



REPUBLIC OF KENYA



**KENYA LAW**  
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**Trustees of Stanbic Bank Kenya Ltd Staff Pension and Life Assurance Scheme  
v Retirement Benefits Appeals Tribunals (Judicial Review E137 of 2021)  
[2022] KEHC 11158 (KLR) (Judicial Review) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 11158 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW E137 OF 2021  
AK NDUNG'U, J  
JUNE 21, 2022**

**BETWEEN**

**TRUSTEES OF STANBIC BANK KENYA LTD STAFF PENSION AND LIFE  
ASSURANCE SCHEME ..... APPLICANT**

**AND**

**RETIREMENT BENEFITS APPEALS TRIBUNALS ..... RESPONDENT**

**JUDGMENT**

1. Trustees of Stanbic Bank Kenya Ltd Staff Pension and Life Assurance Scheme (hereinafter, the applicant) moved this court vide an originating Notice of Motion dated October 5, 2021 seeking orders that:
  - 1) Spent
  - 2) Spent
  - 3) A Declaration be issued that the 1<sup>st</sup> respondent's decision dated September 6, 2021 was unlawful for misapplying the doctrine of *res judicata* as the correct pension accrual factor of 1/60<sup>th</sup> under the Trust Deed and Rules dated January 11, 1978 of the applicant had been determined in the past in three decisions by:
    - (a) The Chief Executive Officer of the Retirement Benefits Authority on November 22, 2010.
    - (b) The Retirement Benefits Appeals Tribunal judgment dated February 23, 2021 in Civil Appeal No 4 of 2011 *Edwin Ngesa & 15 others v the Retirements Benefit Authority and another*.



- (c) The high court judgment of September 19, 2013 in *Republic v Retirement Benefits Appeals Tribunal & another ex parte Edwin Ngesa Nyamboro & 16 others* [2013].
- 4) Declarations be issued that:
- a) The memorandum of appeal dated filed on 13<sup>th</sup> January 2021 by the 2<sup>nd</sup> respondent was time barred and in contravention of section 48 of the *Retirement Benefits Act* having been filed more than 30 days after the decision of the Chief Executive Officer dated December 1, 2020.
  - b) The 2<sup>nd</sup> respondent's claim for taking of accounts and calculations from 23<sup>rd</sup> July 2003 when the cause of action accrued was time barred under sections 4 and 20 of the *Limitation of Actions Act*.
  - c) The decision of the 1<sup>st</sup> respondent was unlawful and manifestly biased in favour of the 2<sup>nd</sup> Respondent by unlawfully admitting a time barred claim on the basis of purported injustice suffered by the 2<sup>nd</sup> respondent.
- 5) An order of certiorari be issued quashing the 1<sup>st</sup> Respondent's Ruling dated September 6, 2021.
- 6) An order be issued allowing the applicant's preliminary objection dated February 9, 2021 and the amended memorandum of appeal dated March 23, 2021 filed by the 2<sup>nd</sup> respondent be dismissed with costs.
- 7) Costs be awarded to the applicant.
2. The application is based on 7 grounds set out on the face thereof viz:
- 1) The 2<sup>nd</sup> respondent filed a Complaint before the Interested party herein on December 4, 2018, seeking, *inter alia*, an explanation of the calculations used to arrive at the lump sum payment paid to the 2<sup>nd</sup> Respondent on July 23, 2003 and the underpayments arising from the difference in using the 1/60 accrual factor as opposed to the 1/16 as indicated in the amended rules of 1994.
  - 2) The Complaint was dismissed by the Authority by a Ruling of the CEO of the Authority by a letter dated 1<sup>st</sup> December 2020 having found that the pension accrual factor had previously been determined and that the claim was time-barred having been brought after 17 years.
- Appeal filed out of time
- 3) The respondent filed its Appeal on 13<sup>th</sup> January 2021 in contravention of section 48 of the *Retirement Benefits Act* as it ought to have been filed by January 3, 2021 and was thus time barred on the face of the record. It later amended the Appeal on March 23, 2021 by enjoining the Chief Executive Officer of the Retirement Benefits Authority.
  - 4) Based on section 48 of the *Retirement Benefits Act*, the Appeal was statute barred as an Appeal from the decision of the Chief Executive Officer ought to be filed within 30 days of receipt of the decision of the Authority.
- Dismissal of Preliminary Objections was unlawful and tainted with bias
- 5) The 1<sup>st</sup> Respondent's dismissal of the Applicant's preliminary objections was unlawful, unreasonable and tainted with manifest bias.
    - a) It was a fatal error of law for the Tribunal to find that as the 2<sup>nd</sup> Respondent was not part of the previous proceedings; the matter was not *res judicata*. This was allowing



litigation by instalments which was addressed by the Court of Appeal in the case of *Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 others v Permanent Secretary, Ministry of Energy & 17 others* [2016] eKLR:

“We are in agreement with the views expressed by the High court in *Omondi v National Bank of Kenya Ltd and others* [2001] I EA 177 at page 183 where that court stated: -

*res judicata* would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their cases at once. They are forbidden from litigating in instalments. ”

