



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 338 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION.

AND

IN THE MATTER OF THE RETIREMENT BENEFITS ACT CAP 197 LAWS

OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE RETIREMENT BENEFITS AUTHORITY.....3RD RESPONDENT

EX PARTE:

1. KENYA AIRPORTS AUTHORITY STAFF

SUPERANNUATION SCHEME (Suing thro' its Trustees Catherine Kisila,

Dr. Elizabeth Kalei, Alex Gitari, Jeridah Mbaka, Judith Bett, Joel Gaya,

Beatrice Atulia and James Mwasi)

2. KENYA AIRPORTS AUTHORITY

AND

1. ANTHONY GITHAIGA

2. MUGO WAIRIMU PHILOMENA

3. MOSES WANYONYI WEKESA

4. NTHENYA JUMA JOAN

5. KUBOKA SOLOMON

6. JOSHUA GUANTAI

7. JOHNSTONE W.WAITARA

8. JOSEPH M. GAKURE

9. MURIITHI JUDITH NKIROTE

10. RICHARD KISONDE MUTISO.....INTERESTED PARTIES

AS CONSOLIDATED WITH

JUDICIAL REVIEW APPLICATION NO. NO 479 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS.

AND

IN THE MATTER OF ARTICLE 27, 43(1) AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE RETIREMENT

BENEFITS ACT CAP 197 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

KENYA AIRPORTS AUTHORITY STAFF

SUPERANNUATION SCHEME.....INTERESTED PARTY

EXPARTE:

1. STEPHEN WAHOME IHIGA

2. JAMES ARIGA MWASI

3. WYCLIFFE KICHANA AMUTALA

4. JOHNSON M. GACHANJA

5. BERNARD WOIYE KAVIVYA

6. MUTHAMI SAMUEL KAMAU

7. STEPHEN KINYUA NYAMU

(All Suing as Members of the Kenya Airports Authority Staff Superannuation Scheme)

JUDGMENT

The Applications

1. There are two applications before this Court for determination. The first application is a Notice of Motion dated 27th June 2017 filed in JR

Application No 338 of 2017 by the Kenya Airports Authority Staff Superannuation Scheme (hereinafter “the 1st Applicant”). The 1st Applicant is a Defined Benefits Retirement Benefits Scheme registered with the Retirements Benefits Authority under the Retirement Benefits Act, and is sponsored by the Kenya Airports Authority.

2. The Second application is a Notice of Motion dated 24th October 2014 filed in JR Application No 479 of 2017 by members of the 1st Applicant, who are also former employees of the Kenya Airports Authority (hereinafter “the 2nd Applicants”). The 2nd Applicants were Appellants in two appeals filed in the Retirement Benefits Appeals Tribunal being **RBATCA No 7 of 2010 - Stephen Wahome Ihiga and Others vs The Retirement Benefits Authority Tribunals & Others**, and **RBATCA No 3 of 2013- Stephen Wahome Ihiga and Others vs Kenya Airports Superannuation Scheme and Others**.

3. The two applications were consolidated to be heard and determined together pursuant to directions given by this Court (Odunga J.) on 23rd October 2017.

4. The 1st and 2nd Applicants are both aggrieved by a judgment delivered on 10th February 2017 by the Retirement Benefits Appeals Tribunal in **RBATCA No 3 of 2013- Stephen Wahome Ihiga and Others vs Kenya Airports Superannuation Scheme and Others**. The Retirement Benefits Appeals Tribunal is the 1st Respondent in the two applications, and will hereinafter be referred to as the 1st Respondent. The said 1st Respondent is a statutory body created under the Retirement Benefits Act, with the mandate to handle disputes with regard to retirement schemes.

5. The Attorney General is also sued as a 2nd Respondent in both suits in his capacity as the legal adviser for Government, while the Retirements Benefits Authority is sued as the 3rd Respondent in JR Application 338 of 2017 and will hereinafter be referred to as the 2nd and 3rd Respondents respectively. The functions of the 3rd Respondent include regulating and supervising the establishment and management of Retirement Benefits Schemes, protect the interests of the members and sponsors of Retirement Benefits Sector and promote the development of the retirement benefits sector.

6. A number of Interested Parties (hereinafter referred to as “the Interested Parties”) who are members of the 1st Applicant by virtue of their past employment with the Kenya Airports Authority, were joined by the 1st Applicant in JR Application 338 of 2017. The said Interested Parties were also Appellants in **RBATCA No 3 of 2013- Stephen Wahome Ihiga and Others vs Kenya Airports Superannuation Scheme and Others**, wherein orders were granted in their favour.

7. Lastly, the 1st Applicant was also enjoined as an interested party in JR Application No 479 of 2017.

8. The 1st Applicant is seeking the following orders in its Notice of Motion dated 27th June 2017 :

1. An order of certiorari remove to the High Court to quash the orders of the 1st Respondent issued on 10th February 2017 as regards the Interested Parties in RBATCA No 3 of 2013.

2. An order of prohibition to restrain the 3rd Respondent from acting in compliance with any of the orders of the 1st Respondent issued on 10th February 2017.

3. Costs of the application be provided for.

9. In the Notice of Motion dated 24th October 2017, the 2nd Applicants seek the following orders:

1. An order of certiorari be issued removing to the High Court to quash the orders of the 1st Respondent dated 10th February 2017 in RBATCA No 3 of 2013 made against the 2nd Applicants.

2. An order of mandamus be issued compelling the 1st Respondent to determine the 2nd Applicant’s Appeal in RBATCA No 3 of 2013 in accordance with the law and trust deed and rules of 2006 of the 1st Applicant.

3. That costs of the application be provided for.

10. The respective cases by the 1st Applicant, 2nd Applicants, the Respondents and Interested Parties in the two consolidated applications are as follows.

The 1st Applicant’s Case

11. The 1st Applicant’s application is supported by a statement of fact dated 16th June 2017 and a verifying affidavit by the 1st Applicant’s Principal Officer, Julius F.O Okello sworn on the 16th June 2017. The said officer also swore a replying affidavit on 24th October 2017 in response to the 2nd Applicant’s application.

12. The 1st Applicant detailed the history of the dispute herein in its pleadings, and explained that it used to operate as a Public Service Defined Benefits Staff Superannuation Scheme. Further, that under a Defined Benefits Scheme, although a member may contribute towards his or her pension, pension benefits are based on the member’s length of service and final salary, and any shortfall between contributions and

pension benefits are met by the sponsor, who in this case is the Kenya Airports Authority.

13. It is the 1st Applicant's case that in the year 2011, there was a directive from the state that all Public Service Pension Schemes convert to Defined Contribution Schemes, and that therefore its Defined Benefits Scheme is a frozen fund and as of 1st July 2011 it ceased to admit new members. Further, that the 2nd Applicants and Interested Parties were its members who retired between the years 2004 and 2007, and were therefore beneficiaries of the closed Defined Benefits Scheme.

14. Further, that following an actuarial valuation, a decision was made to enhance the pensions of members retiring from 1st July 2006, and this meant that all persons retiring from that date, would draw pension of not less than 40% of their final pensionable salary; but that this decision did not affect the 2nd Applicants' and Interested Parties pensions as it could not apply retrospectively to members who had retired before the date, and that the 3rd Respondent made a decision approving this proposals on 16th July 2006.

15. That the 2nd Applicants' being aggrieved with the said decision, filed a complaint with the 3rd Respondent on 30th May 2007, more than nine months later, and which time exceeded the thirty day limitation period provided for in section 48 of the Retirement Benefits Act. The 1st Applicant stated that the 2nd Applicants' complaint of 30th May 2007 was dismissed by the 3rd Respondent in a decision made on 16th July 2007. That more than three years later, the 2nd Applicants' with others applied to file an appeal out of time with the 1st Respondent, challenging the decision made by the 3rd Respondent on 16th July 2007, being **RBATCA No 7 of 2010 - Stephen Wahome Ihiga and Others vs The Retirement Benefits Authority Tribunals & Others**.

16. The 1st Applicant further explained that the 2nd, 4th, 5th, 6th, 8th, 9th and 10th Interested Parties in JR Application No 338 of 2017 were also Appellants in **RBATCA No 7 of 2010 - Stephen Wahome Ihiga And Others vs The Retirement Benefits Authority Tribunals & Others** (hereinafter **RBATCA No 7 of 2010**) which was filed with the 1st Respondent, and in which a decision was rendered by the 1st Respondent in the Appellants' favour on the 23rd February 2012.

17. Further, that the 1st Applicant and Kenya Airports Authority subsequently filed an application for judicial review orders in this Court in **JR No 223 of 2012 - R vs Retirement Benefits Appeals Tribunal & 2 Others ex parte Kenya Authority Superannuation Scheme & Another** (hereinafter **JR No 223 of 2012**), whereupon the orders of the 1st Respondent of 23rd February 2012 in **RBATCA No 7 of 2010** were quashed in a judgment delivered on 30th April 2013 in **JR No 223 of 2012**. That additional orders were given in the said judgment that prohibited the 1st Respondent from hearing and or determining any further proceedings in **RBATCA No 7 of 2010**, and that prohibited the 3rd Respondent from acting in compliance with the orders of the 1st Respondent of 23rd February 2012.

