exits from membership that were obtained from the Scheme.

223. It is the Ex parte Applicant's case that the additional liability is extremely material in the context of this Scheme, and would result in a massive actuarial deficit in the Scheme of Kes. 9.66bn; and that the additional liability is in fact higher than the total liabilities of the Scheme as at 30th June, 2020. That, as at 3rd October, 2022 the actuarial report estimated the additional liability arising from the Tribunal's Judgement at Kes. 13.928bn, which would have a further adverse impact on the financial position of the Scheme. Therefore, that the payment of this additional liability would significantly prejudice the financial security of all the members of the Scheme (including the Interested Parties herein who are among the more than 10,000 pensioners, deferred pensioners, and other members with outstanding benefits in the Scheme).

224. The Ex parte contended that in the event the Scheme were to be compelled to settle the additional liability (estimated at Kes. 13.928 billion) as directed by the Tribunal, it would have a very significant impact on the existence of the Scheme, with a very imminent possibility of the Scheme being put under insolvency.

225. I am in agreement with the findings of Justice Mrima in his judgment in the case of Blasio Ondiek v Retirement Benefits Appeals Tribunal & 950 others Retirement Benefits Authority (Interested party) [2021] eKLR 40 where he decided that:

> " 85. There is also the other contention that the Petitioner's right to property is infringed by the execution of the 1st Respondent's judgment as that will render the Scheme insolvent and deprive Pensioners' monthly dues.
>
> 86. The 3rd Respondent deponed that the Petitioner's said contention is pre-emptive and is not supported by any evidence.
>
> 87. Prayer (b) in the Petition seeks a declaration that the Petitioner or any other person deriving benefit from the 2nd Respondent is a bonafide owner of the properties of the Teleposta Pensions Scheme. This prayer essentially entitles every member of the Scheme to the ownership right, the 3rd to 951st Respondents included. The Petitioner's right to property is no more important than the 3rd to 951st Respondents'. The prayer is, therefore, self-defeating as the Petitioner and the 3rd Respondent are all members of the same Scheme.

88. Further, this Court agrees with the 3rd Respondent that the averment that the execution of the judgment by the Tribunal will render the Scheme insolvent is unsupported by any evidence. However, even if the Petitioner's position on the insolvency is correct, still there is no evidence that the enforcement of the judgment is unconstitutional to the extent that it infringes Article 40 of *the Constitution*."

226. On its part, the 2nd interested party submitted that in their Ex-Parte Application, the Applicants allege that the computations owed to the 2nd Interested Party amount to Kshs 7 billion. This fact having been alleged in the application shows that the Applicants have a problem with the merits of the decision and not the decision process. The said decision in favor of the 2nd Interested party shows that the Applicants are not concerned with the decision-making process but rather with the merits of the decision itself. This court is in agreement with this position.

227. In order to determine this question, I have looked at Section 40 of the Retirement Benefits Authority Act sets out obligation of trustees and managers of a Scheme as follows: -The trustee, manager, custodian or administrator of a scheme shall—

(a) ensure that the scheme fund is at all times managed in accordance with this Act, any regulations made thereunder, the scheme rules and any directions given by the Chief Executive Officer;

(b) take reasonable care to ensure that the management of the scheme is carried out in the best interests of the members and sponsors of the scheme;

(c) report to the Chief Executive Officer, as soon as reasonably practicable, any unusual occurrence which in his view could jeopardize the rights of the members or sponsors of the scheme; and

(d) report to the Chief Executive Officer, as soon as reasonably practicable, if any contributions into a scheme fund remain due for a period of more than thirty days.

228. This leaves me with no doubt that the Applicant has access to the above critical information which it can use in the event of insolvency or execution proceedings. Such evidence is also useful in instances where a judgment debtor is making an application to be allowed to settle a judgment through instalments and not in judicial review proceedings.

229. The theory of proportionality is applicable in cases where rights are violated by administrative action. In applying the proportionality test, the court has to scrutinize the impugned administrative conduct specifically and the accuracy of the authority's choices.

230. It is this court's finding and I so hold, that as the court applies its mind to the doctrine of proportionality it must also weigh the negative impact the application will have on the decree holder and in this case the pensioners.

231. I have looked at paragraph 7B and C of the 2nd Interested Parties Supplementary Affidavit dated 28.11.2022 the deponent deponed that:

"Information on derivation of the additional liability - Request for additional information on the data and assumptions underlying the Report. The Scheme's actuary estimates an additional liability at 30 June 2020 of KShs 11.511 billion (and this is estimated to increase to KShs 13.928 billion at 3 October 2022), and that there are 9,735 members who had exited employment or transferred their benefits from the Scheme before attaining age 50. The report does not contain sufficient information on these 9,735 members, or any

other members included in the additional liability, to be able to independently verify the additional liability.