- b) The Tribunal unlawfully held that order 50 rule 4 of the *Civil Procedure Rules* froze time during the Christmas period from 21<sup>st</sup> December to 13<sup>th</sup> January so as to sustain an appeal filed out of time. This was contrary to the basic legal principles set out by the Court of Appeal in the case of *Maersk Kenya Limited v Murabu Chaka Tsuma* [2017] eKLR where the court held that delegated legislation cannot override statutory time limits.
  - c) The Tribunal unlawfully introduced issues that were not pleaded when it determined that the Appeal was founded on fraudulent breach, misrepresentation, concealment and/or non-disclosure which were matters to be proved by evidence in a full Hearing. This was blatant bias meant to sustain a hopeless Appeal as the 2<sup>nd</sup> respondent did not plead fraud in her complaint before the authority.
  - d) The Tribunal's impartiality is reasonably questionable for manifesting bias against the Applicant.
- 6) Spent
  - 7) Directions be issued for the expedited hearing and determination of these proceedings in accordance with section 8 of the *Fair Administrative Action*.
3. The application is supported by the affidavit of Edwin Limo, a trustee of the applicant sworn on October 5, 2021.
  4. The gist of the applicant's case is that the 2<sup>nd</sup> respondent filed a complaint before the Retirement Benefits Authority (the Interested Party on December 4, 2018 seeking *inter alia* an explanation of the calculations used to arrive at the lump sum payment paid to her on July 23, 2003 and the underpayments arising from the difference in using the 1/60 accrual factor as opposed to the 1/16 as indicated in the amended rules of 1994.
  5. The complaint was dismissed by the Chief Executive Officer on the 1<sup>st</sup> December, 2020. The dismissal triggered an appeal by the 2<sup>nd</sup> Respondent before the Retirement Benefits Appeals Tribunal which appeal was filed on the January 13, 2021. According to the applicant this appeal contravened s48 of the *Retirement Benefits Act* as the same was time barred and therefore the tribunal lacked jurisdiction to adjudicate on the matter. The appeal was later amended on March 23, 2021.



6. It is the applicant's case that it filed its defence dated February 9, 2021 and raised preliminary objections on the grounds that the appeal was improperly before the court, the same being time barred and *res judicata*. The interested party also filed its defence dated April 28, 2021.
7. The applicant has exhibited submissions relied upon by the parties at the tribunal which submissions addressed the preliminary objections raised.
8. In a ruling dated September 6, 2021, the 1<sup>st</sup> respondent dismissed the preliminary objection with no orders as to costs.
9. The decision of the tribunal was based on grounds:
  - a) That the bar of *res judicata* could not be raised as a preliminary objection as the Tribunal would have to go through the pleadings to determine whether the issues raised by the 2<sup>nd</sup> respondent were substantially in issue in the former suit.
  - b) That the suit was not filed out of time as the Civil Procedure Rules provide under order 50 rule 4 that time does not run during the Christmas period from 21<sup>st</sup> December to 13<sup>th</sup> January.
  - c) The issue on whether or not the allegations by the 1<sup>st</sup> Respondent were founded on fraudulent breach, misrepresentation, concealment and/or non-disclosure were matters to be proved by evidence in a full hearing.
10. It is the applicant's case that the ruling was unfair, unreasonable, had no statutory backing, has glaring biases and was materially influenced by an error of law.
11. In its written submissions, the applicant flagged out 5 issues for determination. These are:
  - a) Whether the 1<sup>st</sup> respondent's decision dated September 6, 2021 was unlawful for misapplying the doctrine of *res judicata*.
  - b) Whether the memorandum of appeal filed on 13<sup>th</sup> January, 2021 by the 2<sup>nd</sup> Respondent was time barred.
  - c) Whether the 2<sup>nd</sup> Respondent's claim was time barred under section 4 and 20 of the Limitations of Acts Act.
  - d) Whether this court should issue an order quashing the ruling dated September 6, 2021 and whether the present application is merited.
  - e) Is the present application an invitation for the Judicial Review Court to sit on appeal on a decision of the Tribunal?
12. It is submitted that the decision by the 1<sup>st</sup> Respondent dated September 6, 2021 was unlawful for misapplying the doctrine of *res judicata* as the correct pension accrual factor of 1/60<sup>th</sup> under the Trust Deed and Rules dated January 11, 1978 of the Applicant had been determined in the past in three decisions by:
  - a) The Chief Executive Officer of the Retirement Benefits Authority on November 22, 2010.
  - b) The Retirement Benefits Appeals Tribunal judgment dated February 23, 2021 in Civil Appeal no. 4 of 2011 *Edwin Ngesa & 15 others v the Retirements Benefit Authority and another*.
  - c) The High Court Judgment of September 9, 2013 in *Republic v Retirement Benefits Appeals Tribunal & another ex parte Edwin Ngesa Nyamboro & 16 others* [2013].