18. The 1st Applicant contends that after the decision in **JR No 223 of 2012**, and despite the orders of prohibition therein, the 2nd Applicants and Interested Parties through their letter dated 14th June 2013, brought the same complaints the subject matter of **RBATCA No 7 of 2010** afresh before the 3rd Respondent, and that the 3rd Respondent through a letter dated 1st August 2013 informed the 2nd Applicants and Interested Parties that there was no fresh issue in which a determination could be made, as the substance of these complaints revolving around differential in pension and annual pension increases were already heard and determined by its decision of 16th July 2007.

19. That the 2nd Applicants and Interested Parties thereupon filed an appeal against the 3rd Respondent's letter of 1st August 2013, being **RBATCA No 3 of 2013- Stephen Wahome Ihiga and Others vs Kenya Airports Superannuation Scheme and Others** (hereinafter **RBATCA No 3 of 2013**), raising issues which were the same as those dealt with in **RBATCA No 7 of 2010**. Further, that the 1st Applicant's counsel raised a preliminary objection in **RBATCA No 3 of 2013** dated 23rd July 2014, which objection was dismissed in a ruling delivered therein by the 1st Respondent on 14th November 2014, dismissing the cause. That after the delivery of the said ruling, the 1st Applicant instructed its counsel to file contempt of court proceedings in **JR No 223 of 2012** against the Respondents, which is pending hearing in court.

20. The 1st Applicant contends that the judgment in **RBATCA No 3 of 2013** was delivered on the 10th February 2017, in which the 1st Respondent issued orders which were not prayed for by the Interested Parties and 2nd Applicants, nor canvassed at the hearing of the cause, thus denying the 1st Applicant a fair hearing, and which orders are in breach of the rules of natural justice and legitimate expectation as regards decision making.

21. Furthermore, that the decision of the 1st Respondent was made in contempt of the orders issued in **JR 223 of 2012**; is tainted with bias, unreasonableness, irrationality; and is in excess of its powers under section 48 of the Retirement Benefits Act, and circumvented the procedure provided under section 47 and 48 of the Act. Lastly, that the orders will occasion substantial harm, prejudice and loss to the 1st Applicant, the pension of members who are yet to retire as well as the 1st Applicants sponsor.

22. The 1st Applicant averred in this respect that the 1st Respondent's orders have the effect of extending the benefits of the 2006 amendments to the Act to pensioners who retired prior to the date, and whose benefits had crystallised. Further, that the increase in accrued liabilities for the Interested Parties is estimated to be around Kshs 8.7 million per year which cost will be borne by Kenya Airports Authority from a frozen fund; and that they will be unable to meet this arrears and liabilities without using funds held in trust for its current members or relying on public funds through the Kenya Airport Authority.

23. It is the 1st Applicant's case that the orders of the 1st Respondent are unreasonable as in effect, they have ordered them to pay off the Interested Parties with funds held in trust for members and future pensioners. In addition, that the issues raised by the Interested Parties and 2nd Applicants in both **RBATCA No 7 of 2010** and **RBATCA No 3 of 2013** were the same, particularly with regard to differential in pension and annual pension increases, and that the 1st Respondent ought not to have entertained the proceedings in **RBATCA No 3 of 2013**, as it was prevented from doing so by the prohibition order in **JR 223 of 2012**.

24. Lastly, that the 1st Respondent made its decision concerning the 2nd Applicants on 14th November 2014 and found that their claim was time-barred, and that the impugned proceedings in **RBATCA No 3 of 2013** were brought three years later and are time barred. Further, that they offend the doctrine of finality as the 2nd Applicants have filed several causes all based on the same facts and against the same person. The 1st Applicant annexed copies of the various pleadings, rulings and judgments in **RBATCA No 7 of 2010** and **RBATCA No 3 of 2013**.

The 2nd Applicants' Case

25. The Second Application is supported by a statement of fact dated 1st August 2017, and a verifying affidavit sworn on the same date by Stephen Wahome Ihiga on behalf of the 2nd Applicants. The 2nd Applicants confirmed that they filed a complaint with the 3rd Respondent on 30th May 2007 complaining that in July 2006 the 1st Applicant amended its rules wherein pension payable were increased from 12% to 40% of the last salary payable to a member, but that the 1st Applicant continued to pay them 12% instead of 40% as per the amended rules. The 2nd Applicants contend that the practice was discriminatory and inhuman as it favoured other pensioners to their exclusion. Further, that their pensions had not been increased at 3% per annum as stated in the 1st Applicant's rules.

26. The 2nd Applicants contended that the Retirement Benefits Authority dismissed their complaint as per their letter dated 16th July 2007, which action resulted in the filing **RBATCA 7 of 2010**, which was filed on 23rd July 2007 by the 2nd Applicants and others. They also confirmed the proceedings that followed as detailed by the 1st Applicant, and it is their contention that **JR 223 of 2012** did not touch on any matter affecting the merits of **RBATCA 7 of 2010**, and that the said appeal was never entertained again by virtue of the orders that had been given.

27. The 2nd Applicant's contention is that the 1st Applicant continued with its breaches against them by not complying with the 2006 scheme rules and failed to increase the 2nd Applicants monthly pension as stipulated in law, and as a result this constituted a fresh action, which in law be filed in accordance with section 46 of the Retirement Benefits Act. That the 2nd Applicants together with others therefore filed a fresh complaint with the 3rd Respondent as against the 1st Applicant on 15th July 2013.

28. The particulars of the fresh complaint were detailed by the 2nd Applicants as follows: that their pension have remained static since the date they became pensionable and that the 1st Applicant had not increased their annual pensions by at least 3% as required by law; that despite amendment of the 1st Applicant's trust deed and rules on 2nd October 2006 that the minimum monthly pension payable to a member of the 1st Applicant shall with effect from 1st July 2006 be 40% of the final pensionable salary, the 1st Applicant has refused and failed, to effect the amendment with respect to the 2nd Applicants and continues to pay at 12%; that the 1st Applicant does pay interest on any monies due and payable to the Applicants.

29. That the 3rd Respondent then wrote back to the 2nd Applicants informing that they had already made a decision on those issues, and made reference to their decision which had resulted in **RBATCA 7 of 2010**. That the 3rd Respondent thus summarily rejected the complaint and neglected to put into consideration their role as per section 46 of the Retirement Benefits Act, to monitor the management of the 1st Applicant.

30. The 2nd Applicants averred that the rejection of their complaint by the 3rd Respondent led to them filing the appeal in **RBATCA 3 of 2013**, which appeal filed on 14th August 2013, well within the thirty days as stipulated in section 48(1) of the Retirement Benefits Act. That judgment was delivered thereon on 10th February 2017 dismissing the 2nd Applicants appeal on grounds that they are barred by limitation as prescribed under section 48(1) of the Act, for they had filed a complaint in the year 2007, but allowed the appeal for the other parties who were not parties in the complaint in 2007 but who filed a complaint in the year 2013 including the Interested Parties.

31. It was the 2nd Applicants case there was no *res judicata* on their part in filing the consequent complaint, as the 1st Applicant ought to be supervised in accordance to section 46 of the Retirement Benefits Act, nor with regard to the **JR 223 of 2012** for the case was spent. Further, that despite acknowledging that there was no *res judicata* on the part of the 2nd Applicants, the 1st Applicant is still aggrieved by the judgment entered by the Respondent on 10th February 2017.

32. It is also the 2nd Applicants' case that the 1st Respondent failed to consider the fact that the complaint lodged by the 2nd Applicants was with regard to continuous and subsequent breach by the 1st Applicant, and no law bars them from lodging a complaint with the 3rd Respondent based on subsequent and continuous breaches; that in any case the 3rd Respondent is placed at the apex of the pension sector to direct and supervise compliance with the scheme and rules and laws. Furthermore, that **JR 223 of 2012** closed the case in **RBATCA 7 of 2010**, and the 2nd Applicants had no option in law other than to approach the breaches of the 1st Applicant *de novo*.

33. The 2nd Applicants pointed to the finding in the 1st Respondent's judgment of 10th February 2017 that the Appellants therein were entitled, with effect from 1st July 2006, to have their benefits calculated in accordance with the trust deed and rules dated 2nd October 2006, and that the amended trust deed and rules were binding on all members of the scheme including those in receipt of a pension at the time it came to force. That despite these findings, the 1st Respondent was tainted with bias as it excluded the 2nd Applicants in their determination, despite the fact that they had lodged the complaint with the 3rd Respondent on 1st August 2013 alongside the other Appellants whose appeal was allowed.

34. Further, that the 1st Respondent in its findings in the said judgment found that the Appellants were entitled to such annual increases, as may be determined by the 1st Applicant's actuary in accordance with regulation 31 of the Retirement Benefits (Occupational Retirement Benefits Scheme) Regulations 2006. However, that despite this finding and as evidence of bias, it excluded the 2nd Applicants by dismissing

the 2nd Applicants' appeal and allowing the appeal by other Appellants who had not lodged the 2007 complaint which was spent in 2010 by virtue of **JR 223 of 2012**.

