REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 536 OF 2016

IN THE MATTER OF AN APPLICATION BY THE HERITAGE A.I.I. INSURANCE COMPANY LIMITED RETIREMENT BENEFITS SCHEME FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND DECLARATION

AND

IN THE MATTER OF THE RETIREMENT BENEFITS ACT, CAP 197 LAWS OF KENYA

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010 ORDER 53

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

RETIREMENT BENEFITS APPEALS TRIBUNAL.....RESPONDENT

BENIAH WEKESA WANYONYI.....INTERESTED PARTY

AND

THE HERITAGE A.I.I. INSURANCE COMPANY

LIMITED RETIREMENT BENEFITS SCHEME....*EX-PARTE* APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 10th November, 2016, the *ex parte* applicant herein, **The Heritage A.I.I. Insurance Company Limited Retirement Benefits Scheme** (hereinafter referred to as "the Scheme)**,** seeks the following orders:

1. **CERTIORARI removing to this Honourable Court for the purposes of quashing the judgement against the Applicant dated 9th September 2016 and the consequential decree.**

2. **DECLARATION that the judgement dated 9th September 2016 is a violation of the Applicant's right to fair administrative action and contrary to Article 47 of the Constitution of Kenya, 2010 as read with Section 4 of the Fair Administrative Action Act, 2015 as the same is an abuse of process, arbitrary, capricious and brought mala fides by the Respondent in abuse of due process of the court, and has occasioned the subject great prejudice.**

3. **DECLARATION that the judgement dated 9th September 2016 amounts to deprivation of the Applicant's right to property guaranteed under Article 40 of the Constitution as payments were lawfully expended to offset the Interested Party's mortgage liabilities.**

4. **DECLARATION that the judgement dated 9th September 2016 was null and void as it affects the contractual rights of the parties *to wit,* the Interested Party and the Sponsor regarding the mortgage and further condemned the Sponsor un-heard.**

5. **DECLARATION that the claim by the Interested Party before the Chief Executive Officer of the Retirement Benefits Authority was time-barred.**

6. **Costs be provided for.**

***Ex Parte* Applicant's Case**

2. According to the Scheme, the Interested Party (hereinafter referred to as "the employee) was employed by the **Heritage Insurance Company Limited** (hereinafter referred to as "the Sponsor") on 1st July 1988 until 25th September 1996 when his services were terminated. In February 1995, the Sponsor financed the purchase of plot known as L.R No.Ngong/Ngong/9288 for Kshs.1,425,000.00 on behalf of the employee. A further Kshs.418,000.00 was released to him so that he could commence building. It was averred that at a time of termination of his contract on 25th September 1996, the employee agreed to offset any liabilities to the Sponsor from any other benefits due to him.

3. According to the Scheme, *o*n 20th August 1996, the Sponsor wrote to the employee indicating that the facility advanced to him attract interest at the rate of 21%. To the Scheme, as at 31st December 1996, the employee's pensions due were Kshs.1,042,963.60. When a calculation was done on 24th January 1997 the pensions due were 1,042,963.60 but the fund continued earning interest for the entire year of 1997 up to November 1998. This calculation, it was averred was done by the Scheme. It was averred that the final payment to recover the loan from his pension account was eventually effected on 4th November 1998 at which date, his loan balance was Kshs. 2,942,021.33 and his pension was Ksh.1,415,301.40 hence the pension ceased to exist as it was used to offset the employee's outstanding loan balance. As at that date, the employee's loan balance after offsetting the pension stood at Kshs.1,526,719.93 which balance accrued interest at the rate of 21% per month as had communicated to him earlier.

4. The Scheme disclosed that the employee then paid the Sponsor Kshs. 1,415,301.40 which was used to offset the Interest Party's loan balance on 18th November 1998. However, sometimes in February 2014, the employee through the firm of Hayanga & Co. Advocates sought to access the employee's pension to which the Scheme responded on 31st March 2014 that the employee had given his approval for his pension benefits to be used to partially offset his loans; and that the pension was used to offset the loan liabilities but the same were not sufficient to totally cover his entire liabilities; that the unpaid loans continued to accrue interest from November 1998 as no other payments continued to accrue interest and that the employee still owed the Sponsor monies accruing from the accumulated interest on the un-serviced loan.

