



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A.C. Mrima, J.)

CONSTITUTIONAL PETITION NO. 560 OF 2017

BLASIO ONDIEK.....PETITIONER

VERSUS

- 1. RETIREMENT BENEFITS APPEALS TRIBUNAL**
- 2. THE BOARD OF TRUSTEES TELEPOSTA PENSION SCHEME**
- 3. BONIFACE MARIGA & 948 OTHERS.....RESPONDENTS**

AND

RETIREMENT BENEFITS AUTHORITY.....INTERESTED PARTY

JUDGMENT

Introduction:

1. The Petitioner herein, *Blasio Ondieki*, is a Pensioner of the *Teleposta Pension Scheme and Provident Fund* (hereinafter '**the Scheme**'). He is also the Chairperson of Postel Pensioners Association.
2. He is aggrieved that the failure of the 1st Respondent herein, *Retirement Benefits Appeals Tribunal*, (hereinafter '**The Tribunal**' or '**the 1st Respondent**'), to involve him and other Pensioners in the decision to pay *Boniface Mariga & 948 Others*, the 3rd to 951st Respondents herein, Kshs.7.2 Billion violated their constitutional right to natural justice under Article 47, right to property under Article 40 and the right to equality and non-discrimination guaranteed under Article 27.

The Petition:

3. A brief recount of the of events culminating into the foregoing dispute and the Petition will suffice.
4. The 3rd to 951st Respondents herein are a group of pensioners. They are former employees of Telkom Kenya Limited and members of the Scheme.
5. They lodged complaint before *Retirement Benefits Authority* (hereinafter referred to as '**the RBA**' or '**the Interested Party**') claiming that in the Year 2010 and 2011, their former employer (Telkom Kenya Limited) caused an actuarial calculation to be done on the *Net Accrued Pension* payable to them upon leaving service. The said calculation revealed that the Scheme had incorrectly computed amounts due to them and as a result, were underpaid contrary to the Trust Deed and Rules of the Scheme.
6. They contended that the under payment was illegal for reasons *inter-alia* that the Scheme failed to disclose the applicable factors and methods of computation of pension benefits, miscalculated the early retirement Benefits and Nominal Retirement Benefits and failed to publish the Actuarial factors that would be used.