35. The 2nd Applicants contend that in making the orders on the 10th February 2017 to exclude the 2nd Applicants, the 1st Respondent was in gross violation of the said Applicants' fundamental right to equal protection and benefit in law as protected in Article 27 of the Constitution, for the orders granted were evidently tainted with bias and discriminatory in nature. Further, that the orders granted on the 10th February 2017 dismissing the 2nd Applicants' appeal on account of limitation of time was in violation to Article 47 of the Constitution, for the order was given to the 2nd Applicants exclusion, despite the fact that they made a complaint with the 3rd Respondent together with the rest of the Appellants.

36. In addition, that the orders granted by the 1st Respondent were in breach of Article 41(1) of the Constitution which provides for fair labour practices for the 2nd Applicants, and to have their benefits recalculated in accordance to the law and the 1st Applicant's scheme rules. That they have fundamental rights to social and economic empowerment as per Article 43(1)e of the Constitution, which have been breached by the 1st Respondent, who in acts of bias and discrimination excluded them from having their pension recalculated, in accordance to the law and the 1st Applicant's scheme rules. The 2nd Applicants also pointed that Article 57 of the Constitution protects their rights as older members of society with respect to pursue their personal development and to live in dignity and respect.

37. Lastly, the 2nd Applicants reiterated that the orders of the 1st Respondent were unreasonable and irrational, and circumvented the decision making process provided for in section 46 and 48 of the Retirement Benefits Act, and were in breach of the 2nd Applicants fundamental rights and rules of natural justice. Further, that the decision of the 1st Respondent took into account extraneous factors other than the law and relevant trust deed and rules and is unreasonable, as it allows other members of the pension scheme to earn monthly pension to up to 40% of their salaries but excludes the 2nd Applicants. Therefore, that the decision was made in error of the Constitution, Retirement Benefits Act and Employment Act, which outlaw discrimination in labour practices

The Respondents' Cases

The 1st and 2nd Respondents Case

38. The 1st and 2nd Respondents filed grounds of opposition to both JR Application No 338 of 2017 and JR Application No 479 of 2017 dated 12th July 2017 and 11th December 2017 respectively. The 1st and 2nd Respondents oppose the two applications and the orders sought therein on the grounds that the said applications are appeals disguised as a judicial review applications, and ought not to be entertained by this court.

39. Further, that the orders being sought by the 1st and 2nd Applicants do not fall under the ambit of judicial review as they question the merits and consequential effects of the 1st Respondent's decision of 10th February 2017, instead of the process of decision making.

40. The 1st and 2nd Respondents also stated that the judgment in **JR 223 of 2012** quashing the decision in **RBATCA No. 7 of 2010** did not operate *in rem* to cover all complaints to ever exist as between the 1st Applicant and its members, and as such no contempt subsists. In addition that the provisions of the law and agreement by the parties including amended trust deeds are to be adhered to in a non-partisan way to uphold equity and not discriminate against one party in line with the principles propagated under the Constitution.

41. Lastly, that the 1st Applicants' failure, ignorance, neglect and or refusal to remit the proper pension benefits to the Interested Parties as and when they fell due, should not be negatively visited upon their former employees/members who faithfully and diligently discharged their mandate and terms of service when they lasted, as shown by the records.

The 3rd Respondent's Case

42. The 3rd Respondent also responded to JR Application No 338 of 2017 and JR Application No 479 of 2017. Their response to the 1st Applicant's application was in a replying affidavit sworn on 7th August 2017 by Nzomo Mutuku, its Chief Executive Officer, while the 3rd Respondent's Advocates filed Grounds of Opposition dated 14th December 2017 in response to the 2nd Applicants' application.

43. The 3rd Respondent averred that in undertaking its functions, it is mandated to hear appeals by any member of a scheme dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme. That section 46 of the Retirement Benefits Act requires its Chief Executive Officer to review any such challenged decision with a view to ensuring that such decision was made in accordance with the provisions of the relevant scheme rules, or the Act under which the scheme was established. Further, that under section 48 of the Act any person aggrieved by the decision of the Chief Executive Officer has a right of appeal to the 1st Respondent within thirty days of the receipt of the decision.

44. The version of events by the 3rd Respondent is that on 16th July 2007, it rendered its decision on an appeal by members of the 1st Applicant as relates to *inter alia* the issues of differential in pension and annual pension increases. The said decision was the subject of the subsequent challenged before the 1st Respondent in **RBTACA No. 7 of 2010**, whose decision was quashed by this court in a decision rendered on 30th April 2013.

45. Further, that through a letter dated 14th June 2013, the Interested Parties forwarded to the 3rd Respondent various complaints under section 46 of the Retirements Benefits Act, which complaints revolved around differential in pension and annual pension increases. The 3rd

Respondent rendered its decision on the complaints on 1st August 2013, and noted that the issues raised were substantially the same as those raised and determined in 2007, and further informed the Interested Parties that its decision on those issues remained as communicated then.

46. The 3rd Respondent averred that the Interested Parties appealed the said decision in **RBATCA No 3 of 2013**, and that their appeal was allowed by a decision rendered by the 1st Respondent on 10th February 2017. The 3rd Respondent's view is that having made a decision in 2007 which decision had not been overturned on appeal, the decision stands binding as it relates to the same issues on differential in pension and annual pension increases. Further, that a decision having been already made on the application of a group of members of a scheme, it is not open to them to relitigate the issue before the 3rd Respondent or another forum in the hope of getting an improved result.

47. The 3rd Respondent stated that it has no vested interests in disputes between a scheme and its members, and is only concerned with the development of the retirement benefits sector. Further, that it made its decision as relates to among others the differential in pension and annual pension increases based on what it considered the correct position in law.

48. The 3rd Respondent's grounds of opposition with regard to the 2nd Applicants' application were that the application is fatally defective and ought to be struck out, as it has been instituted in clear disregard of, and offends the mandatory provisions of section 9(3) of the Law Reform Act and Order 53(2) of the Civil Procedure Rules 2010, having been brought after six months from the date of the decisions of the 1st Respondent declining jurisdiction to entertain the 2nd Applicants' appeal.

49. Further, that the application is an attempt by the 2nd Applicants to relitigate grievances which were initially dismissed by the 3rd Respondent on 16th July 2007, and the dispute later reached this court under **JR 223 of 2012**. That The 2nd Applicants have thus not demonstrated sufficient cause upon which the court can grant the orders sought.

The Interested Parties Case

50. The Interested Parties opposed the 1st Applicant's application through a replying affidavit sworn on 1st August 2017 by Anthony Githaiga, the 1st Interested Party. They did not file any response to the 2nd Applicants' application.

51. The Interested Parties averred that the judgment delivered on 10th February 2017 in **RBATCA No 3 of 2013** by the 1st Respondent allowed their appeal against the 1st Applicant and the 3rd Respondent. Further, that the 1st Respondent correctly interpreted the law by finding that the Interested Parties had not filed any complaint on 30th May 2007.

52. The Interested Parties explained that in the complaint that was lodged with the 3rd Respondent Retirement Benefits Authority on 30th May 2007, the complainants therein alleged *inter alia* that in July 2006 the 1st Applicant amended its rules wherein pension payable were increased from 12 % to 40 % of the last salary payable to a member, but the 1st Applicant continued to pay them 12% instead of 40 % as per the amended rules. That the complainants further alleged that the practice was discriminatory and inhuman because it favoured other pensioners in their exclusion who receive 12%; and their pensions had not been increased at 3% per annum as stated in the 1st Applicant's rules.

53. The Interested Parties position is that the 1st Respondent correctly interpreted the law by finding that by virtue of section 46 of the Retirement Benefits Act, the Interested Parties alongside others not parties to the suit filed their complaint against the 1st Applicant with the 3rd Respondent on 15th July 2013. Further, that the particulars of the Interested Parties complaint were that their pension benefits have remained static since the day they became pensionable, and that the 1st Applicant had not increased their annual pensions by at least 3% as required by law despite the amendment of the 1st Applicant trust deed and rules on 2nd October 2006. Further, that the 1st Applicant does pay interest on any monies due and payable to the Interested Parties.

54. It is the Interested Parties case that the 3rd Respondent wrote back to them on 1st August 2013, stating that it made a decision on those issues in its letter dated 16th July 2007, which was communicated to them, and that it therefore did not have any new decision on the issue. The Interested Parties averred that the 1st Respondent correctly interpreted the law by finding that by so doing, the 3rd Respondent had not conducted its due diligence and had not put into consideration the fact that the Interested Parties had not signed the complaint, hence were not parties to the complaint lodged on 30th May 2007.

55. Further, that the 1st Respondent put into consideration the 1st Applicant's objection on the matter being *res judicata* and found that the 1st Applicant ought to be supervised, and that the judgement in **JR 223 of 2012** only barred the entertaining of **RBATCA No 7 of 2010**, which in law did not mean to bar the entertaining of any other appeal by the Interested Parties herein, for the same would be against the principles of natural justice.