13. Counsel submits that the Tribunal arrived at an unlawful decision in dismissing the preliminary objection as the pension accrual factor issue had been determined in the past by the Tribunal and the High Court. It is urged that *res judicata* applies even where matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Reliance is placed on the decision by the Court of Appeal in [Africa Oil Turkana Drilling Consortium Ltd & 3 others v Permanent Secretary, Ministry of Energy & 17 others](#) [2016] eKLR.
14. It is urged therefore that the finding by the 1<sup>st</sup> Respondent that the matter was not *res judicata* on the basis that the 2<sup>nd</sup> Respondent was not a party in the said proceedings, was materially influenced by an error of Law. The 2<sup>nd</sup> Respondent having not applied to be enjoined in the Edwin Ngesa case is bound by the decision of the High Court. Further reliance is placed on the Court of Appeal decision in [Nguruman Limited v Shompole Group Ranch and another](#) [2014] eKLR.
15. It is further submitted that the Tribunal being a creature of statute can only exercise such jurisdiction as conferred on it by Statute. The Tribunal cannot overturn the decision of the High Court in Misc. Application. JR No. 203 of 2012, [Republic v Retirement Benefits Appeals Tribunal & another ex parte Edwin Ngesa Nyamboro & 16 others](#) [2013] eKLR. The court was referred to the decision of the Environment and Land Court in [Kennedy Ellam Wekesa \(as the representative of the Estate of George Ellam Wekesa v Abdulla Taib \(as the Representative of the Estate of Sheikh Ali Taib\)](#) [2020] eKLR.
16. It is urged that the Tribunal acted beyond its powers under the Act by purporting to sit on appeal on a decision of the High Court. The decision was unlawful as it was influenced by an error of law by misapplying the doctrine of *res judicata*. The court's attention was drawn to the decision in [Alfred Asidaga Mulima & 2 others v Attorney General & 8 others](#) [2017] eKLR.
17. On the question whether the memorandum of appeal filed on 13<sup>th</sup> January, 2021 was time barred and in contravention of section 48 of the [Retirement Benefits Act](#), counsel submits that an appeal from the decision of the Chief Executive Officer ought to be filed within 30 days of receipt of the decision of the Authority.
18. It is urged that the appeal was filed out of time and the Tribunal thus lacked jurisdiction to adjudicate on the matter.
19. Counsel posits that the [Civil Procedure Act](#) does not apply to appeals to the Tribunal since the [Retirement Benefits \(Tribunal\) Rules 2000](#) sets out the procedure to be followed when filing an appeal before the tribunal. Reliance was placed on the decision of the Court of Appeal in [Staff Pension Fund and Kenya Commercial Bank Staff Retirement \(DC\) Scheme 2006 and another v Ann Wangui Ngugi & 524 others](#) [2018] eKLR.
20. It is urged that based on the tribunal rules and computation of time under section 57 of the [Interpretation and General Provisions Act](#), the appeal before the Tribunal ought to have been filed by January 3, 2021 when the 30-day period lapsed.
21. On the question whether the appeal before the Tribunal was time barred, counsel submits that the 2<sup>nd</sup> Respondent's claim at the [RBA](#) is incurably and fatally defective having been instituted more than 6 years after the date on which the cause of action accrued which is in contravention of section 20 of the [Limitation of Actions Act](#). The appeal before the 1<sup>st</sup> Respondent has no legs to stand on and should thus be dismissed. It is urged and case law provided, that there is no law that states that when a suit is pending in the wrong forum, time stops running for the purposes of limitation of action.
22. On whether the application herein is merited and the court should issue an order quashing the ruling dated September 6, 2021, counsel submits that an order of *certiorari* is issued to quash a decision already



- made and it will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with. Reliance was placed on the Court of Appeal's decision in *Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR.
23. It is urged that Article 47 of the *Constitution of Kenya* provides that every person has the right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Article requires that where a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action, the person has right to be given written reasons for the action. Counsel cited the decision in *Judicial Service Commission v Mbalu Mutava & Another* [2015] eKLR.
  24. Counsel submits that the decision by the 1<sup>st</sup> Respondent was a violation of the Applicant's right to fair administrative action and contrary to article 47 of the *Constitution* as read with section 4 of the *Fair Administrative Action Act*.
  25. The decision is faulted for being materially influenced by an error of law by misapplying the doctrine of *res judicata* in that the issue of pension accrual factor has in the past been resolved by the CEO of the *RBA*, the Retirement Benefits Appeals Tribunal and the High Court who all agreed that the factor was 1/60.
  26. It is contended that the 1<sup>st</sup> Respondent was not impartial and descended into the arena of the conflict by introducing the issue of fraud which had not been pleaded by the 2<sup>nd</sup> respondent in the complaint lodged with the Interested Party. Counsel urges that at no time were the allegations of fraud if any pleaded or proved. He adds that merely pleading fraud without particularizing acts of fraud and leading evidence on the same does not lead to the claim before court or before a Tribunal being one of fraud.
  27. It is submitted that the Tribunal's impartiality is reasonably questionable for manifesting bias against the applicant by even quoting a musician in support of the purported injustice allegedly suffered by the appellant.
  28. Counsel maintains that the Judicial Review application herein is not an appeal against the decision of the 1<sup>st</sup> Respondent. He cites the decision in *Trustees of Teleposta Pension Scheme v Attorney General & 5 others* [2014] eKLR for the proposition that this court has jurisdiction to entertain judicial review applications by fact of its supervisory jurisdiction under article 165(6) as read with article 162(2) and 165(5) of the *Constitution* .
  29. It is urged that merit review is permissible in Judicial Review and reliance is placed on the decision in *Judicial Service Commission v Lucy Muthoni Njora* [2021] eKLR.

#### **The 1<sup>st</sup> Respondent's Case:**

30. The 1<sup>st</sup> Respondent in response to the Originating Motion filed a Replying Affidavit sworn by Fred Gekonde, its Tribunal clerk. It is the 1<sup>st</sup> Respondent's case that upon the court's judgment in ELRC Cause No.2003 of 2015-*Bernadette Kariuki & others v the Trustees of Stanbic Bank Kenya Limited Staff Pension & Life Assurance Scheme* directing that it did not have jurisdiction to hear the matter before it and that the same should be subjected to the mechanism under the *Retirement Benefit Act*, the 2<sup>nd</sup> Respondent herein filed a complaint before the Interested Party herein which was dismissed on 1<sup>st</sup> December,2020 for want of merit.
31. The 2<sup>nd</sup> Respondent aggrieved by the said decision filed a Memorandum of Appeal dated January 13, 2021 and subsequently an Amended Memorandum of Appeal dated March 24, 2021. In response, the Applicant herein filed a PO, statement of defence and statement of facts in which it sought to have the Amended Memorandum struck out on grounds that the Appeal was res judicata and time barred.