7. Upon considering the complaint, the RBA was of the finding that the 3rd to 951st Respondents' benefits had been paid out correctly and in accordance with the Scheme's Trust Deed and Rules and prevailing legislation. It returned the conclusion that, save for two members, the rest were paid their rightful dues. Accordingly, it dismissed the complaint.
8. Aggrieved, the 3rd to 951st Respondents appealed the RBA's decision before the Tribunal in *Tribunal Civil Appeal No. 7 of 2011*. Their primary complaint was that RBA erred in arriving at the decision that they were not underpaid. They prayed *inter-alia* that RBA's decision be set aside and be substituted with an order directing for payments of their benefits as computed by Independent Actuarial Consultants.
9. The Tribunal heard the dispute and on 13th February 2017, allowed the appeal. The Tribunal was of the finding that the 3rd to 951st Respondents had been underpaid. It directed *the Board of Trustees Teleposta Pension scheme*, 2nd Respondent herein, to pay a sum of 7.2 billion to the 3rd to 951st Respondents being unpaid pension benefits.
10. The foregoing turn of events instigated the instant Petition. On 7th November 2017, The Petitioner herein filed this Petition contemporaneously with a Notice of Motion application under certificate of urgency. In the latter, he sought conservatory orders against the implementation of the *Tribunal's* decision.
11. The Petition is supported by the Affidavit of *Peter K. Rotich*, an Administrator of the Scheme, sworn on 18th November, 2018. It is also supported by the Supplementary Affidavit of the Petitioner sworn on 17th September, 2020 and the Affidavit of Sandeep Raichura, the Chief Executive Officer of *Zamara Actuaries*, sworn on 9th July, 2020.
12. The Petitioner pleaded that the Respondents' actions resulted in violation of his right and that of other 10,000 persons who were pensioners, dependants and beneficiaries of the Scheme's pensioners' *right to equality and freedom* protected by Article 27, *right to property guaranteed under Article 40*, *right to due process and fair administrative action under Article 47* and the right to *access to justice and the right to fair hearing under Article 50*.
13. The Petitioner urged that as members of the Scheme, they had ownership rights, stake and interest in its properties in which they delegated to the trustees to exercise fiduciary duty on their behalf.
14. He posited, therefore, that the decision by 1st Respondent awarding 3rd to 951st Respondents Kshs. 7.2 Billion would prejudice operations of the Scheme and reduce its ability to sustain pensions for all the members who drew their monthly pensions therefrom.
15. The Petitioner implored the Court that, as a stakeholder in the Scheme, his right and that of other pensioners to natural justice was violated. That the 1st Respondent's decision in *Tribunal Civil Appeal No. 7 of 2011* ought not to have been made without their involvement.
16. He further posited that the Tribunal's decision was discriminatory as it restricted his enjoyment of the right to property as guaranteed under Article 40 of the Constitution.
17. The Petitioner prayed for the following orders: -
 - a. *A declaration that the judgment and Order of the Tribunal in Tribunal Civil Appeal No. 7 of 2011 on 13th February 2017 is unconstitutional and therefore null and void.*
 - b. *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.*
 - c. *A declaration that the decision of the Tribunal delivered on 13th February 2017 is unconstitutional in so far as it is discriminatory in breach of Article 27, and failed the test of fair administrative action in breach of Article 47 and as far as it purports to restrict the extent of enjoyment of the Petitioners right to property as enshrined under article 40 of the Constitution of Kenya;*
 - d. *A declaration that any decision made by the Tribunal that may lead to depletion of the property of the scheme is a violation of the Petitioner's right to property as per Article 40, a fair administrative process as enshrined under Article 47 of the Constitution of Kenya.*
 - e. *A conservatory Order restraining the Respondents either by each one of them or jointly or by persons claiming through them be strictly enjoined by way of a conservatory order and be restrained whether by themselves or by their servants, agents or otherwise howsoever from implementation and enforcement of the Judgment and order made by the Respondent in the Tribunal Civil Appeal No. 17 of 2011 on the 13th February 2017.*
 - f. *A judicial Review Order of Certiorari quashing the decision of the 2nd Respondent in the Tribunal Civil Appeal No. 7 of 2011 on the 13th February 2017.*
 - g. *Such other and/or further relief as this Court may deem fit to grant.*
 - h. *An Order of Costs to be provided for.*

18. Directions on the hearing of the Petition were taken on 26th April, 2021. *Mr. Gorge Gilbert*, Counsel appeared for the Petitioner, whereas *Mr. Rabut* was Counsel for the 2nd Respondent while *Miss Merich* was for the 3rd to 951st Respondents.

2nd Respondent in support of the Petition:

19. The 2nd Respondent supported the Petition. Through written submissions filed on 27th January 2020, it submitted that the Scheme contested the judgment of the Tribunal by filing Judicial Review proceedings before the Employment and Labour Relations Court in *ELRC No. 28 of 2018 (Formerly JR No. 141 of 2017, R. -vs- Retirement Benefits Tribunal & Others Ex-parte Teleposta Pension Scheme)*. It claimed that it sought an order of prohibition and *Certiorari* to prevent implementation of the judgment and to quash it on the grounds that it was *ultra vires* the powers of the Tribunal. The 2nd Respondent submitted that the proceedings were ongoing in the Employment and Labour Relations Court and the Court of Appeal.

20. The 2nd Respondent submitted that the Tribunal's actions infringed on its rights and that of the Petitioner's under Article 47 of the Constitution for being unreasonable, *ultra-vires*, illegal, irrational and tainted with procedural impropriety.

21. As regards the limb of illegality, the 2nd Respondent submitted that the Tribunal's judgment contravened clause 10(d), (g) and 15(b) of the Trust Deed and Rules as well as clause 8(d), (g) and 13(b) of the 2004 Amended Trust Deed and Rules which required actuarial cash equivalents of members be computed from age of 55 and not 50 years. It further contended that the judgment also failed to consider that the members who retired before the age of 55 did not have an automatic right to receive an unreduced pension. It was their claim further that the Tribunal disregarded rule 13(b) of the Scheme Rule which formed the basis for cash equivalents payment for deferred pension dues and the basis upon which such payments were discounted by the 2nd Respondent from the age of 55 years.