56. The Interested Parties reiterated that the 1st Respondent correctly interpreted the law in issuing the orders on 10th February 2017 by finding that the Interested Parties' relationship with the 1st Applicant is that of a trustee and beneficiary and the said relationship is anchored on an irrevocable trust deed, which is subject to lawful amendments from time to time.

57. Further, that the 1st Respondent correctly interpreted the law by finding that the 1st Applicant was expected to abide by the trust deed and rules dated 2nd October 2006, and that with effect from 1st July 2006 the 1st Applicant ought to have computed their monthly pensions in accordance with rule 4(a) of the rules of the scheme dated 2nd October 2006, and that the trust deed and rules of the scheme did not provide for any discriminatory provision against members of the scheme who were on pensions before 1st July 2006.

58. That, the law was correctly interpreted by the 1st Respondent in finding that the 1st Applicant covenanted to increase their pension by at least 3% p.a which the 1st Applicant had refused or declined to make good their promise with the result that the Interested Parties' monthly pensions had remained static from the dates they became pensionable, and the Interested Parties' rights and entitlements in the scheme had been severely prejudiced and reduced respectively.

59. Lastly, that the law was correctly interpreted by the 1st Respondent in its finding that the Interested Parties are entitled with effect from 1st July 2006 to have their benefits calculated in accordance with the trust deed and rules dated 2nd October 2006, and that the amended trust deed and rules were binding on all members of the scheme including those in receipt of a pension at the time it came to force. In addition, that the Interested Parties are entitled to such annual increase as may be determined by the 1st Applicant's actuary in accordance with regulation 31 of the Retirement Benefits (Occupational Retirement Benefits Scheme) Regulations 2006.

The Determination

60. The Application was canvassed by way of written submissions. The 1st Applicant's Advocates on record, Mohammed Muigai Advocates filed two sets of submissions dated 28th September 2017 and 13th February 2018 on the 1st Applicant's and 2nd Applicants' applications, respectively. Koceyo and Company Advocates for the 2nd Applicants filed submissions dated 9th January 2018, while Naghea H. Daido, a State Counsel in the Attorney General's Chambers filed two sets of submissions on the two applications dated 2nd October 2017 and 5th February 2018 respectively, on behalf of the 1st and 2nd Respondents. The 3rd Respondent's Advocates on record, Ogetto Otachi & Company Advocates in turn filed consolidated submissions dated 5th February 2018, and the Interested Parties Advocates, Koceyo and Company Advocates, filed submissions dated 17th October 2017.

61. Having taken into account the parties respective parties' pleadings and submissions, this Court notes that the 1st Applicant and 3rd Respondent made arguments about this Court's jurisdiction to hear and determine the 2nd Applicants' application, which will have to be addressed as a preliminary issue. If this Court is found to have jurisdiction it will then proceed to review the decision of the 1st Respondent on the grounds alleged by the 2nd Applicants.

On this Court's Jurisdiction

62. The preliminary issue as regards the propriety of this forum arose from arguments made by the 1st Applicant and 3rd Respondent that the decision to dismiss the 2nd Applicant's appeal was made by the 1st Respondent's judgment of 14th November 2014, and not its decision of 10th February 2017, which only repeated it. Therefore that these proceedings are time barred by dint of Order 53 Rule 2 of the Civil Procedure Rules of 2010 that prescribe that the time within which a party can apply for an order of certiorari is within six months after the date of proceedings.

63. I have perused the ruling by the 1st Respondent of 14th November 2014 that was annexed as "Annexure JFO 5" to the 1st Applicant's verifying affidavit sworn on 16th June 2017. The said judgment arose from a preliminary objection filed by the 3rd Respondent, who was the 1st Respondent in **RBATCA No 3 of 2013**. The 1st Respondent identified five issues for determination in its judgment on the preliminary objection.

64. The first was whether it had jurisdiction to hear and determine the Appellants' case which it found in the affirmative. The second was whether the Appellants' case was barred by the Limitation of Actions Act, which objection was rejected by the 1st Respondent. The third was whether the Appellants' case was barred by the Retirement Benefits Act. This objection was upheld with respect to the 1st, 3rd, 9th, 12th, 15th, 16th and 17th Appellants therein (who are the 2nd Applicants herein), with respect to their complaint dated 30th May 2007, for which the 3rd Respondent rendered a decision on 16th July 2007, and which was found to be time barred under section 48(1) of the Retirement Benefits Act.

65. The fourth issue was whether the orders issued in **JR 223 of 2012** barred it from hearing and determining the case, while the last issue was whether the Appellant's complaint therein was *res judicata*, which objections were rejected by the 1st Respondent.

66. What then is the effect on this Court's jurisdiction of the 1st Respondent's decision to uphold the objection that the 1st, 3rd, 9th, 12th, 15th, 16th and 17th Appellants were time barred? I find it to be of no effect for the following reasons. First, the objection that was upheld by the 1st Respondent on 14th November 2014 was specifically in relation to the said Appellants' complaint dated 30th May 2007, for which the 3rd Respondent rendered a decision on 16th July 2007, and which was the one found to be time barred.

67. Second, the 1st Respondent in its judgment of 14th November 2014 did acknowledge that the said Appellants also filed a fresh complaint on 14th June 2013 together with the other Appellants in the case, on which a decision was made by the 3rd Respondent on 1st August 2013, which fact is not contested by the 1st Applicant. This Court is being asked by the 2nd Applicants to review the decision of the 1st Respondent in **RBATCA No. 3 of 2013** with respect to the decision that was made by the 3rd Respondent on 1st August 2013 on their complaint dated 14th June 2013. It is thus the import of the complaint of 14th June 2013, and not the complaint of 30th May 2007 that is before this Court.

68. Lastly, the 1st Respondent rendered its decision on the appeal on the 3rd Respondent's decision of 1st August 2013 on 10th February 2017, in which specific orders were given dismissing the 2nd Applicants appeal therein. The 2nd Applicants filed their Chamber Summons for leave to commence judicial review proceedings to quash the 1st Respondent's decision dated 10th February 2017 on 2nd August 2017, and were therefore within the six months limitation period prescribed by Order 53 Rule 2 of the Civil Procedure Rules of 2010.

69. The second objection to this Court's jurisdiction to hear the 2nd Applicants' application was on the ground of *res judicata*, and it was urged in this respect that the 2nd Applicants' complaints were dismissed by the 3rd Respondent's decision of 16th July 2007, which decision to date has neither been overturned on appeal nor varied by review. Furthermore that the order of prohibition in **JR 223 of 2012** put finality to the proceedings.

70. That the 3rd Respondent's decision is thus final and binding on the 2nd Applicants, and the doctrine of *res judicata* thereby applies. Reliance was in this respect placed on sections 2 and 7 of the Civil Procedure Act, and the rationale for *res judicata* as held in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others, (2015) e KLR**, being that there should be an end to litigation.

71. The decision in **Republic vs City Council of Nairobi & 2 Others (2014) eKLR** was also cited for the holding that the court is not powerless where it is clear that by bringing proceedings a party is clearly abusing the court process, and that whereas *res judicata* may not be invoked in judicial review, the court retains an inherent jurisdiction to terminate proceedings where the same amount to an abuse of its process.

72. The doctrine of *res judicata* simply put is that once a suit is decided, the same issue in the said suit cannot be contested again. Section 7 of the Civil Procedure Act provides for when a suit is *res judicata* as follows:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

73. For a matter to be *res judicata* this suit must raise issues that are directly and substantially similar to those in a former suit. In examining whether a matter is *res judicata*, this Court therefore has to examine the two suits: the current suit and the former suit in totality. This would mean that the Court has to investigate whether the parties in both suits are the same; whether issues raised are substantially similar; and whether the prayers sought are the same. In **Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others [1996] eKLR**, the Court of Appeal stated that for the doctrine of *res judicata* to apply the following conditions must be fulfilled:

- (i.) **There must be a previous suit in which the matter was in issue;**
- (ii.) **the parties were the same or litigating under the same title.**
- (iii.) **a competent Court heard the matter in issue;**
- (iv.) **the issue has been raised once again in a fresh suit.**

74. The purpose of this doctrine is to bring an end to litigation and ensure that litigants do not abuse the Court process by bringing suits which evoke issues that have already been determined by the Court in other suits as held by the Court of Appeal in **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others (supra)**.

75. It is thus evident that this Court as a judicial review Court is not the appropriate Court to examine a challenge to a suit on the grounds of *res judicata*, as it will have to examine the merits of the case before it to determine if the issues raised are the same as in the alleged previous cases. A defence of *res judicata* can only properly be pleaded in ordinary proceedings, on appeal, or as a preliminary objection, but not in judicial review proceedings.

76. Indeed as noted by the 1st Applicant, *res-judicata* does not ordinarily apply to judicial review, as was held in **Republic vs Judicial Service Commission ex parte Pareno (2004) 1 KLR 203 -209**. This position was explained in detail in **Republic v City Council of Nairobi & 2 Others (supra)** as follows:

“24. It has also been contended that the doctrine of *res judicata* does not apply to judicial review proceedings.