5. It was contended that sometimes in February 2015, the employee a complaint with the Chief Executive

Officer of the Retirement Benefits Authority (hereinafter referred to as "the Authority") about his failure to access 50% of his employer's pension contribution and by letter dated 15th May 2015, the employee stated that the letter dated 27th September 1996 was promissory than instructional and that the Appellant had agreed to allow his pension to continue. However, no evidence was offered to support the claim. In response thereto, the Appellant by a letter dated 30th June 2015, using the letter head of the Sponsor, submitted a Statement of Account purportedly reflecting the employee's balance of Kshs.6,035,901.41 which letter was erroneously sent by the Human Resources Manager of the Sponsor and wrongly computed the pension outstanding as at May 1998 of Kshs.1,415,301.40 as accumulating at different rates from that date. Though the latter was withdrawn, the Respondent refused to accept indicating that it had being withdrawn in bad faith.

6. It was averred that sometimes in July 2015, the employee demanded payment of his dues from the Managing Director of the Sponsor and the Legal Services Officer of the Retirement Benefits Authority by the letter dated 14th July 2015 found out that the Appellant had breached the law to use the employee's pension to offset his dues. The Officer demanded the Scheme to calculate the employee's benefits up from the time he left service together interest realized for the period the funds were held in the scheme less any deductions lawfully due from him and to render full amount to the employee on the computation of his benefits and pay his benefits without further delay.

7. It was averred that by letters dated 29th July 2015 and 6th August 2015, the Scheme responded to the Legal Services Officer of the Authority informing the Authority that it does not have jurisdiction to investigate claims of pensions being used to offset mortgage liabilities before section 38(1) of the ***Retirement Benefits Act*** (hereinafter referred to as "the Act") had been operationalized. It also analysed the chronology of events. By letter dated 25th August 2015, the Respondent reiterated that it had jurisdiction to investigate the complaint and by letter dated 16th September 2015, the Respondent threatened to make adverse recommendations against the Scheme with the attendant penal consequences if the recommendations to pay the employee Kshs.6,035.901.45 were not respected. By letter dated 15th October 2015, the Scheme responded to the Authority's letters dated 16th September 2015 and 25th August 2015 and laid down the chronology of facts with supporting documents to the Respondent and withdrawing the Statement of Accounts dated 30th June 2015 as it was done in error and provided the correct statement of account; reiterating that the pension dues were used to offset the employee's loan liabilities on 4th November 1998 and the said pension become depleted and could therefore not accumulate interest; and reiterating that the Respondent had no jurisdiction to investigate alleged complaints of scheme using pension of its members to offset loan liabilities as section 38(1) of the ***Retirement Benefits Act*** was operationalized in 2000 and the same provision of the law does not apply retrospective.

8. It was averred that on 9th November 2015 the Chief Executive Officer of the Authority without reasons directed the Scheme to pay the employee Kshs.6,035,901.41 and further refused to admit the corrected Statement of Accounts on grounds that the same had been withdrawn in bad faith. On 9th November 2015, the Applicant informed the Chief Executive Officer of its intention to appeal his decision to the Tribunal and on 9th December 2015, the Scheme filed the Memorandum of Appeal to the Respondent on the following grounds:

a. It was not an offence for the Applicant to use the Interested Party's pension to offset his mortgage liabilities in 1998 as section 38(1) of the ***Retirement Benefits Act, Cap 197*** commenced on 21st August 2000.

b. Section 38(1) of the Retirement Benefits Act, Cap 197 does not have a retrospective effect.

c. The decision was erroneous as the Interested Party's pension was used to offset his loan labilities and become depleted. It could therefore not accumulate and earn interest.

d. The decision was erroneous as the Chief Executive Officer of the Authority failed to consider the

detailed chronology of events and the accompanying documents in a letter dated 15th October 2015.

e. The decision of the Chief Executive Officer of the Authority was null and void *ab initio* as it was done without the Officer having jurisdiction.

f. The decision by the Chief Executive Office of the Authority would amount to unjust enrichment by the Interested Party as he had authorized the use of his personal contribution to offset his mortgage debt. To now order a refund would be unlawful and unconscionable.