22. To buttress the foregoing illegality on the part of the Tribunal, the 2nd Respondent placed reliance in *Kenya Ports Authority -vs- Industrial Court of Kenya & 2 Others*, and *R -vs- Retirement Benefits Appeals Tribunal & 5 Others Ex-Parte Willy Jeremiah Ombese (2014) eKLR*.

23. On the limb of unreasonableness, the 2nd Respondent stated that The Tribunal computed the benefits as commencing from age 50 but instead contradicted that finding by directing the Scheme to pay the 3rd to 951st Respondents pension benefits from age 50.

24. It was further submitted that the Tribunal considered the funding of the Scheme in determining the pension dues payable to the 3rd to 951st Respondents which according to the 2nd Respondent was an irrelevant factor as it could not confer a benefit or entitlement to a member. It further stated that the Tribunal failed to consider the oral evidence and written submissions made on its behalf. Reliance was placed on the decision in *R -vs- Public Procurement Administrative Review Board & 2 Others ex- parte Rongo University (2018) eKLR*.

25. The 2nd Respondent further submitted that the Tribunal's decision was *ultra-vires* for permitting new claimants who were not part of the original complaint file before the RBA. It also complained that it raised a preliminary objection to that end, but the objection was not considered.

26. It was further submitted that the Tribunal was biased and did not meet the required standard of procedural propriety as required under Article 47 of the Constitution for failing to accord the 2nd Respondent a hearing prior to its decision.

27. As regards violation of the right to property and right against discrimination, the 2nd Respondent largely reiterated the Petitioner's case. It relied on the decision in *Henry Kamau Ngare -vs- Teachers Service Commission & Another (2016) eKLR* to buttress the right to property and the one in *Centre for Rights Education Awareness (CREAW) & 7 Others -vs- Attorney General (2011) eKLR* on right to equality.

28. In the end, the 2nd Respondent urged that the Petition was merited and ought to be allowed. It posited that unless the Tribunal's judgment was set aside, the Petitioner's constitutional right to property, equality, and fair administrative action would be violated.

The Responses:

The 1st Respondent's case:

29. The 1st Respondent opposed the Petition through Grounds of Opposition filed in Court on 15th October, 2019. The Tribunal claimed that pursuant to Sections 48 and 49 of the *Retirement Benefits Act No. 3 of 1997* (hereinafter '**the RBA Act**') it was well within the law to hear and determine Tribunal Civil Appeal No.7 of 2011.

30. It asserted that anyone aggrieved by its decision ought to lodge an appeal to the High Court as provided for under Section 50 of the RBA Act and as such, the Petition is pre-emptive. It is founded on the assumption that the enforcement of its decision will deplete the Scheme's funds.

31. It further claimed that the Petition was omnibus, imprecise and lacked sufficient detail as required by the principles set in *Anarita Karimi Njeru (1976-1980) KLR 1272*. It posited that there was no constitutional dispute for Court's determination as it failed to demonstrate the threatened violation.

32. The 1st Respondent prayed that the Petition be dismissed with costs.

The 3rd to 951st Respondents' case:

33. The 3rd Respondent to 951st Respondents (hereinafter referred to as '**the 3rd Respondent**') also opposed the Petition. They filed written submissions in response to the Petition and the Notice of Motion. They are dated 27th July, 2020. From the onset it submitted that the Petition is without merit, an abuse of Court process and a means to achieve ulterior motives.

34. It submitted that upon the Tribunal rendering its judgment, the 2nd Respondent instituted High Court Judicial Review No. 141 of 2017 where stay orders were granted against implementation of the Tribunal's decision. The said case was, however, transferred to The Employment and Labour Relations Court and it was registered as *ELRC Case No. 36 of 2018*. The matter is still pending before that Court.