25. *Res Judicata*, strictly speaking is provided under section 7 of the *Civil Procedure Act* which in the preamble to the Act is “An Act of Parliament to make provision for procedure in civil courts”. However, it is now well settled that judicial review applications are neither criminal nor civil in nature. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

26. In **Commissioner of Lands vs. Hotel Kunste Ltd (supra) and **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** it was held that Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the *Civil Procedure Act* does not apply since it is governed by sections 8 and 9 of the *Law Reform Act* being the substantive law and Order 53 of the *Civil Procedure Rules* being the procedural law. Therefore strictly speaking section 7 of the *Civil Procedure Act* does not apply to judicial review proceedings. In fact in **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** it was held that *res judicata* does not apply to judicial review. See also **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47**.**

27. This, however, does not mean that the Court is powerless where it is clear that by bringing proceedings a party is clearly abusing the court process. Whereas *res judicata* may not be invoked in judicial review the Court retains an inherent jurisdiction to terminate proceedings where the same amount to an abuse of its process. One of cardinal principles of law is

that litigation must come to an end and where a court of competent jurisdiction has pronounced a final decision on a matter to bring fresh proceedings whether as judicial review proceedings or otherwise would amount to an abuse of the process of the court and would therefore not be entertained. The Court in terminating the same would be invoking its inherent jurisdiction which is not a jurisdiction conferred by section 3A of the *Civil Procedure Act* as such but merely reserved thereunder.”

77. It is thus my finding that this Court has jurisdiction to hear and determine the 2nd Applicants application for the foregoing reasons, and will make any appropriate findings as regards to the said application’s propriety or otherwise, after consideration of the grounds raised by the 2nd Applicants.

The Substantive Issues

78. I shall therefore now proceed to examine the substantive issues raised by both the 1st Applicant and 2nd Applicants. The main issue arising for determination in this regard are whether the 1st Respondent acted outside its jurisdiction and powers in entertaining the Interested Parties and 2nd Applicants appeal in **RBATCA No 3 of 2013**. If this issue is resolved in the negative, the Court will then proceed to consider the other two substantive issues as to whether the 1st Respondent accorded the 1st and 2nd Applicants a fair hearing during the hearing of the said appeal, and whether the 1st and 2nd Applicants are entitled to the relief sought.

79. In considering the said issues, it is imperative at the outset to delineate the parameters of this Court’s powers in judicial review. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

80. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited**, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR 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 or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

81. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others**, (2016) KLR that while *Article 47* of the Constitution as read with the grounds for review provided by section 7 of the *Fair Administrative Action Act* reveals an implicit shift of judicial review to include aspects of merit review of administrative action, reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

82. This Court will proceed to examine and determine the issues raised by the parties in light of the foregoing principles.

Whether the 1st Respondent acted outside its Jurisdiction and Powers.

83. Three limbs were raised by the 1st Applicant in their submissions on the issue of the 1st Respondent’s jurisdiction. The 1st Applicant contended that the correct procedure set out in section 46 of the *Retirements Benefits Act* (hereinafter “the Act”) was not followed in the hearing of **RBATCA No 3 of 2013**, that 1st Respondent’s made orders it did not have powers to make under the Act in its decision of 10th February 2017; that the said decision was made in contempt of orders issued in JR 223 of 2012.

84. I will first dispose of the argument that the impugned decision of the 1st Respondent was in contempt of **JR 223 of 2012**. The 1st Applicant submitted in this regard that the order of prohibition given in **JR No 223 of 2012** against the decision in **RBATCA No 7 of 2010** applied to **RBATCA No 3 of 2013**, and therefore the 1st Respondent should not have entertained the proceedings in **RBATCA No 3 of 2013**. Further, that the issues raised in the complaint of 30th May 2007 were raised again in the complaints dated 14th June 2013 and in particular on differential pensions and annual pension increases, despite being dismissed by the 3rd Respondent's decision of 16th July 2007, from which **RBATCA No 3 of 2013** arises.

85. The 1st Respondent in response submitted that section 4(1) of the contempt of court act defines civil contempt as wilful disobedience of any judgement, decree, order, or other process of a court or wilful breach of an undertaking given to a court, and that they did not in any way act in contempt by adjudicating on **RBATCA No 3 of 2013**. That on the contrary, the tribunal indeed acted in compliance with the directions of the court in **JR 223 of 2012** by not entertaining further proceedings in **RBATCA No 7 of 2010**. Further, that the 1st Respondent in its decision in **RBATCA No 3 of 2013** barred those who seemed to have been circumventing the process and were limited by time in **RBATCA 7 of 2010** by pointing them out and dismissing their appeals.

86. That however, in its decision of 10th February 2017, it found that the Interested Parties' complaint was merited since it raised new and fundamental breaches of the schemes rules and the law; the breach complained about is continuous and has never been decided and or resolved; and each continuous breach constituted a new course of action. Further, that not all the Appellants in **RBATCA No 3 of 2013** had lodged a complaint in 2007 including the interested parties.

87. The 1st Respondent's position was reiterated by the Interested Parties.

88. The finding as to whether or not the 1st Respondent's decision is in contempt of the decision in **JR 223 of 2012** is a finding that this Court is ill-equipped to make in judicial review proceedings, for the same reasons given in the foregoing as regards a plea of *res-judicata* in judicial review. In addition, contempt of court is conduct that defies the authority of court, and is an offence that is punishable by fine or imprisonment because it is conduct that interferes with the administration of justice. A specialized procedure which is quasi-criminal in nature therefore applies in contempt of court proceedings, as a determination of culpability has to be made after examination of the evidence.

89. For this Court to make a finding as to whether the decision of the 1st Respondent was in contempt, it has to be in appropriate proceedings, where it firstly will be required to hear the 1st Respondent on the issue and consider its evidence, and secondly make a decision as to the 1st Respondent' culpability or otherwise, as evidenced by the 1st Respondent's submissions hereinabove. This is also a merit review that is not within the province of this Court sitting as a judicial review court. Therefore, notwithstanding that this Court has inherent jurisdiction under section 3 of the Civil Procedure Act to make such orders that may be necessary in the interests of justice and the rule of law, the proper option is for the 1st Applicant to commence separate proceedings against the 1st Respondent for contempt of Court.

90. On the argument that the correct procedure set out in section 46 of the Retirements Benefits Act (hereinafter "the Act") was not followed in the hearing of **RBATCA No 3 of 2013**, the 1st Applicant submitted that upon being dissatisfied with the decision of the 1st Applicant, the Interested Parties were required to make a written request for the decision to be reviewed by the Chief Executive Officer of the 3rd Respondent with a view to ensuring that it was made in accordance with the provisions of the Applicant's Trust Deeds and Rules. However, that no such written request was made.

91. The 1st Applicant in this regard also contended that the 2nd Applicants ought to have filed an appeal within the timeline prescribed, as the 2006 decision by the 3rd Respondent is the basis of the complaint of 30th May 2007 and therefore the basis of subsequent appeals in **RBATCA No 7 of 2010** and **RBATCA No 3 of 2013**.

92. I will dispose of this argument by referring to the earlier finding in this judgment that the decision of the 1st Respondent in **RBATCA No. 3 of 2013** was with respect to the decision that was made by the 3rd Respondent on 1st August 2013 on the complaint dated 14th June 2013. Further, that this is the decisions that are before this Court for review, and it is thus the complaint of 14th June 2013 and not the complaint of 30th May 2007 that is relevant in the proceedings before this Court.

93. Section 46 of the Act in this regard provides for appeals to the 3rd Respondent's Chief Executive Officer as follows:

“(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.

(2) A copy of every request under this section shall be served on the manager, administrator, custodian or trustees of the scheme.”

94. A copy of the complaint made by the Appellants in **RBATCA No. 3 of 2013** dated 14th June 2013 was annexed by the 1st Applicant to the replying affidavit sworn on 12th February 2018 by Julius Okello as “Annexure JFO 6(a)”. It complained that the 1st Applicant's trustees were still breaching the provisions of the Trust Deed and Rules, and therefore fell within the ambit of section 46 of the Act. Furthermore, the 3rd Respondent specifically made a decision on the said complaint in its letter dated 1st August 2013, which was annexed by the 1st Applicant in its replying affidavit sworn on 12th February 2018 by Julius Okello as “Annexure JFO 7”. This ground by the 1st Applicant thus fails for these reasons that a specific complaint dated 14th June 2013 was made by the 2nd Applicants and interested Parties to the 3rd Respondent.

95. On the second limb that the 1st Respondent lacked jurisdiction in making the orders pursuant to section 49 of the Act , the 1st Applicant submitted that the scope of the 1st Respondent's powers in the said section is 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. (Emphasis by the 1st Applicant).

96. Further, that the section makes provision as to the orders the 1st Respondent can make as follows:

“(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.” (Emphasis by the 1st Applicant).

97. In support of its argument, the 1st Applicant referred to the decision on how lack of jurisdiction may arise in **Anisimic vs Foreign Compensation Commission (1969) 1 All ER 208 at 233**. Reliance was also placed on the decision by Madan J (as he then was) in the case of **Choitram vs. Mystery Model Hair Salon (1972) EA 525** and in **Republic v Attorney General & 3 others Ex-Parte Kenya Airports Authority Staff Retirement Benefits Scheme [2015] eKLR** that a provision giving powers to a statutory tribunal must be strictly construed and that the powers must be expressly conferred and cannot be a matter of implication.