32. It was the Applicant's case that a similar matter had already been determined being Civil Appeal No.4 of 2022-*Edwin Ngesa Nyaboro & 15 others v Retirement Benefits Authority & another*. Further that the same claimants then filed *Republic v Retirement Benefits Authority ex parte Edwin Ngesa Nyaboro & 15 others* [2013] eKLR which was dismissed by the court on grounds that the matters raised had already been considered by the Interested Party and Tribunal.
33. While dismissing the PO, the Tribunal observed that it did not see how the Appeal before it was an Appeal against the decision in the High Court in respect to Civil Appeal No.4 as the 2<sup>nd</sup> Respondent was not a party therein. On the matter being time barred, the 1<sup>st</sup> Respondent urged that pursuant to order 50 rule 4 of the [Civil Procedure Rules](#) any computation of time for amending, delivering or filing of any pleadings or the doing of any other act between the 21<sup>st</sup> day of December and the 13<sup>th</sup> day of January in the next year shall be omitted.
34. The 1<sup>st</sup> Respondent's case is also that the remedy sought by the Applicant herein is not available in Judicial Review as the court has no jurisdiction to go into the merits of its decision. To support this argument, the cases of *Republic v Public Procurement Administrative Review Board & another ex-parte Express DDB Kenya Limited* [2018] eKLR, *RE Bivac International SA (Bureau Veritas)* (2005) 2 EA 43, *Pastoli v Kabale District Local Government Council & others* [2008] 2 EA 300, [Republic v Kenya Revenue Authority ex parte Yaya Towers Limited](#) [2008] eKLR, *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another* [2014] eKLR on the scope of Judicial Review were cited. In addressing the prayer of certiorari the case of [Republic v Commissioner of Customs Services ex parte Africa K-Link International Limited Nairobi](#) [2012] eKLR was referred to.
35. It is the 1<sup>st</sup> respondent's argument that the applicant herein has failed to demonstrate that its decision was so irrational that no reasonable body properly directing itself as to law to be applied could have reached a similar one. The [Halsbury's Laws of England](#) treatise, 4<sup>th</sup> Edition and the case of *Animistic v Foreign Compensation Commission* were quoted.
36. In further response the 1<sup>st</sup> respondent contends that the [Civil Procedure Rules](#) by virtue of rule 12 of the [Retirement Benefits \(Tribunal\) Rules](#) apply to the Tribunal. The application it is argued does not meet the basic tenets of judicial review and should therefore be dismissed with costs.

### **The 2<sup>nd</sup> Respondent's case**

37. The 2<sup>nd</sup> Respondent opposed the motion through the replying affidavit of Bernadette Kariuki sworn on October 27, 2021 and grounds of opposition of even date. In her grounds of opposition, the 2<sup>nd</sup> Respondent contended that the application is grossly misconceived and fatally defective as the application as drafted seeks to appeal the entire ruling of the 1<sup>st</sup> Respondent issued on September 6, 2021 and this Honourable Court lacks the requisite jurisdiction to sit as an appellate court and entertaining the same will only occasion wastage of judicial time. Further, the application is fatally flawed, is marred with material non-disclosure of facts which will undoubtedly have the effect of misleading this Honourable Court, is malicious and made in bad faith as it is calculated to ensure that the 2<sup>nd</sup> Respondent is denied her constitutional right under article 50 of the [Constitution](#). As such, the conduct of the Applicant in delaying the hearing of the substantial issues raised in the 2<sup>nd</sup> Respondent's complaint on merit before any court or tribunal should not elicit any lenient exercise of discretion by the court. It was further contended that the application runs foul to the overriding objective of this court and the same ought to be dismissed with costs to the 2<sup>nd</sup> Respondent.



38. In her reply, she contended that contrary to what is averred in paragraphs 4 (a) and 12 (f) of the affidavit of Edwin Limo, her claim before the courts and the tribunal is not time barred under section 20 of the Limitations of Actions Act. She averred that the Applicant herein alleges that the claim was only filed 17 years after the accrual of the cause of action but fails to disclose to this Honorable Court, in the instant application and the documents in support of it, that this matter has been pending before various courts for 17 years. Further, that the Applicant has consistently failed to indicate to the court that this matter has never been heard on merit despite its long history in the Kenyan court system.
39. In a nutshell, the 2<sup>nd</sup> Respondent is a former employee of Stanbic Bank Kenya Limited and during the pendency of her employment, she was a member of the Stanbic Bank Kenya Limited Staff Pension and Life Assurance Scheme which was established by her then employer. On July 1, 2003 she wrote to the Trustees applying for her pension benefits and the Trustees paid her Kes 1,341,427/- representing the total cash surrender value payable to her under the scheme.
40. Being dissatisfied with the amount, she instructed an advocate who sent a demand letter dated September 15, 2004 to the Trustees which later led to the institution of a suit before the High Court as Civil Case No. 983 of 2004, Jimmy R. Kavilu & 16 others v Stanbic Bank Limited Kenya & 7 others in which she was the 2<sup>nd</sup> Plaintiff. The Applicant raised a preliminary objection challenging the court's jurisdiction but the objection was dismissed with the High Court asserting its jurisdiction *vide* a ruling dated 23<sup>rd</sup> May, 2008. This decision was never appealed by the Applicant and following the establishment of the Employment and Labour Relations Court, the matter was administratively transferred to the Employment Court as Cause No. 2003 of 2015, Jimmy R. Kavilu & 16 others v Stanbic Bank Kenya Limited & 7 others where the Applicant again raised a preliminary objection on the court's jurisdiction and the court *vide* a ruling dated 4<sup>th</sup> February, 2019 directed that the claim be referred to the Retirement Benefits Authority (RBA), the Interested Party herein. Therefore, the referral of the matter to RBA was as a result of a court directive and the Applicant is misleading the court by alleging that the claim was brought 17 years after the cause of action.
41. The CEO of the Interested Party took almost an entire year to render a decision *vide* a letter dated December 1, 2020 and the 2<sup>nd</sup> Respondent appealed the said decision before the Appeals Tribunal, the 1<sup>st</sup> Respondent herein, where the Applicant once again raised a preliminary objection that the appeal was filed out of time and in any event, the issues raised were *res judicata*. The Tribunal herein dismissed the objection *vide* its decision of 6<sup>th</sup> September, 2021 finding that the 2<sup>nd</sup> Respondent should be granted an opportunity to present her case before the Tribunal after her quest in various courts for the last 18 years. The Applicant being dissatisfied with the said decision filed the instant application.
42. Accordingly, she urged that the legal principle of *nemo debet bis vexari* will be violated if this court reviews that decision as she will be required to spend time and resources repeating the same submissions and arguments which were made in the proceedings before the 1<sup>st</sup> Respondent. She also averred that she is old and has been pursuing justice for more than 17 years and justice delayed is justice denied. Further, the actions of the Applicant to raise objections when the matter is set down for substantive hearing has curtailed her constitutional right under article 50 of the Constitution and it is only in the interest of justice that the application be dismissed.