35. The 3rd Respondent contended further that the 2nd Respondent went to the Court of Appeal contesting the transfer of the case to the ELRC. It is its submission that the appeal is pending determination. The 3rd Respondent submitted that the prayers sought in the Court of Appeal are similar to the ones as in the instant Petition.

36. The 3rd Respondent further submitted that the instant Petition is an abuse of Court process since the Chief Executive Officer of the 2nd Respondent is the one who swore the affidavit in support of the Petition in a bid to hoodwink the Court to rule in favour of the Petitioner. He submitted that the Petition was filed at the behest of the 2nd Respondent.

37. The 3rd Respondent submitted further that since the Petitioner's interests and that of the 2nd Respondent converge, the Petitioner cannot claim that his right to fair administrative action were violated by the Tribunal yet the 2nd Respondent participated in the proceedings at the Tribunal.

38. From the foregoing, the 3rd Respondent in relying on the Supreme Court in *Petition No. 3 of 2016 Albert Chaurembo Mumba & 7 Others -vs- Maurice Munyao & Others* submitted that the High Court has no jurisdiction to hear a Petition challenging the decision of the Tribunal.

39. To further buttress this Court's lack of jurisdiction, Court was referred to the decision in *Petition No. 44 of 2018 Anne Wangui Ngugi & Others -vs- Kenya Commercial Bank Pension Scheme*, where the Employment and Labour Relations Court relied on the Supreme Court's decision in *Albert Chaurembo Mumba & 7 Others -vs- Maurice Munyao & Others* (supra) in refusing to entertain a Petition.

40. In the end, the 3rd Respondent implored the Court to dismiss the Petition, for failing to meet the threshold set in *Anarita Karimi Njeru* case.

41. The Interested Party did not participate in the proceedings.

Issues for Determination:

42. Having carefully considered the Petition, the responses thereto, the parties' submissions and the decisions referred to, I find that the following issues arise for determination: -

- i. *Whether this Court has jurisdiction over the Petition;*
- ii. *Whether the proceedings and the judgment in Tribunal Civil Appeal No. 7 of 2011 violated the Petitioner's rights under Articles 27, 40 and 47 of the Constitution;*
- iii. *Remedies.*

Analysis and Determinations:

i. Whether this Court has jurisdiction over the Petition:

43. Jurisdiction is a challenge that must be addressed in the first instance. I previously dealt with its significance in *Petition E282 of 2020, David Ndiu & 4 others v Attorney General & 3 others; Kenya Human Rights Commission & 2 others (Intended Amicus Curiae) [2020] eKLR* where I made reference to the decisions of the Superior Courts on its centrality. I observed as follows: -

24. *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.

25. 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 cognizance 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 cognizance 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.

26. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. 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...

27. 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: -

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;

- 1)
- 2) *The jurisdiction either exists or does not ab initio ...*
- 3) *Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.*
- 4) *Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.*

28. On the centrality of jurisdiction, the Court of Appeal in *Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others* (2013) eKLR stated that: -

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

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.

31. **And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR, the Court of Appeal further stated: -**

[44] a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court..

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.*

44. The jurisdictional challenge before this Court was raised by the 3rd Respondent. It is that the judgment of the Tribunal cannot be challenged by way of a constitutional petition but by other ways as established under the law.

45. In order to establish whether this Court is vested with jurisdiction, the baseline is the Constitution and the relevant enabling legislation.

46. Section 5 of the RBA Act sets out the object and functions of the Act as under: -

5. Object and functions of the Authority

The object and functions of the Authority shall be to—

(a) regulate and supervise the establishment and management of retirement benefits schemes;

(b) protect the interests of members and sponsors of retirement benefits sector;

(ba) approve trustees' remuneration approved by members during the annual general meeting after every three years;

(c) promote the development of the retirement benefits sector;

(d) advise the Minister on the national policy to be followed with regard to retirement benefits schemes and to implement all Government policies relating thereto; and

(e) perform such other functions as are conferred on it by this Act or by any other written law.

47. A plain reading of the foregoing section indicates that the RBA Act tallies word for word with the longstanding dispute between the parties. I say so because the instant Petition deals with the management of the Scheme, protection of members, among other issues.