98. The 1st Applicant submitted that when it comes to the 1st Respondent's jurisdiction and powers, the Act discusses the procedural abilities of the 1st Respondent but is silent on what orders it can give and this was observed in **Republic v Attorney General & 3 others Ex-Parte Kenya Airports Authority Staff Retirement Benefits Scheme (supra)**. It is thus the 1st Applicant's argument that Orders (c), (d) and (e) of the 1st Respondent's decision were made without jurisdiction and contrary to section 7(1)(b) of the Fair Administrative Action Act, 2015.

99. Similar arguments were made by the 3rd Respondent who submitted that the 1st Respondent is a body that exercises quasi-judicial powers and can only act upon being moved by an aggrieved party, and grant such remedies as may have been sought, and cannot grant remedies which were not subject to litigation before it. The 3rd Respondent made reference to the memorandum of appeal before the 1st Respondent , and it was its submission that the 1st Respondent issued orders *suo moto* on the issues which were not in the memorandum of appeal and thereby fell into error.

100. The issues identified by the 3rd Respondent in this regard were whether the appellants are entitled to have their benefits calculated in accordance with the trust deed and rules dated 2nd October 2006; whether the appellants are entitled to annual pension increases by at least 3% per annum; and whether interest is payable on any benefits not paid to a beneficiary.

101. According to the 3rd Respondent the 1st Respondent exceeded its jurisdiction by granting orders neither prayed for nor pleaded, and reliance was placed on the decisions in **Paulina Wangare Njoroje vs Joseph Wainaina Gituro and 2 others (2005) eKLR** and **Republic vs Resident Magistrates Court, Mombasa ex parte Husna Hussein Mohamed & Another, (2012) eKLR** for the proposition that the 1st Respondent should have restricted itself to the prayers sought in the pleadings before it, and does not enjoy inherent jurisdiction that would allow it to grant orders not sought.

102. The 2nd Applicant on its part referred to the jurisdiction of the 3rd Respondent under section 46 of the Act to consider continuing breaches by the 1st Applicant. It was submitted in this regard that the 1st Applicant continued with its breaches against the 2nd Applicants by not complying with 2006 Scheme Rules which failed to increase the applicant's monthly pension as stipulated in law, which therefore constituted a fresh action in law which could only be done in accordance with section 46 of the Retirement Benefits Act. That the 2nd Applicants therefore filed a fresh complaint against the 1st Applicant with the 3rd Respondent on 15th July 2013, which matter was dismissed against them.

103. The 1st and 2nd Respondents' submissions on this issue were that the procedure to be followed in making determinations before the 1st Respondent is given under section 48 of the Act which provides that any person aggrieved by the decision of the 3rd Respondent or its Chief Executive Officer may appeal to the 1st Respondent tribunal within thirty days of the receipt of the decision.

104. Further, that the 1st Respondent followed the procedure laid down as it properly heard and determined the claims by the Interested Parties contained in the amended memorandum of appeal that outlined their case. It was their submission that the Interested Parties were appealing the decision of the 3rd Respondent issued on 3rd August 2013 pursuant to their complaint lodged with on 17th June 2013, and that the Interested Parties without any undue delay filed **RBATCA No 3 of 2013** on 15th August 2013, two weeks after 3rd Respondent's decision.

105. According to the 1st Respondent, the Interested Parties were not involved in the complaint of 30th May 2007 and therefore required that the Authority listen to their complaint. It was contended by the 1st Respondent that parties exchanged pleadings and the 1st Respondent after outlining its reasoned decision gave its determination which the 2nd Applicants decided to challenge in part. That the Applicants are thus

inviting the court to address itself on the merits of the case instead of the procedure.

106. The Interested Parties on their part submitted that the 1st Respondent followed due procedure, and that they filed a complaint as determined on 1st August 2013 according to section 46 of the Retirement Benefits Act. They relied on section 48(1) of the Retirement Benefits Act that any person aggrieved by the decision of the 3rd Respondent or its Chief Executive Officer under the provision of the Act may appeal to the Tribunal within thirty days of the receipt of the decision. They submitted that the matter proceeded for four years and all parties attended proceedings, parties argued the applications in-depth and the 1st Respondent took into consideration all the arguments.

107. I have considered the arguments made by the parties on this issue, which revolve around the jurisdiction and powers of, and procedure to be employed by the 1st Respondent. The same are provided for in section 48 and 49 of the Act as follows:

“48. Appeals to the Tribunal

(1) Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made thereunder may appeal to the Tribunal within thirty days of the receipt of the decision.

(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.

49. Powers of Appeals Tribunal

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

(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.”

108. In determining whether or not the 1st Respondent acted outside its powers, regard is made to the description of illegality by Lord Diplock in Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410 as a failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law. In addition, in Anisminic vs Foreign Compensation Commission (1969) 1 All ER 208 at 233, Lord Pearce held as follows on when a public body may lack jurisdiction:

“Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step out of its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

109. This Court is also guided by the expose on when errors of law will arise in decisions made by a public body, as expounded in Halsbury’s Laws of England, 4th Edition at paragraph 77 as follows:

“There is a general presumption that a public decision making body has no jurisdiction or power to commit an error of law; thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order. The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed. In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete. A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power.”

110. It is therefore necessary when deciding whether a statutory power or duty has been lawfully exercised or performed, to identify the scope of that power and duty, and which involves construing the legislation that confers the power and duty. In the present application, the power granted to the 1st Respondent by section 48 and 49 of the Act is to hear appeals from decisions of the 3rd Respondent, or hear disputes arising between the 3rd Respondent and a third party as regards the exercise of the 3rd Respondent’s powers and duties.

111. The Memorandum of Appeal that was before the 1st Respondent in this respect was annexed by the 1st Applicant in its replying affidavit sworn on 12th February 2018 by Julius Okello as “Annexure JFO 8”, and raised one ground of appeal, which was the failure by the 3rd Respondent to make a decision on the Appellants’ complaint, and gave particulars thereof. The Appellants complaint was dated 14th June 2013, and was that the 1st Applicant’s trustees were still breaching the provisions of the Trust Deed and Rules.

112. The 1st Respondent, in rendering its decision of 10th February 2017 made the following orders:

“In our Judgment dated 14th November, 2014 we made a finding that 1st, 3rd, 9th, 12th, 15th, 16th, and 17th Appellants’ claims in this case are barred by the limitation prescribed under Section 48(1) of the Retirement Benefits Act for filing appeals in the Tribunal.

We are inclined to allow, as we hereby do, this appeal in favour of the 2nd, 4th, 5th, 6th, 7th, 13th and 14th Appellants. Ordinarily, costs follow the event. The 2nd, 4th, 5th, 6th, 7th, 13th and 14th Appellants shall have costs of the appeal to be paid by the 2nd Respondent.

In the upshot, we make the following orders:-

a. The 1st, 3rd, 9th, 12th, 15th, 16th and 17th Appellants’ Appeal is hereby dismissed.

b. The 2nd, 4th, 5th, 6th, 7th, 13th and 14th Appellants’ appeal is hereby allowed.

c. The Trustees of the 2nd Respondent shall with effect from 1st July 2006 calculate and pay to the 2nd, 4th, 5th, 6th, 7th, 13th and 14th Appellants their monthly pension at a rate not less than 40% of each of the 2nd, 4th, 5th, 6th, 7th, 13th and 14th Appellant’s final pension salary.

d. The Trustees of the 2nd Respondent shall prepare and submit to each of the 2nd, 4th, 5th, 6th, 7th, 13th and 14th Appellants a statement of account showing how the benefit payable is calculated and arrived at within 45 days of today’s date;

e. The Trustees of the 2nd Respondent shall pay interest on the sum found unpaid in (b) above from 1st July 2006 until payment in full which shall not be less than the investment interest declared by the 2nd Respondent in the years that the benefit has remained due,

f. The 2nd Respondents shall pay the 2nd, 4th, 5th, 6th, 7th, 13th and 14th Appellants costs of the Appeal assessed at Kshs 20,000.00...”

113. It was urged in this regard by the 1st Applicant and 3rd Respondent that the said orders, particularly orders (c), (d) and (e) reproduced herein above, were not sought by the Appellants, and that the 1st Respondent therefore erred and acted beyond its jurisdiction. It was also noted by the 1st Applicant that the Act is silent on what orders the 1st Respondent can give.

114. An appeal is defined in **Black’s Law Dictionary . Fourth Edition** at page 112 as a proceedings undertaken to have a decision reconsidered by a higher authority, especially the submission of a lower court’s or agency’s decision to a higher court for review and possible reversal. Therefore, on appeal, the higher authority can either affirm or reverse the lower agency’s decision, and hearing an appeal of necessity includes making a decision on the matter being appealed on.