## Submissions

43. Ms. Nyiha Mukoma & Co. Advocates on record for 2<sup>nd</sup> Respondent filed written submissions dated February 1, 2022.



44. It is contended that the 2<sup>nd</sup> Respondent filed the claim before the RBA as a result of the directions disused by Justice Maureen Onyango in her ruling dated December 4, 2019. The CEO of the RBA made a decision on the December 1, 2020 dismissing the 2<sup>nd</sup> Respondent's complaint.
45. Aggrieved by the said decision, the 2<sup>nd</sup> Respondent filed a Memorandum of Appeal dated 13<sup>th</sup> January, 2021 and the said memorandum was amended on 23<sup>rd</sup> March 2021 on directions of the Tribunal only for purposes of joining the Interested Party as a Respondent in the appeal. The applicant herein raised a preliminary objection to the appeal based on the doctrine of res judicata and alleged filing of the appeal out of time. This preliminary objection was dismissed. This dismissal gave rise to the present application before the court.
46. Counsel submits that the instant application is an invite to the court to sit on appeal on the merits of the preliminary objection and substitute the decision of the Tribunal with the prayers sought. It is an appeal clothed as a judicial review application.
47. It is submitted that the 1<sup>st</sup> Respondent exercised discretion and dismissed the applicant's preliminary objection and this court ought not to interfere with the Tribunal's discretion unless it is shown that the discretion was exercised unfairly, unprocedurally and in excess of jurisdiction. Reference was made to the decision in *Republic v Rodgers A. Tindi & 3 others ex parte Jonathan Chacha Weche & another* [2021] eKLR.
48. Counsel argues that the clearest indication that the instant application is an appeal is found in prayer 6 which seeks to have the court allow the applicant's preliminary objection dated February 9, 2021 before the 1<sup>st</sup> respondent and dismiss with costs the 2<sup>nd</sup> Respondent's amended memorandum of appeal dated March 23, 2021 before the 1<sup>st</sup> respondent. It is urged that clearly this is a matter for a substantive appeal rather than a judicial review process. Further, that the prayers sought herein are alien to the orders contemplated by section 11(1) of the *Fair Administrative Action Act* under which the application is brought.
49. On the question whether the Appellant's complain and subsequent appeal are *res judicata*, it is submitted that contrary to the applicant's assertion, besides the issue of the accrual factor, the 2<sup>nd</sup> Respondent in its complaint before the interested party included 2 other issues and the CEO of the interested party only dealt with the 1<sup>st</sup> issue in the decision appealed from while totally disregarding the other issues raised in the complaint. The two other issues which were unaddressed by the CEO are:
- a) An explanation of the calculations used to arrive at the lump sum amount paid to the Appellant on 23<sup>rd</sup> July, 2003 as it is not clear from the withdrawal benefits statement dated 30<sup>th</sup> April, 2002.
  - b) A statement of the employer's contribution from the date the Appellant joined the scheme to the date she left employment.
50. Counsel submits that Majanja, J, did not determine the issue of pension accrual factor with finality in *Republic v Retirement Benefits Appeals Tribunal & another ex parte Edwin Ngesa Nyamboro & 16 others* [2013] eKLR. The Judge was not sitting on appeal on the decision of the Tribunal and it is urged therefore that there is no way one can conclude that the High Court determined the issue of the pension factor with finality within a judicial review application.
51. Submitting on the issue whether the memorandum of appeal was filed out of time, counsel submits that rule 12 of the *Retirement Benefits (Tribunal) Rules 2000* allows the Tribunal discretion to adopt