48. The RBA Act also sets out the hierarchy of adjudication of disputes. Where a Pensioner/Member of a scheme is aggrieved by an action of the Scheme, the first port of call is a request in writing by such person to the to the Chief Executive Officer of RBA. That is provided for in *Section 46* of the Act as follows: -

46. Appeals to the Chief Executive Officer

(1) Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established.

49. *Section 47* of the RBA Act establishes the Tribunal. It is the forum where a disgruntled member of a Scheme gets to appeal the decision of the RBA or the RBA's Chief Executive Officer. *Section 48* sets the jurisdiction of the Tribunal in the following terms;

(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.

50. As to where a party resorts to if not satisfied with the decision of the Tribunal, the RBA Act is silent. It is on this basis that the 3rd Respondent assert the jurisdictional challenge of this Petition. Concisely, the 3rd Respondent claim that the decision of the Tribunal cannot be challenged by way of a petition to the High Court.

51. The Supreme Court has, however, had occasion to deal with the issue of jurisdiction where there is a dispute involving Pensioners, Schemes, the RBA, the Tribunal and Trustees of Pension Schemes.

52. In Petition 3 of 2016 **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) -vs- **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, the Apex Court comprehensively addressed the forum which a Pensioner can ventilate grievances emanating from the Tribunal.

53. Before the Supreme Court were two pertinent issues. Firstly, the question whether the Court of Appeal was right in the finding that Employment and Labour Relations Court, pursuant to Articles 162(2)(a) and 162(3) of the Constitution as read with Section 12 of the Employment and Labour Relations Act was the Court conferred with jurisdiction to hear and determine disputes between pensioners and Trustees of a Pension Scheme. Secondly, was the issue whether Article 165(1) of the Constitution and Section 60 of the 1963 Constitution (repealed) conferred the High Court with original jurisdiction to hear disputes between Schemes, pensioners and its Trustees.

54. The Apex Court was of the finding that Employment and Labour Relations Court has no jurisdiction in disputes involving Pensioners, Trustees, Schemes and the RBA. The Court arrived at that finding upon the analysis as hereunder: -

[137] To give a prescriptive answer to the jurisdictional question, the first port of call is to determine the nature of the dispute. Whether in the circumstances of the case, it is a dispute contemplated to be adjudicated by the High Court under Article 165 of the Constitution or it revolves around those disputes reserved for resolution by the Employment and Labour Relations Court pursuant to Article 162(2) and Section 12 of the Employment and Labour Relations Court.

[138] At the risk of repetition, it is not in dispute that the controversy is between members, beneficiaries and dependants of a pension scheme on one hand and the Trustees of the Scheme on the other hand. What then is a pension scheme?

[139] The Law Dictionary defines a pension scheme as: A retirement plan offered by an employer. Funds come from both employee and employer. The employers' managers make sure the funds are in there upon retirement. They do this by investing in fixed income or equity securities. [Emphasis ours]. Miriam Webster Dictionary defines a pension scheme as: an arrangement made with an employer to pay money to an employee after retirement [Emphasis ours].

[140] The above comparative broad definitions leave no iota of doubt that at the core of a pension scheme is a relationship between an employer and an employee. It is apparent in this case that the savings to the Scheme were from the deductions of proceeds of the employment relationship between the respondents and the Authority.

[141] More so, according to the RBA Act, "Sponsor" is defined to mean "a person who establishes a scheme." In this case, the Sponsor is the Kenya Ports Authority which established the Kenya Ports Authority Pension Scheme and was the former employer of the respondents.

[142] An uncontested argument was made that the establishment of the Trustees and Trust Deed and Regulations made thereunder were as a result of a Collective Bargaining Agreement between the employees and the employer Kenya Ports Authority. The record before us contains an agreement titled "Agreement Between the Kenya Ports Authority and Dockworkers Union in respect of Unionisable Employees (The Collective Agreement)."

[145] On the other hand, section 2 of the Employment and Labour Relations Court Act defines the term an "employee" to mean a person employed for wages or a salary and includes an apprentice and indentured learner. The provision further defines "employer" to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. Thus, whereas a dispute between a Trustee and a beneficiary may well fall within an employment dispute, the meaning of a Pensioner is nowhere near the meaning of an employee neither can the scheme of organisation fit in the meaning of an employer.