115. In addition, where a statutory provision expressly confers a power or a duty upon a public body, and is silent whether the public body has the power to take associated steps which are necessary for, or incidental to the discharge of its functions, this fact does not mean that the body has no power to take the associated or incidental steps or powers. This is for the reason that it is an established principle of statutory interpretation that where no statutory incidental power is provided for, a public body will usually have an implicit power to do things that may reasonably and fairly be consequential upon, or incidental to its express statutory function, provided that they are necessary to the exercise of the primary function. See in this regard the text by F. Bennion: **Bennion on Statutory Interpretation, 4th Edition**, at section 174.

116. It was also held in **Attorney-General v Great Eastern Railway Co (1880) 5 App Cas 473, at 478** by Lord Selborne LC held that the doctrine of *ultra vires* ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*. Lord Blackburn at page 481 of the said decision also held that that “those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited.”

117. Therefore, the fact that the Act in the present application did not provide for the specific orders that the 1st Respondent can make on the hearing of an appeal, does not mean that the 1st Respondent has no powers to make such orders for the foregoing reasons. In addition, it is of essence and a necessary consequence and incident that the 1st Respondent upon hearing an appeal, has to make orders either affirming or reversing the decision appealed from in whole or in part. The 1st Respondent therefore had jurisdiction to make the said orders and did not act in error of law in doing so.

118. As to whether or not the said decisions were right or wrong is however beyond the province of this Court as a judicial review Court, as

that will be a finding of merit on the substance of the 1st Respondent's findings. This Court's limited role in merit review will be addressed in its determination of the next issue.

119. Before addressing the second issue, there was one error of law that this Court found was committed by the 1st Respondent, in its findings on the 2nd Applicants' appeal. Its decision in this respect was that in its judgment dated 14th November, 2014, it had made a finding that the claims by the 1st, 3rd, 9th, 12th, 15th, 16th, and 17th Appellants' (the 2nd Applicants herein) were barred by the limitation prescribed under Section 48(1) of the Retirement Benefits Act for filing appeals in the Tribunal. It thereby proceeded to dismiss the appeals by the said Appellants.

120. The judgment dated 14th November 2014 was on a preliminary Objection the 1st Applicant's filed with the 1ST Respondent and the said judgment was annexed to the verifying affidavit sworn on 16th June 2017 by Julius F.O. Okello as Annexure JFO 5(a). The 1st Respondent's finding in this regard was as follows:

“In respect of the complaint dated 30th May 2007 for which the 1st Respondent rendered a decision on 16th July 2007, we find that the 1st, 3rd, 9th, 12th, 15th, 16th, and 17th Appellants' claim in this case is barred by the time prescribed under Section 48(1) of the Retirement Benefits Act for filing appeals in the Tribunal”

121. There was manifest error on record in the decision made on 10th February 2017 as regards the 2nd Applicants' appeals as firstly, the complaint that was the subject of the appeal was the 2nd Applicants' complaint dated 14th June 2013, and not their complaint dated 30th May 2007, and the 1st Respondent expressly acknowledged the existence of the complaint dated 14th June 2013 in its judgment of 14th November 2014.

122. Secondly, where a public body has a statutory power or duty to act, the question as to whether the public body, having taken a decision to exercise the power or to perform the duty (or a decision not to do so, as the case may be), is able to revisit that decision depends on the statutory context of the particular power or duty in question. Therefore, where a public body is entrusted with the task of taking a 'one-off' decision, such as the determination of a particular application, then it is likely that once it has reached its decision it has no power to revisit it. In such a case, the public body is said to be *functus officio*.

123. However, where a public body has a discretion or duty which is by its very nature ongoing, such as a power to issue policy or guidance on a particular matter as is the case with the 3rd Respondent, it will have the power to exercise that function from time to time. Section 42 of the Interpretation and General Provisions Act in this respect provides as follows:

“Where a written law confers a power or imposes a duty, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed from time to time as the occasion arises.”

124. Thus, the 1st Respondent's by basing its decision on the 2nd Applicants' complaint of 30th May 2007, interpreted the law wrongly to allow the 3rd Respondent to abdicate its continuing duty and responsibility to hear and determine the 2nd Applicants' complaint of 14th June 2013, contrary to express provisions of section 46 of the Act which are reproduced hereabove.

125. The second issue for determination is whether the 1st Respondent's granted the 1st and 2nd Applicants a fair hearing. The 1st Applicant's submissions in this regard were that it was not afforded a fair hearing. Further, that it was ambushed as the 1st Respondent issued orders which had not been prayed for. According to the 1ST Applicant, the Appellants in **RBATCA No. 3 of 2013** only prayed for the decision by the 3rd Respondent to be set aside, and for the 3rd Respondent to be compelled to decide the complaint dated 14th June, 2013 on its merits. That this was allowed and partially reflected in order (b) of the said judgment.

126. However, that the 1st Respondent however went further than what was prayed and was prosecuted by the Appellants, defended by the Applicants and submitted on by both parties. In particular that orders (c), (d) and (e) were never prayed for, and the Applicants never had a chance to make representations on them to the 1st Respondent.

127. Reliance was placed on the decisions by the Court of Appeal in the cases of **David Sironga Ole Tukai ve Francis Arap Muge & Others (20140 eKLR)** and **Global Vehicle Kenya Limited vs Lenana Road Motors, Mombasa Civil Appeal No 7 of 2015** that the court will not grant a remedy which has not been applied for, nor determine issues which the parties have not pleaded, and that parties are bound by their pleadings.

128. The 2nd Applicants' submission were that the 1st Respondent clearly failed to follow due procedure by putting into consideration irrelevant facts which related to the **RBATCA No 7 of 2010**, which matter was never determined, and that the matter in **RBATCA No 3 of 2013** was *de novo*, with regard to a continuous breach by the 1st Applicant, which fact the 1st Respondent failed to put into consideration, and which was the root of the application despite the two preliminary objections in law instituted by the 1st Applicant failing.

129. Furthermore, that while recognising that indeed the matter was not *res judicata*, the 1st Respondent went ahead to blatantly discriminate upon the 2nd Applicants herein. The 2nd Applicants relied on the decision of **Pastoli vs Kabale District Local Government Council And Others, (2008) 2 EA 300**, that for one to succeed in an application for judicial review one has to show the act complained of is tainted with illegality, irrationality and procedural impropriety.

130. The Interested Parties reiterated their submissions that the Applicants were accorded a fair hearing and that all parties attended

proceedings before the 1st Respondent. Therefore, that no party was ambushed as all were present during the proceedings, and that the Applicants are attacking the merits of the 1st Respondent's decision.

131. It is evident that both the 1st and 2nd Applicants are attacking the substance of the decision made by the 1st Respondent, and have not faulted the procedural steps taken in reaching the decision. The respective arguments in a nutshell are that the 1st Respondent gave orders that were not supported by the pleadings, evidence and argument by the parties; and that it took into account irrelevant factors and failed to take into account relevant factors as regards the previous complaints made by the 2nd Applicants.

132. The remit of this Courts jurisdiction to review a decision on merits is provided by section 7(2) of the Fair Administrative Action Act as follows:

(2) A court or tribunal under subsection (1) may review an administrative action

or decision, if-

(a) the person who made the decision-

(i) was not authorized to do so by the empowering provision

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to-

(i) the purpose for which it was taken;

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate

expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power.

133. The Court of Appeal in held as follows as regards the limits of this Court's merit review in judicial review proceedings:

“An analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.”

134. It is also an established principle of law that the decision of a public body will be unlawful if it is irrational or unreasonable, in the sense of being a decision which no public body acting reasonably would have reached. This was principle was settled by the decisions in Associated Provincial Picture Houses vs Wednesbury Corporation (1948)1KB 223 and Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374. This ground was also explained in Pastoli vs Kabale District Local Government Council & Others, (supra) as follows:

“...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...”

135. The general rule on failure to take into account relevant considerations or taking into account irrelevant considerations was stated in Associated Provincial Picture Houses Ltd vs Wednesbury Corporation (1948) 1 KB 223 that a public body when making a decision, must take into account all the factors which the legislation conferring the relevant function expressly or implicitly requires it to have regard, and disregard irrelevant considerations. The extent to which a public body inquiries into a particular factor and the weight to be attached to a factor is however to be decided by the public body provided its acts reasonably. In addition, considerations to be taken into account or not taken into account will also depend on the circumstances of each case.

136. In making my determination, have perused the complaint dated 14th June 2013, the 3rd Respondents decision thereon dated 1st August 2013 and the memorandum of appeal dated 14th August 2013 filed against the said decision in **RBATCA No 3 of 2013**. The complaint dated 14th June 2013 stated as follows:

“The Chief Executive Officer,

Retirement Benefits Authority

Rahimtulla Towers

NAIROBI

Dear Sir,

RE: COMPLAINT BY 17 MEMBERS IF KENYA AIRPORTS AUTHORITY STAFF SUPERANNUATION SCHEME

The above matter and the complaint lodged herein refers.

We hereby forward to you the following documents pursuant to provisions of Section 46 of the Retirement Benefits Act.