Please may I request: - Individual details of these 9,735 members and any other members included in the additional liability; and - A sample calculation of each category of member (with the category linking into how the Ruling affects each class of member based on their current status and the reason of exit, as mentioned in the point above)? The Scheme's actuary does state that they have been unable to reconcile the exits data. Can the actuary confirm whether this could have a material impact on the additional liability estimated due to the Ruling? Please may I check whether the Scheme's actuary has reviewed the financial and demographic assumptions (that have been summarized in Section 6 of the Report) as a result of the Ruling, or whether they are of the view that those assumptions continue to remain valid and applicable?

Scheme insolvency - Request for additional information on the Scheme actuary's conclusion that there is an imminent possibility of the Scheme being put under insolvency. In their Affidavit the Scheme's actuary states that if the Scheme was compelled to pay the additional liability, then there is a very imminent possibility of the Scheme being put under insolvency. Other than the Report showing an estimate of the additional liability due to the Ruling, the Report does not contain any other detail that would lead to the conclusion of a very imminent possibility of insolvency. Please may I request the Scheme's actuary to provide more information on what information they received, analysed and discussed with relevant stakeholders for the actuary to deduce that there is an imminent risk of insolvency? For example, can the Scheme's actuary provide more details on the following: -The expected annual cash flows of the Scheme including the expected additional liability due to the Ruling, - A proposed deficit recovery plan for additional contributions that would be expected to be due from the Sponsor to plug the assessed deficit within a reasonable period of time as required by the Retirement Benefits (Minimum Funding Level and Winding-up of Schemes) Regulations, 2000; Any measures taken by the Trustees to protect the Scheme against financial loss arising out of any negligence, default or willful default on the part of any of its officers, Trustees, administrator, manager or custodian either by way of a guarantee from the Sponsor or by way of insurance of such amount as the Trustees may deem adequate. - An analysis of the strength of the Sponsor's covenant; - A reconciliation of the assessed deficit at 30 June 2020 with the estimated funding positions in prior actuarial valuations to determine what other factors have contributed to the current assessed deficit; -Whether any provisions or reserves were discussed for this Case in previous actuarial valuation exercises; - A sensitivity analysis of the total assessed deficit (that includes the assessed additional liability due to the Ruling) to alternative financial and demographic assumptions; - Any other relevant information that was considered that affects the solvency of the Scheme. Finally, I note that the data underlying the Scheme actuary's report is already two years out-of-date given that we are now in the year 2022."

232. From this it is clear that the Pensioners have a stake when it comes to the application of the doctrine of proportionality. There must be a balance between the competing rights which can only be achieved through the production of evidence by parties that must then be placed on the scales of justice.

233. An in-depth evaluation of the evidence that the Applicant and the Pensioners have tendered must be carried out before the court can decide and or ascertain what would amount to the correct proportions.

234. This court is not in a position to assess whether the Tribunals judgment was excessively restrictive or that it inflicted an unnecessary burden on the Applicant. The fragile Pensioners did not get an

opportunity to swear Affidavits to tender evidence to demonstrate the pain and suffering they have been forced to endure as they crawl through the dark tunnel of time as they try and wait to access their retirement entitlements. Some might have already passed on empty handed.

235. According to the 2nd Interested Party the Ex parte Applicant has come up with a figure of Kenya shillings Seven (7) Billion out of thin air which figure is completely unsupported. In any case, that justice must come to an end and the 2nd Interested Party must reap the fruits of justice; therefore, that it is in the interest of justice that this Application should fail.

236. Moreover, to the 2nd Interested Party, the Ex parte Applicant has so far failed to adhere to the Judgment and are deliberately delaying the conclusion of this matter since it is yet to comply with the orders as issued by the Tribunal. That Article 57 of *the Constitution* protects the 2nd Interested Party's rights as older members of society with respect to pursue their personal development and to live in dignity and respect; instead the members are aged pensioners who are suffering an injustice that is being by far extended by the delay of the Applicants not adhering to the said Judgment - thereby causing financial and emotional turmoil to the 2nd Interested Party.

237. Further, the 2nd Interested Party in response to and opposing the Application, and in particular response to Applicant's Supplementary Affidavit dated 12th October, 2022 and sworn by Sundeep Raichura, specifically on the annexed Actuarial Report annexed therein; the 2nd Interested Party through their Further Affidavit dated 14th October, 2022 and sworn by Boniface Mariga averred that the debt has continued to accrue due to the failure by the Trustees to settle the Judgement sum which continues to accrue interest until settled in full. That a mere fact that a judgement sum accrues interest due to non-payment is not a valid ground to set aside the Judgement nor to impute irregularity, the law allows for interest on decretal sum until settled in full and there is nothing unlawful about it.

238. As per the 2nd Interested Party, the pension benefits which has accrued to a beneficiary cannot be reduced nor taken away on the basis that if paid correctly, as adjudicated by a competent tribunal, then the liquidity of the scheme will be in problem or that the scheme will be in deficit. That the Retirement Benefits Authority Act No. 3 of 1997 Retirement Benefits (Minimum funding level and winding up Scheme Rule 2020) provides for remedial measures where a scheme is in liquidity problem or in deficit and denial of a beneficiary his/her accrued pension rights is not one of the measurers allowed for as a remedial measure by the Retirement Benefits Authority.