[146] In our view, once a member leaves the employment of a Sponsor, by becoming a pensioner, there is no longer a relationship of employer-employee that exists between such a pensioner and the sponsor. The relationship that exists in that case becomes that of trustee and beneficiaries (members) of a trust and that relationship is governed by the Retirement Benefits Act, Trustee Act Cap 167 of the laws of Kenya and the general common law on the law of trusts. It is important to note that nowhere in the Employment and Labour Relations Court Act is there jurisdiction conferred on the Employment and Labour Relations court to resolve issues between trustees of a pension scheme and members of the scheme (pensioners).

55. Further to the foregoing, the Learned Supreme Court Judges agreed with the Court of Appeal in **Civil Appeal No. 236 of 2012 Kenya Ports Authority** where in interpreting Section 12(2) of the Employment and Labour Relations Court Act, the section that sets the categories of persons whom may present a case before the Employment and Labour Relations Court, as *employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose*, and observed as follows: -

[148] We do not see how a pensioner falls within the listed category of persons and parties that can make an application or institute proceedings before the court. From the foregoing it is thus clear that the Employment and Labour Relations Court had no jurisdiction to hear and determine a dispute that relates to trustees of a pension scheme and members of the scheme particularly where the said members are no longer employees of the Sponsor. Besides, the trust so established as a pension scheme retains autonomy from both the Sponsor and the employees hence its regulation by the Authority.

56. Deriving from the above, it is evident that the 3rd Respondent is right to the extent that the Employment and Labour Relations Court does not have jurisdiction over the matter. **However**, the same cannot be said of the High Court.

57. There are two reasons for such a finding. The first one is that the Supreme Court in the aforesaid case *Albert Chaurembo Mumba & 7 Others* (supra) did not deal with the High Court's supervisory jurisdiction over quasi-judicial bodies like the Tribunal which power is expressly conferred under Article 165(6) of the Constitution. The provision states as follows: -

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

58. In that case, therefore, whereas on one hand, the High Court may not exercise original or appellate jurisdiction over matters involving disputes between Pensioners, Trustees, Schemes, the RBA and the Tribunal, the High Court, on the other hand, has unqualified supervisory jurisdiction over judicial or quasi-judicial bodies save over a superior Court.

59. In other words, while a party to a dispute involving Pensioners, Trustees, Schemes, the RBA and the Tribunal is estopped from invoking the original or appellate jurisdiction of the High Court, such a party may approach the High Court with a request that the High Court exercises its supervisory jurisdiction over either a subordinate Court or a quasi-judicial body.

60. At this point in time, it is imperative to highlight on the Supreme Court's restriction of the High Court's jurisdiction the *Albert Chaurembo Mumba & 7 Others* case (supra). The reason why the apex Court decreed that the High Court did not have jurisdiction over the dispute was because the parties did not invoke the dispute settlement mechanism provided for under the Act, but instead moved directly to the High Court and requested the High Court to exercise original jurisdiction in the matter. The Supreme Court was clear that such an avenue

was unavailable to the parties and accordingly referred back the dispute to RBA for proper adjudication in line with the provisions of the RBA Act.

61. The Supreme Court observed as follows: -

[155] ...The RBA Act was enacted in the year 1997 and was in existence by the time the suit was filed. It is our view, as already stated earlier in this judgment that the RBA Act mechanism was applicable. We add that that mechanism falls within the constitutional ambit as stated in Article 165(5)(b) of the Constitution for which the High Court cannot usurp the jurisdiction of a specialized mechanism provided for by statute and the Constitution. In a nutshell, we conclude that the High Court whether under the repealed or new constitution does not have jurisdiction.

62. It is, hence, clear that the 3rd Respondent's understanding of the jurisdictional point taken by the apex Court over the High Court was a misdirection.

63. In the instant case, the parties subjected themselves under the dispute resolution mechanism in the RBA Act. The dispute was first heard by RBA and later an appeal was lodged before the Tribunal. In such a case, a party was at liberty to approach the High Court in its supervisory jurisdiction.