9. Following the filing of the responses to the application as well as the submissions, during the hearing of the matter, the Respondent (hereinafter referred to as "the Tribunal") directed that the Scheme furnishes it with the minutes of 1998, the period when the Interested Party's pension was used to offset his mortgage liabilities. Upon request for the same by the Scheme to its Record Management Company, it was confirmed that the records were destroyed in 2009 and the Scheme was furnished with copies of the said destroyed documents which were furnished to the Tribunal.

10. It was averred that on 9th September 2016, the Tribunal delivered the impugned judgment wherein it dismissed the appeal by the Scheme and ordered it to pay the Authority and the employee costs on the upper scale.

11. Based on the advice of its legal counsel, the Scheme averred that it had an excellent case for the following reasons:

a. The Respondent in dismissing the appeal by the Applicant, ignored clear evidence in its possession contrary to the provisions of Article 47 of the Constitution as read with section 4(1) of the ***Fair Administrative Action Act*** which provide a right to lawful, reasonable and procedurally fair administrative action *to wit:*

i. Finding that the Applicant did not pay any money to the Sponsor when evidence of the receipt was exhibited.

ii. It was not an offence for the Applicant to use the Interested Party's pension to offset his mortgage liabilities in 1998 as section 38(1) of the ***Retirement Benefits Act, Cap 197*** commenced on 21st August 2000.

iii. Section 38(1) of the ***Retirement Benefits Act***, Cap 197 does not have a retrospective effect.

iv. Failing to find that the decision of the Authority was erroneous as the Interested Party's pension was used to offset his loan labilities and become depleted. It could therefore not accumulate and earn interest.

v. Failing to find that the decision of the Chief Executive Officer of the Authority was erroneous and failed to consider the detailed chronology of events and the accompanying documents in a letter dated 15th October 2015.

vi. Failing to find that the decision of the Chief Executive Officer of the Authority was null and void *ab initio* as it was done without the Officer having jurisdiction.

vii. The decision by the Chief Executive Office of the Authority would amount to unjust enrichment by the Interested Party as he had authorized the use of his personal contribution to offset his mortgage debt. To now order a refund would be unlawful and unconscionable.

viii. Failing to find that the decision of the Authority in failing to allow the recall of the Statement of Accounts *vide* the letter dated 15th October 2015 was in violation of the

provisions of the ***Fair Administrative Action Act*** as no reasons were given for its failure to admit the statement of accounts.

b. Contrary to the provisions of Sections 7 (2) (a) (iv), (c), (d), (e), (f), (h), (i)(iii) & (iv), (j), (k) and (n) of the ***Fair Administrative Action Act*** the decision by the Respondent is:

i. Unreasonable as it flies in the face of clear evidence that the Interested Party had consented to his pension being used to offset his mortgage liability in 1996. Offsetting a person's pension was not an offence under the Retirement Benefits Act.

ii. Indicative bias by the Respondent for the reasons that:

a. The Respondent failed to evaluate the evidence before it wholesomely and the submission and authorities submitted by the Applicant which were dismissed casually by the Respondent.

b. Finding that a party cannot recant a document when the other party has acted on it yet failing to make the same finding as regards to the termination letter to the Interested Party wherein he consented to his pension being used to offset his mortgage liability.

c. Admitting the letter by Mary Mati to the Interested Party forwarding the Statement of Account of the Interested Party on the grounds that though all the correspondences were in the letter head of the Sponsor, they were also from the Trustee. However, the Respondent failed to make the same finding on other correspondences by the Chairman of the Applicant and also the Administrator of the Applicant which letters were all written using the letter head of the Sponsor.