239. The principle of proportionality must fit into the dictates and the Constitutional scheme of Article 47 which guarantees the Applicant and the pensioners to the right to fair administrative action.

240. It is the 2nd Interested Parties case that pension benefits are one of the social protections accorded to the older members of the society by Article 43 and 57 of *the Constitution*, and thus it would be unfair, unjust, and unlawful to deny the retirees their accrued pension benefits-as a result of the Trustees own convenience, as propagated in the Report by their Actuary.

241. The 2nd Respondents argues that what the Scheme Actuary Sundeep Raichura is advocating for in his Report is that the benefits due to members be reduced by taking into account discounting factors not contained in the Scheme Rules. That this was addressed by the Tribunal with the concurrence of both parties' actuaries; that the Scheme Rules do not provide for reduction of benefits by use of discounting factors and that the same would be contrary to Regulation 16 (1) of the Retirement Benefits Authority Regulations which prohibits reductions of accrued rights.

242. It is this courts firm belief and I so hold, that the effect of the application of application of the proportionality test as sought by the Applicant will erode the pensioner's entitlements and rights that flow from the judgment. It is my view and I so hold, that the proportionality test must be bow and

subjected to Article 24 of *the Constitution* which provides for a very progressive threshold when it comes to the limitation of rights. The burden lies on the Applicants to satisfy the court that it has made out a case that falls within the ambit and the restrictions of Article 24.That is not an issue for this court but for The Human rights and Constitutional court.

243. This court refuses to allow the proportionality argument in the form and fashion as invited by the Applicant.

244. I am guided by the case of K. S. Puttaswamy Vs. Union of India, 2017 (10) SCC 1] where the test of proportionality was upheld by the Hon'ble Supreme Court. It was held that the case of proportionality of a measure must be determined while looking at the restrictions being imposed by the State on the fundamental rights of citizens. It is not just the legal and physical restrictions that must be looked at, but also the fear that these sorts of restrictions engender in the minds of the populace, while looking at the proportionality of measures.

245. I must remind myself which I hereby do that the judicial review court must be careful whenever it is invited to carry out a proportionality test or analysis. The High Court must always be careful not to stroll into the arena of the Court of Appeal court which is vested with the powers to rehear, reassess and reevaluate evidence when so invited by an appellant who believes that the quantum of general damages is excessive. To me that is what the Applicant is seeking to achieve which I hereby do. The outcome and the effect of the applying test will be a reduction or re evaluation of the quantum of the entitlements that the Petitioners have. I do not have the jurisdiction to do a merit analysis between the evidence tendered by the Applicant and the petitioners case.

246. I dismiss the Applicants' argument under the doctrine of proportionality. However, it would be remise of me to shut doors to the doctrine of proportionality in judicial review matters in appropriate cases. The doctrine of proportionality has its place within the Wednesbury principle and in appropriate cases it should be applied.

Disposition:

247. Section 7(2) (d) of The *Fair Administrative Action Act*, provides that a court or tribunal under subsection (1) may review an administrative action or decision, if the action or decision was materially influenced by an error of law.

248. The Applicant has not proven that the Tribunal's decision was materially influenced by an error of law. The Applicant has failed to prove that it is entitled to an order of Certiorari to remove into this Honourable Court and quash the judgment and orders of the Retirement Benefits Appeals Tribunal made in Tribunal Civil Appeal No. 7 of 2011 Boniface Mariga & 948 Others vs The Retirement Benefits Authority and the Board of Trustees Telposta Pension Scheme and Provident Fund which judgment is dated the 13th February, 2017.

249. In seeking the prayer for an order of prohibition, the Exparte Applicant relied on the case of Republic v Principal Kadhi, Mombasa & Another Ex-parte Alibhai Adamali Dar & 2 others [2022] which provides that:

> " The Order of "Prohibition" issues where there are assumption of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi's Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction." (... ..) "Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was

equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself."

250. Having found no fault in the impugned Tribunals finding, the application for an order to prohibit the 1st Respondent from any further dealing with the Tribunal Civil Appeal No. 7 of 2011, whether by way of any further order, enforcement or otherwise whatsoever will serve no useful purpose, and I decline the prayer.

251. This court is in full agreement with the 2nd Interested Party that the grounds raised in this Judicial Review application are grounds which can only be raised on appeal as they touch on the merits of the case. As such, that the instant application is an Appeal disguised as a Judicial Review Application; and is thus incompetent, fatally defective, frivolous, vexatious, lacks merit, an abuse of the courts time, and ought to be dismissed.

Orders:

The Application dated 11th April 2017 lacks merit and the same is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 16TH DAY OF AUGUST 2023.

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JOHN CHIGITI (SC)

JUDGE