64. The second reason why the High Court may have jurisdiction over a dispute involving Pensioners, Trustees, Schemes, the RBA and the Tribunal is founded in instances where the doctrine of exhaustion does not apply.

65. This Court recently discussed the doctrine of exhaustion and its exception in **Nairobi Petition No. E406 of 2020 Renita Choda -versus- Kirit Kapur Rajput** (unreported). This is what I stated: -

64. The doctrine of exhaustion was recently dealt with in detail by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR. The Court stated as follows: -

*52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in **R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR**, where the Court opined thus:*

*42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in **Speaker of National Assembly v Karume [1992] KLR 21** in the following oft-repeated words:*

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

*This is **Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR**, where the Court of Appeal stated that:*

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

65. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

*59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In **R vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA)** (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:*

*What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the **Shikara Limited Case** (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values*

enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by *Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.*

62. In the instant case, the Petitioners allege violation of their fundamental rights. **Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.**

66. Where a party, therefore, demonstrates the inadequacy of audience before a forum created by a statute, or the lack of quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit or a party is able to show that the matter before the High Court '*...primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.*'

67. The case at hand reveals an attempt by the Petitioner to contest, in a broader perspective, the infringement of the right to natural justice under Article 47, right to property under Article 40 and the right to equality and non-discrimination guaranteed under Article 27 of the Constitution. It is not demonstrated that the claimed constitutional violations are mere "bootstraps" or the Petition is merely framed in Bill of Rights language as a pretext to gain entry to the Court. Where a question on the enforcement of fundamental rights or freedoms arises, that question can only be determined by the High Court under Article 165(3) of the Constitution.

68. In the end, this Court hereby find and holds that the High Court is vested with jurisdiction under Article 165(3) of the Constitution to deal with disputes involving Pensioners, Trustees, Schemes, the RBA and the Tribunal in instances where it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or the Petition is not merely framed in Bill of Rights language as a pretext to gain entry to the Court. The High Court can also exercise its supervisory jurisdiction under Article 165(6) of the Constitution over a subordinate Court or a quasi-judicial body.

69. The Court is, hence, properly seized of the matter and will now deal with the remainder of issues.

ii. Whether the proceedings and the judgment in Tribunal Civil Appeal No. 7 of 2011 violated the Petitioner's rights under Articles 27, 40 and 47 of the Constitution:

70. The Petitioner's contention of violation of various constitutional rights arises from his non-involvement in the proceedings before the Tribunal. It is from that basis that he asserts his right to property and non-discrimination were eventually violated.

71. As the Petitioner's claim hinges on whether Article 47 of the Constitution was adhered to, I will reproduce sub-articles (1), (2) and (3) thereof and as under: -

(1) *Every 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*

72. The legislation that was contemplated under Article 47(3) is the Fair Administrative Actions Act. No. 4 of 2015. Section 4 thereof provides that: -

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

(2) *Every person has the right to be given written reasons for any administrative action that is taken against him.*

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(4)

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (d) a statement of reasons pursuant to section 6;
- (e) notice of the right to legal representation, where applicable;
- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(5) The administrator shall accord the person against whom administrative action is taken an opportunity to-

- (a) attend proceedings, in person or in the company of an expert of his choice;
- (b) be heard;
- (c) cross-examine persons who give adverse evidence against him; and
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(6) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(7) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

73. Section 2 of the Fair Administrative Actions Act defines an 'administrative action' and an 'administrator' as follows: -

'administrative action' includes -

- (i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- (ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

'administrator' means 'a person who takes an administrative action or who makes an administrative decision'.

74. In **Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR** Court of Appeal addressed itself on Article 47 of the Constitution. The Court held that: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

75. The South African Constitutional Court in **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1** ring-fenced the importance of fair administrative action as a constitutional right. The Court while referring to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution stated as follows: -

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that

where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

76. The right was further discussed in **Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR**. The Court had the following to say:

25. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano* [39] the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.

These are: -

a. **Illegality** - Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.

b. **Fairness** - Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

c. **Irrationality and proportionality** - The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation**: -

If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...