Individual Complaint forms for all the 17 complaints being:-

1. Stephen Wahome Ihiga

2. Antony M. Githaiga

3. James Ariga Mwasi
4. Mugo Wairimu Philomena
5. Moses Wanyonyi Wekesa
6. Nthenya Juma Joan
7. Kuboka Solomon
8. Joshua Guantai
9. Wycliff Kichana Amutala
10. Johnstone W. Waitara
11. Joseph M. Gakure
12. Johnson M. Gachanja
13. Mueithi Judity Nkorote
14. Richard Kisonde Mutiso
15. Benard Woie Kavivya
16. Mutham Samuel Kamau
17. Stephen Kinyua Nyamu

We would also like to inform you that six (6) of the above complainants has lodged a complaint with you in the year 2007 which related to causes of action at that time.

Secondly, the complaint herein is based on new causes of action which is that as at todate, the Trustees are still breaching the provisions of the Trust Deed and Rules thus giving rise to the instant claim.

Thirdly, a case which was filed at the Tribunal under Tribunal Appeal No. 7 of 2010 which was determined by the Tribunal in favour of the Complainants herein who lodged a complaint with you in 2007, was overturned by the High Court on a Technical point that the Tribunal did not have the power to enlarge time within which the Complainants could file an Appeal under Section 48 of the Retirement Benefits Act.

Kindly therefore have the complaint herein determined on its merits.

Yours faithfully

Koceyo Titus

KOCEYO & COMPANY ADVOCATES”

137. The 3RD Respondent’s decision dated 1st August 2013 on the said complaint was as follows:

“Koceyo & Company Advocates

4th Floor, Queensway House, Kaunda Street

P.O. Box 73088-00200

NAIROBI

Dear Sir,

RE: COMPLAINT FILED BY 17 MEMBERS OF KENYA AIRPORTS AUTHORITY STAFF SUPERANNUATION SCHEME

We thank you for your letter dated July 15, 2013 and confirm having

read the enclosures therein.

We note that the issues raised in the complaint are substantially the same as those raised by your other clients in 2007. In our letter of July 16, 2007 the Authority made a decision on those issues which was communicated to you. We therefore do not have any new decisions to make on those issues.

Yours faithfully,

Leboo K. Irene

LEGAL SERVICES DEPARTMENT “

138. The Memorandum of Appeal dated 14th August 2013 and filed with the 1st Respondent that appealed the said decision of the 3rd Respondent stated as follows:

“THE APPELLANTS being dissatisfied with the entire decision of the Retirement Benefits Authority made on 1st August, 2013 at Nairobi hereby appeal against the same on the following grounds:-

1. FAILURE TO MAKE A DECISION ON THE APPELLANTS COMPLAINT

- a. The Retirement Benefits Authority erred in law and fact in failing to decide the complaint lodged by the Appellants on its merits despite the same raising new and fundamental breaches of the Scheme Rules and the Law
- b. The Retirement Benefits Authority erred in law and fact in failing to consider that the breach complaint about is continuous and have never been decided and/or resolved and each continuous breach constitutes a new cause of action.
- c. The Retirement Benefits Authority erred in law and fact in failing to consider that not all the complainants had lodged a complaint in 2007 as alleged. The Authority never identified which complainant they allege to have lodged a complaint in 2007.
- d. The Retirement Benefits Authority erred in law and fact in failing to consider that each subsequent month when a monthly pension is underpaid in violation of the law constitutes a fresh cause of action.
- e. The Retirement Benefits Authority failed to consider that failure to effect annual pension increases on the Appellants' monthly pension constitutes fresh cause of action.

Reasons wherefore the Appellants pray that the Retirement Benefits Authority's decision be set aside and the Retirement Benefits Authority be compelled to decide the complaint on its merits.”

139. The statement of facts supporting the said affidavit specifically referred to the issues arising as follows:

“1. The Complainants were employees of the Kenya Airports Authority, the employer herein and were also members of the Kenya Airports Authority Superannuation Scheme which was and is an irrevocable trust and established by the Employer under the Trust Deed Rules dated 11th August, 1995 and amended from time to time the latest being 2nd October 2006, as a scheme to provide pension and other benefits to the employees of the said employer upon their retirement at a specified age and relief for the Defendant of deceased employees.

2. On or about 17th June 2013 the complainants found out that, the 2nd Respondent had reduced their pension benefits due to them as a result of Fraudulent Misrepresentation, Concealment and/or Non-disclosure of material facts thereby resulting in the Appellants being paid reduced amounts, contrary to the Trust Deed and Rules, which action is illegal, null and void.

3. The Appellants filed a complaint on 17th June, 2013 thereby expressing dissatisfaction on how the Trustees have been handling their pension and sought the 1st Respondent's intervention in the matter.

4. On the 1st August, 2013, the Appellants received a letter through their advocates whereby the Retirement Benefits Authority states therein that the issues raised therein were similar to those raised in a Claim filed by some of the former members of the Scheme earlier in the year 2007....”

140. It is evident that cutting across the said documents and pleadings is the issue of the pension benefits due to the Appellants in **RBATCA No 3 of 2013** under the 1st Applicant's Trust Deed and Rules. The orders (c), (d) and (e) made by the 1st Respondent in the impugned decision of 10th February 2017 relate to this issue, and cannot therefore be said to have been irrational or unreasonable on account of not being prayed for, nor can it be argued that they were irrelevant considerations. As to whether the said orders were right or wrong is another matter which is not for this Court to decide in judicial review.

141. This finding notwithstanding, this Court finds that the order by the 1st Respondent in the impugned decision of 10th February 2017 to dismiss the 1st, 3rd, 9th, 12th, 15th, 16th, and 17th Appellants' (the 2nd Applicants herein) appeal was irrational. The said appeals were dismissed on account of the claims therein being barred by the limitation prescribed under Section 48(1) of the Retirement Benefits Act for filing appeals. This Court finds that the said order was irrational particularly in light of, and taking into account the 1st Respondent's findings in its judgment of 14th November 2014, that was the basis of the order.

142. This finding is supported by two reasons. Firstly, as found earlier on in this judgment, there was an error of law made by the 1st Respondent in its decision of 10th February 2017, and it failed to take into account a relevant consideration which was that the complaint that was before it was that made by the Appellants on 14th June 2013 and the decision thereon by the 3rd Respondent made on 1st August 2013, and not the complaint dated 30th May 2007.

143. Second, the 1st Respondent's decision in its impugned decision of 10th February 2017 did consider the issue whether the 3rd Respondent made a decision on the merits of the Appellants' complaint dated 14th June 2013, and made a specific finding that the 3rd Respondent was under a duty to consider the said case under section 46 of the Act, and held as follows:

“In our view, the 1st Respondent erred when it summarily rejected the Appellants' complaint by reference to a decision made in a previous complaint without further inquiry. Had the 1st Respondent made any prudent investigations of the Appellants complaint, it would have isolated those Appellants who signed the complaint dated 30th May 2007 upon which a decision was made on 16th July 2007 and determined the case of the remaining Appellants in the manner set out in the law.

144. This finding was at variance with, and manifestly contradicted the orders made dismissing the 2nd Applicants appeal on account of its previous complaint dated 3rd May 2007, as evidently the 1st Respondent found that its complaint of 14th June 2013 had not been considered, and there was thus a manifest lack of logic to the orders made as regards the 2nd Applicants.

Whether the 1st and 2nd Applicants are entitled to the relief sought

145. On the last issue as regards the relief sought, the 1st and 2nd Applicants has sought orders of certiorari, prohibition and mandamus. The Court of Appeal held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *inter alia* as follows as regards the nature of the two judicial review orders:

““Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

146. The 1st Applicant failed to prove the grounds for judicial review that they alleged and are not entitled to the orders they seek.

147. This Court has however found that the order given by the 1st Respondent on 10th February 2017 as against the 2nd Applicants were made in error of law and were irrational. The 2nd Applicants are thus entitled to the order sought of certiorari to quash the impugned order. The effect of the order of certiorari once granted will be to restore the status to the position it was before the said decision, and that the appeal by the 2nd Applicant and Interested Parties will remain undecided.

148. As regards, the order of mandamus that is sought by the 2nd Applicants, while section 11 (1) (e) and (h) of the **Fair Administrative**

Action Act permits this court to remit a matter that has been quashed or set aside back to the decision maker for reconsideration, this Court cannot grant the orders of mandamus on the terms sought by the 2nd Applicants, as it cannot direct the 1st Respondent to undertake its duties in a particular manner

149. In the premises, this Court orders as follows:

1) The 1st Applicant's Notice of Motion dated 27th June 2017 is found not to be merited and is dismissed with costs to the Respondents and Interested Parties.

2) The 2nd Applicants' Notice of Motion dated 27th October 2017 is allowed in terms of the following orders:

a) An order of Certiorari be and is hereby issued to remove into this Court for quashing, the decision of the decision and orders of the 1st Respondent dated 10th February 2017 in RBATCA No 3 of 2013.

b) The 2nd Applicants and Interested Parties appeal in RBATCA No 3 of 2013 is hereby remitted back to the 1st Respondent for fresh hearing and determination in accordance with all the applicable laws.

c) That 1st, 2nd and 3rd Respondents shall meet the costs of the 2nd Applicants Notice of Motion dated 27th October 2017.

150. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF NOVEMBER 2018

P. NYAMWEYA

JUDGE