- Civil Procedure Rule which it has done in the instant suit, concerning the computation of time between 21<sup>st</sup> day of December and 13<sup>th</sup> January of the following year.
52. On the question whether the applicant's complaint before the RBA was time barred, it is urged that the applicant herein never raised the issue of limitation in its response dated February 28, 2020 to the 2<sup>nd</sup> Respondent's complaint before the Interested Party. It could, therefore, not successfully raise it as a preliminary objection to the appeal before the 1<sup>st</sup> Respondent.
53. It is submitted that the matter was filed before the High Court within 2 years of the cause of action which arose in July 2003. The matter was filed in September, 2004 as court Case No. 983 of 2004. The applicant herein raised a preliminary objection on jurisdiction of the High Court. In a ruling dated May 23, 2008, Nambuye J (as she then was) asserted jurisdiction and dismissed the objection. The applicant never appealed this decision. It is urged, then that the applicant herein is estopped from alleging that the 2<sup>nd</sup> Respondent has been litigating before the wrong forum all along. Reliance was placed on the supreme Court decision in Mawathe Julius Musili v IEBC & another [2018] eKLR.
54. It is urged that the 2<sup>nd</sup> Respondent has been litigating in the right forum and Section 20 of the Limitation of Actions Act should not therefore apply to the current suit before the RBA Tribunal given that the 2<sup>nd</sup> Respondent filed her case before the High Court within 6 years of the Cause of Action arising and her being in court since 2004.
55. Counsel submits that the matter was referred to the Retirement Benefits mechanism by Onyango J, and it is incorrect for the applicant to maintain that the only case referred to the RBA mechanism was that of Jimmy Kavilu. Counsel submits that the order by Onyango J referring the matter to the RBA mechanism affected all the other plaintiffs since they were litigating under the same title with respect to retirement benefits. It is also submitted that the applicant herein acknowledged that the ELRC referred the case to the RBA through its ruling dated February 4, 2019 as seen in the applicant's response letter dated February 28, 2020 addressed to the Interested Party.
56. On the question whether the ELRC could refer a case in which it had no jurisdiction in the first place, it is submitted that the Supreme Court in Albert Chaurembo Mumba & 7 others v Maurice Munyao & 14 others [2019] eKLR directed the remission of the dispute to the RBA mechanism after finding that neither the High Court nor the ELRC had jurisdiction in the matter. The Supreme Court dismissed the Appeal in which it clearly had no jurisdiction since the RBA mechanism had not been involved in the first place and remitted the matter to the RBA. Counsel opines that, following this decision, where a superior court lacks jurisdiction, it may remit a matter to the properly mandated authority or judicial forum.
57. The allegations of bias made by the applicant are denied. It is urged that bias must be particularised and not merely alleged in broad terms. Mere citation of music in no way constitutes a particular bias. The music did not constitute the reason for the decision.
58. On the question whether the 1<sup>st</sup> Respondent dealt with unpleaded issues, counsel submits that the 2<sup>nd</sup> respondent was never afforded a chance to prove fraud since the applicant has never allowed the case to be heard on merit. The issue of concealment, fraud and non-disclosure of material facts had also been pleaded in both the complaint before the interested party and in the appeal before the 1<sup>st</sup> respondent.

#### **Applicant's rejoinder submissions:**

59. In rejoinder to the submissions by the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent, the applicant in rejoinder submissions states that the scope of judicial review post the 2010 Constitution includes merit review. For this proposition, the case of Felix Kiprono Matagei v Attorney General; Law Society of



*Kenya (Amicus Curiae)* [2021] eKLR is cited together the Supreme Court decision in *Communication Commission of Kenya v Roy Media Services & 5 others*.

60. It is urged that in the *Edwin Ngesa Case*, the judicial review court upheld the decision of the RBA and the Tribunal and therefore the accrual factor question was settled since at paragraph 16 of its judgment the court rightly found that there was no error in the Tribunal's decision.
61. It is submitted that the appeal was filed out of time. Such an appeal is void ab initio and cannot be remedied by seeking an extension of time. In support of that proposition, the Supreme Court's decision in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* [2014] eKLR is cited.
62. On the issue of a superior court's power to refer a matter to the proper forum, counsel urges that the case of *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* cited by the 2<sup>nd</sup> Respondent's counsel is distinguishable from the present case as follows:

The court was called upon to determine the question on whether a dispute relating to amendment of the definition of pensionable emoluments could be referred to the CEO for review when it was the same Authority that approved implementation of the new definition.

- a) The Appellants had approached the High Court on the basis of a perceived conflict of interest on the part of the CEO of the Retirement Benefits Authority.
- b) The court found that the respondents should have, in this case, sought review before the CEO where the issue of conflict of interest would have been canvassed, a decision made by the CEO and an appeal preferred in any event on that issue to the Retirement Benefits Appeals Tribunal.
- c) The Supreme Court gave an order remitting the matter for adjudication before the right forum, the Retirement Benefits Authority.

#### **Analysis and Determination:**

63. The common ground in this matter is that the 2<sup>nd</sup> Respondent has been in the corridors of justice in a long journey that started with the filing in the High Court of Civil Case no. 983 of 2004, *Jimmy R. Kavilu & 16 others v Stanbic Bank Kenya Limited & 7 others*. In a preliminary objection on jurisdiction taken by the applicant herein, the High Court (Nambuye J as she then was) dismissed the objection and made a finding that the court had jurisdiction in the matter. The case was later to find its way to the Employment and Labour Relations Court (ELRC) where the matter was transferred administratively and registered as ELRC cause no. 2003 of 2015.
64. Following yet another preliminary objection by the applicant on jurisdiction, on the 4<sup>th</sup> February, 2019 M. Onyango J ordered that the claim for retirement benefits be referred to the Retirement Benefits Authority (RBA). The claim found its way to the RBA as a result of the directions by the Judge as a complaint filed on December 19, 2019. The CEO of the RBA would later dismiss the complaint in a decision contained in a letter dated December 1, 2020 for want of merit.
65. The 2<sup>nd</sup> Respondent herein was aggrieved by that decision giving rise to an appeal before the Retirement Benefits Appeals Tribunal filed on January 13, 2021. The appeal was met with a preliminary objection by the applicant herein which objection was premised on grounds that the appeal was filed out of time and the issues raised therein were res judicata. In a ruling dated September 6, 2021, the preliminary objection was dismissed.
66. The applicant has approached this court by way of judicial review challenging the dismissal of the preliminary objection.



67. Gleaned from the application, the supporting grounds and affidavit, the responses and the submissions on record, the issues for determination crystallize into the following:
1. What are the applicable legal principals?
  2. Whether the applicant has laid sufficient grounds for the Grant of orders sought.
  3. Who bears the costs of this application?