77. In Petition 213 of 2019, **Lewis Oburu Owala & 2 others v Physiotherapy Council of Kenya; Charles Kiguoya (Interested Party)** [2021] eKLR yours truly referred to the Court of Appeal on the subject. I observed as follows: -

61. In **Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR** Court of Appeal addressed itself on the above. The Court held that: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

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78. From the foregoing, the 1st Respondent's actions in hearing and determining the appeal before it were administrative actions. I say so because the actions affected the legal rights and interests of the Petitioner. As such, the decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness. In so ascertaining, I will, albeit briefly, revert to the Act.

79. Section 2 of the Act defines a 'trustee' to mean 'a trustee of a scheme fund and includes a trust corporation.'

80. Section 40 of the Act sets out obligation of trustees and managers of a Scheme as follows: -

40. 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 jeopardise 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.

81. Among the evidence supplied by the Petitioner, is the 'Statement of Trustees' Responsibilities'. The statement was signed and approved by the Board of Trustees (that is the 2nd Respondent herein) on 28th September, 2017. In acknowledging their responsibilities, the statement partly reads: -

...The Kenya Retirement Benefits Act also requires the trustee to ensure that the fund maintains proper accounting records that are sufficient to show and explain the transactions of the fund and disclose, with reasonable accuracy, the financial position of the fund. The trustees are also responsible for safeguarding the assets of the fund and for taking reasonable steps for prevention and detection of fraud and error.

82. Having carefully considered the record what comes to the fore is that despite the fact that the 3rd to 951st Respondents and the Petitioner are members of the same Scheme, the Petitioner seeks to prevent the payment of Kshs. 7.2 Billion to the 3rd to 951st Respondents. That is the position held by the trustees all through from the proceedings before the RBA running to the Tribunal and beyond.

83. The RBA Act bestows upon the duty to manage and administer the Scheme unto the trustees. The Petitioner has not laid any complaint against the trustees towards their administration of the Scheme. Unfortunately, the Petitioner seeks to discharge the duties of the trustees through these proceedings. In addition, the Petitioner neither availed the proceedings before the RBA and the Tribunal to prove any illegality, unfairness and/or irrationality neither did he demonstrate how he may take over the duties of the trustees *vide* these proceedings. Infact, what the Petitioner and the 2nd Respondent are indeed engaged in is to challenge the merit or otherwise of the decision of the Tribunal before this Court, a jurisdiction which this Court is not vested with.

84. The upshot is that the Petitioner has failed to prove that his right under Article 47(1) of the Constitution was in any way infringed in the proceedings before the Tribunal.

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.

89. On Article 27 of the Constitution, the Petitioner has also failed to prove how the proceedings and the execution of judgment of the Tribunal offend the Petitioner's right against discrimination.

90. As I come to the end of this decision, I must state that the challenge raised by the Petitioner regarding the Petition's lack of precision is unfounded.

91. From the analysis of the facts as set out in the Petition, the Petitioner alludes to violation of Article 27, 40 and 47 of the Constitution. In paragraphs 38, 41, 43, 44, 45 and 46 of the Petition, the Petitioner elaborately and precisely demarcates constitutional violations and the manner in which they were violated. The Petition, therefore, stands the test in *Anarita Karimi Njeru's* case (supra).

92. Lastly, if the Petitioner is to succeed in his claim, then it will mean that the rest of the thousands of the beneficiaries of the Scheme ought to individually participate in the proceedings. That cannot be the position unless the trustees are not in place. Further, chances of determining such a matter will be very minimal, if at all any, unless the members of the Scheme are represented. In this case, the representation is by the trustees.

93. Having dealt with all the issues raised in the Petition, this Court finds that the Petition and the Application are without merit.

94. The Petition is hereby wholly dismissed. There shall be no orders as to costs since the dispute involves members of the same Scheme.

95. Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 22nd day of July 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Omollo holding brief for **Mr. George Gilbert**, Counsel for the Petitioner.

Mr. Rabut, Counsel for the 2nd Respondent.

Elizabeth Wambui – Court Assistant