### **The applicable Legal Principles**

68. The advent of the *Constitution of Kenya*, 2010, and specifically the proviso in article 47 gave judicial review constitutional underpinning The article provides:

“47. Fair administrative action

(1) very person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

- (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
- (b) promote efficient administration”

69. Judicial review remains, in my view, a special jurisdiction even with constitutional underpinning. The underpinning enriches and adds flexibility in the application of judicial review remedies but takes nothing away from the traditional scope of judicial review jurisdiction of this court in which the court in its supervisory powers over administrative bodies and judicial and quasi-judicial entities ought not to exercise an appellate jurisdiction over the acts or decisions of such bodies or entities.

70. As illuminated in the decisions in *Judicial Service Commission & another v Lucy Muthoni Njora* [2021] eKLR and *Communication commission of Kenya v Royal Media Services & 5 others* [2014] eKLR, decisions of the Court of Appeal and Supreme Court respectively, merit review is permissible in judicial review to certain extents.

71. The Court of Appeal while relying on the decision of the Supreme Court in *Communication Commission of Kenya v Royal Media Services & 5 others* [2014] eKLR held:

“To my mind even fealty to the traditional ‘process-only’ approach to judicial review must involve a measure of merit analysis. How would a court determine whether an employer acted reasonably and fairly ‘in the circumstances of the case’, without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the bond or range of reasonable responses? I think that it would be unrealistic for a court to engage in a dry and formalistic approach, steeped in process alone, while eschewing a measure of merit examination. Such merit review is a sine qua non of meaningful engagement with the question of reasonableness and fairness as the antidote to the arbitrary, capricious or illegal conduct of authorities, that invite judicial review in the first place. Judicial review as an area of



law is not static and its parameters have never been cast in stone. Thus, in the common law jurisdictions, there have been major developments in the field, especially in the last four decades or so. In the United States, for instance, there has been a decisive shift, with the Supreme Court there seeming to impose a heightened standard of judicial review that involves more judicial scrutiny of administrative action through "a searching and careful" engagement. This has been recognized as the "hard look doctrine". It is much less deferential to the decision maker as formerly encapsulated in the process-only approach".

72. At the centre of the dispute herein is the decision of the Tribunal dismissing the applicant's preliminary objection which was based on grounds that the appeal was filed out of time and that the issue of pension accrual factor has in the past been resolved by the CEO, RBA. The Retirement Benefits Appeals Tribunal. In an elaborate reasoned ruling dated 6<sup>th</sup> September, 2021 the Tribunal considered all the issues raised and made a determination dismissing the preliminary objection.
73. Can this court exercising its judicial review jurisdiction grant the declaratory orders, the order of certiorari and an order allowing the preliminary objection dated 9<sup>th</sup> February, 2021 and the dismissal of the Memorandum of Appeal dated 23<sup>rd</sup> March 2021 filed by the 2<sup>nd</sup> Respondent be dismissed with costs?
74. Section 49 gives the 1<sup>st</sup> Respondent powers as follows:
- (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.
  - (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 a 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.
  - (4) The Tribunal shall have power to award the costs of any proceedings before it and to direct that costs shall be paid in accordance with any scale prescribed for suits in the High Court or to award a specific sum as costs.
  - (5) All summons, notices or other documents issued under the hand of the chairman of the Tribunal shall be deemed to be issued by the Tribunal.
  - (6) Any interested party may be represented before the Tribunal by an advocate or by any other person whom the Tribunal may, in its discretion, admit to be heard on behalf of the party"
75. In dismissing the Preliminary Objection, this is the power the Tribunal exercised and which is now challenged under the judicial review application herein. A look at the scope of judicial review as seen from the screen of precedent is necessary at this stage. In *Republic v Retirement Benefits Appeals Tribunal & another ex-Parte Edwin Ngesa Nyamoro & 16 others* [2013] eKLR Majanja J in his decision quoted by the applicant as one where the issue of accrual factor was determined with finality stated as follows:

"The scope of judicial review was aptly summarised by Githua J., in *Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited* Nairobi HC Misc JR No



157 of 2012[2012]eKLR where she stated; “It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates” (See Republic v Kenya National Examinations Council ex parte Geoffrey Gathenji and 9 others Civil Appeal No. 266 of 1996).

At paragraph 15 the judge stated;

“15. The grounds upon which the applicants’ attack the Tribunal’s decision, which I have set out at paragraph 9 above, are in essence grounds of appeal seeking to review the merits of the decision. The applicants require the court to reconsider all the evidence and decide whether the Tribunal came to the correct conclusions. The issue before the Authority and the Tribunal was the applicable factor, whether 1/60 or 1/16, used in calculating the retirement dues. The obligation of the Scheme to the beneficiaries flows from the Trust Deed and the rules and it is apparent from the evidence that the Authority in investigating the applicant’s complaints scrutinised the relevant documentation to determine whether the proper factor was used. Both the Authority and the Tribunal considered these matters and came to a decision that they were entitled to”.

76. In Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited & another (Interested Party) Ex parte Kenya Power and Lighting Company Limited [2019] eKLR Mativo J while relying in the decision in Paul Kiplagat Birgen & 25 others v Interim Independent Electoral Commission & 2 others {2011} eKLR held as follows...

“A Judicial Review court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the body. Where a body is granted wide decision-making powers with a number of options or variables, a judicial review court may not interfere unless it is clear that the choice preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, a Judicial Review court may not interfere only because it favours a different option within the range”.

77. In Municipal Council of Mombasa v Republic & another [2002] eKLR the Court of Appeal expressed itself as follows:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as



a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was sufficient evidence to support the decision -and that, as we have said, is not the province of judicial review”

78. Korir J, in *Republic v Retirement Benefits Appeals Tribunal & 5 others ex-parte Kenya Airports Authority Staff Superannuation Scheme* [2015] eKLR the court stated;

“The 1<sup>st</sup> Respondent therefore addressed the *Limitation of Actions Act* before reaching its decision. I did not get the opportunity of reading the 1<sup>st</sup> Respondent's decision on the issue. It suffices to say that the 1<sup>st</sup> Respondent must have concluded that its decision was not statute barred and that is why it went ahead to decide in favour of the interested parties. The 1<sup>st</sup> Respondent may have reached the wrong decision on the issue of limitation of the interested parties' claim but that cannot be equated to unreasonableness. Those given power to make decisions are entitled to reach a wrong decision. This finding will apply to question of the award of interest by the 1<sup>st</sup> Respondent.

My decision is fortified by the judgement of the Court of Appeal in *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others* [2012] eKLR in which it was stated that:

“Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter.”

79. Away from the traditional scope of judicial review as shown in the above authorities, the ground has somewhat shifted with the advent of the new Constitution and some elements of merit review are now permissible in judicial review. Strictly speaking, even in the tradition common law scope of judicial review, the court would certainly have to do some analysis of the impugned decision or administrative action to determine if same is tainted with illegality, unreasonableness or impropriety thus engaging in some degree of merit review.

80. To what extent then is merit review permissible in the new approach? The Court of Appeal in *Judicial Service Commission & another v Njora* (Civil Appeal 486 of 2019) [2021] KECA 366 (KLR) (7 May 2021) stated:

“In our own jurisdiction, judicial review has taken the same trajectory in recent years, spurred in large measure by the *Constitution of Kenya, 2010*. It changed the fundamental underpinnings of judicial review from the common law as codified in the *Law Reform Act*, to its article 22(3) (f), which recognizes judicial review as one of the appropriate reliefs available. This is bolstered by article 47(1), which decrees the right to fair administrative action, given further effect by the *Fair Administrative Action Act* which, at section 7(2), sets out an expansive list of circumstances in which a court may review an administrative action or decision.

48. The superior courts of this country have spoken with near-unanimity that the current constitutional and statutory landscape calls for a more robust application of the relief of



judicial review to include, in appropriate cases, a merit review of the impugned decision. See, for instance, *Communication Commission of Kenya v Royal Media Services & 5 others* [2014] eKLR by the Supreme Court, this Court's decisions in *Suchan Investment Ltd v Ministry of Natural Heritage & Culture & 3 others* [2016]eKLR and *Child Welfare Society Of Kenya v Republic & 2 others ex parte Child In* [2017]eKLR and the High Court's. in *Republic v Commissioner Of Customs Services Ex parte Imperial Bank Ltd*[2015] e KLR (per Odunga, J.) They all speak to the unmistakable sea change and approach, stated thus by this Court in *Super Nova Properties Ltd & anor v District Land Registrar Mombasa & 2 Others, Kenya M\_anti Corruption Commission & 2 others (interested Parties)*[2018] eKLR”

81. As illuminated in the decisions in *Judicial Service Commission & another v Lucy Muthoni Njora* [2021] eKLR and *Communication commission of Kenya v Royal Media Services & 5 others* [2014] eKLR, decisions of the Court of Appeal and Supreme Court respectively, merit review is permissible in judicial review to certain extents.
82. I hasten to add that the shift in the approach to judicial review to one where merit review is permissible does not elevate the judicial review jurisdiction to an appellate one. Neither is it a carte blanche for the usurpation of the authority and powers of tribunals and other administrative bodies by the court.
83. I have carefully considered the originating Notice of Motion herein. The grounds raised and the prayers sought are clearly couched as an appeal against the decision of the Tribunal. Its mainstay is the Applicant's position that the Tribunal erred in various respects. The plea before the court is beyond the province of judicial review. I echo the words of the Court of Appeal in *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others* [2012] eKLR in which it was stated that:

'Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter.' (emphasis added).
84. A Look at the raft of prayers sought and the elaborate submissions made in support thereof clearly demonstrates that the substance of the application herein is an appeal that has found its way to the judicial review court through the back door. Where the intention is that appeals be available to aggrieved parties, Parliament has not shied away from enacting the necessary legislation to that end. Judicial review cannot be a substitute to an appellate process.
85. Prayer 6 in the Originating Motion is a clear pointer that the application herein is an appeal couched as a judicial review application. The prayer reads; “An order be issued allowing the Applicant's preliminary objection dated February 9, 2021 and the Amended Memorandum of Appeal dated March 23, 2021 filed by the 2<sup>nd</sup> respondent be dismissed with costs”. This prayer calls for the court's substitution of the Tribunal's decision with its own, a remedy available on appeal but not in judicial review. As held in *Judicial Service Commission v Lucy Muthoni Njora*(supra) current constitutional and statutory landscape calls for a more robust application of the relief of judicial review to include, in appropriate cases, a merit review of the impugned decision. The case herein is not an appropriate one since, as indicated above, it is a clear Appeal against the decision of the Tribunal.



86. Having so found, the import is that am divested of jurisdiction to entertain the ‘appeal’ and I must therefore resist the temptation to sit on appeal of the Tribunal’s decision as, having been moved under judicial review in the current application, such a venture would have no support in law.
87. From the foregoing and for reasons above stated, I make a finding that the applicant’s originating motion dated October 5, 2021 is without merit. I make the following orders;
1. The originating summons dated October 5, 2021 is hereby dismissed.
  - 2) The 1<sup>st</sup> and 2<sup>nd</sup> respondents shall have costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JUNE 2022.

.....

A.K. NDUNGU

JUDGE