d. Approbated and probated in its judgment. The Respondent dismissed the letter that recalled the earlier Statement of Accounts submitted to the Interested Party on the basis that all correspondences prior to 5th October 2015, the Applicant had not stated anywhere that the Interested Party's pension would be used to offset his mortgage liabilities yet there was evidence before of it vide letter dated 6th August 2015 and 31st March 2014 by the Applicant clarifying on the same.

e. The Respondent finding that there was no retention policy with Archives Solution Limited as no agreement was shown to exist yet the letter that forwarded the documents was from the Chairman of the Applicant.

f. It misinterpreted the doctrine of estoppel and acquiescence and failed to consider the submission and authorities by the Applicant.

iii. Materially influenced by an error of law as:

a. If a party acquiescence to a position, he cannot be heard to complain later if prejudice may be caused by the other party.

b. If a party has so acted where fair inference can be drawn from his conduct that he consents to a transaction to which he might quite properly have objected he cannot be heard to question the legality of the transaction against the person who on the f ace of his conduct has acted on the view that the transaction was legal. The principle applies even if the party whose conduct is in question was himself acting without full knowledge or error.

c. A party is in law estopped from reneging on his promise which the other party reasonably relied on.

d. Destruction and/or disposal of documents is lawful in so far as it is done with no intention to hinder justice.

iv. Procedurally unfair as the Applicant was not accorded a fair hearing by the Respondent who either ignored its evidence and/or relied on the evidence produced selectively. The Respondent further failed to evaluate the evidence and submissions by the Applicant.

v. Indicative ulterior motives or calculated to prejudice the rights of the Applicant as the decision by the Respondent flies in the face of logic and evidence.

vi. Failed to take into account relevant consideration being that before 2000, Section 38 of the ***Retirement Benefits Act*** had not been operationalized and therefore it was not an offence for the sponsor and/or trustee to use a person's pension to offset his mortgage. Further, that the Applicant had paid the Sponsor the pension due to the Interested Party and therefore there was no money that could accrue interest.

vii. The decision was made in bad faith.

viii. It was not rationally connected to the information before it.

ix. It is unreasonable as it effectively condemns the Applicant to pay the Interested Party Kshs.6,062,610.61 in addition to the costs on the upper scale to the Authority and the Interested Party yet the Interested Party's pension was used to offset his mortgage liabilities in 1998.

x. It's an abuse of the Respondent's discretion.

xi. It's unfair and an abuse of the Respondent's power.

12. It was submitted on behalf of the Applicant Scheme that on failure by the Respondent to file any reply to the allegations set out in evidence, shows that the facts are deemed admitted. Similarly, the Interested Party has not succinctly denied the facts set forth in the Verifying Affidavit and thus are deemed admitted since the Interested Party only responded to the grounds for the judicial review and not to the facts of the case. In this respect the Applicant relied on the case of **Mohammed & Another vs. Haidara [1972] E.A 166** *at page 167* paragraph F-H, where **Spry V.P** considered the failure by a party to file any reply to allegations set out in evidence and expressed himself as follows:

> **"The respondent made no attempt to reply to these allegations and they therefore remain unrebutted… Here, the respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied…"**

13. It was submitted that the Ex-Parte Applicant acted on the Instructions of the Interested Party to use his Pension Amount of Kshs.1,415,301.40 as at 31.10.1998 to offset his mortgage liability and is thus estopped from denying the same. It was the applicant's case that the Interested Party through a letter dated 25th September 1996 to him, by implication when he appended his signature thereto, acquiesced to the Trustee using his pension contributions to clear part of the outstanding mortgage. During the hearing at the Respondent and documents filed therein, there was unequivocal evidence that the Trustee paid the Sponsor Kshs.1,415,301.40 to offset the Interested Party's loan liabilities. His pension thereafter become depleted and/or exhausted when the same was paid to clear his pension liabilities. According to the applicant, section 120 of the ***Evidence Act, Cap 80*** creates a statutory estoppel barring the attempt by a party to renege on a position it had led another party to rely on. The said provision provides thus:

> ***"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his***

representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

14. The foregoing provision, it was submitted sets out the doctrine of estoppel that can be construed by conduct. This arises where it would be unconscionable for a person to deny a representation of fact that is implicit in his conduct. Such an estoppel may arise from agreement or from an express or implied representation, promise or from negligence. In the applicant's view, where a party to an agreement acquiesces to a position, he cannot be heard to renege on the same where there is no fault on the adverse party. In support of this position the applicant relied on the cases cited in **G.V Odunga** in his book ***Odunga's Digest on Civil Case Law and Procedure*** and **Ayman Hijjawi vs. Anwar Hussein [2014] eKLR** wherein the Court held cited with approval the decision of **Denning, LJ** in **Combe vs. Combe (1951)2 KB 215** where it was held that:

"The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.

15. In the applicant's view, it is trite law that a party should not be allowed to sit on what it considers to be his rights under an instrument to only rise up when the other attempt to enforce its rights under the same as delay defeats equity. To the applicant, delay defeats equity and courts do consider the same as a critical factor before issuing any order. Further, the doctrine of laches defeats the Interested Party's claim at the Respondent and reliance was sought from **Abigael Barmao vs. Mwangi Theuri (2013) eKLR** where **Munyao J.** buttressed this position citing ***Snell's E quity 30th Edition at page.33 para 3-18*** (quoting **Lord Camden L.C** in **Smith vs. Clay (1767) 3 Bro. C.C. 639n. at 640n)** which asserted that a court of equity:

"has always refused its aid to stale demands where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence, where these are wanting, the court is passive, and does nothing."

16. In this it was submitted that the Respondent failed to evaluate the evidence before it and arrived an erroneous decision as the Interested Party was estopped from denying that he authorized the Applicant to use his pension to offset his mortgage liability which authorization was acted upon by the Applicant.

17. The applicant contended that section 38 of the ***Retirement Benefits Act, Cap 197*** does not have a retrospective application. According to the applicant, only an Act of Parliament or Regulations made thereunder to give effect to an Act of Parliament that can legalize or illegalize an act since it is a non-adherence to the provisions of the law or regulations made thereunder that can make an act illegal. Regulations and/or rules of an organization or scheme as in this case, cannot legalize or illegalize an act. Such scheme rules provide for rights and remedies to its members and the procedures to be followed. Non-adherence to the procedures of such a scheme does not make the impugned act illegal but rather make it irregular. It was disclosed that in its judgement (page 75 of the judgment), the Respondent held that section 38(1) of the ***Retirement Benefits Act*** has a retrospective effect. That Act, it was averred was assented to on 22nd August 1997 and section 38(1) of the Act commenced on 21st August 2000. That The Respondent found out that the section has a retrospective effect is an error of law that taints the whole decision yet it is not the role of a Court of Tribunal to dictate as to whether a law should or should not apply retrospectively. That is a matter within the province of the legislature. In this respect the applicant relied on section 23(3) of the ***Interpretation and General Provisions Act***, Cap 2 which provides:

Where a written law repeals in whole or in part another written law, then, unless a contrary

intention appears the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.

18. It was submitted that the foregoing crystalizes the issue on the cardinal rule for construction of Acts of Parliament as stated in ***Craies on Statute Law*** **6th Edition pg.66** that:

> **"The cardinal rule for contrition of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. The tribunal that has to construe and Act of legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words, it is natural to inquire what is the subject matter with respect to which they are used and the object in view."**

19. The foregoing comes from the high authority of **Lord Balckburn** in **Director United States Cable vs. The Anglo-American Telegaph Co. 2 A.C 394 1877** and **in Barnes vs. Jarvis (1953) 1 WLR 649** where **Lord Goddard CJ** said**:**

> **"…a certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered."**

20. Further reliance was placed on **Municipality of Mombasa vs. Nyali Limited (1963) E.A 371** where **Newbold JA** stated thus:

> **"Whether or not legislation operate retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction. One of these rules is that if the legislation affects the substantive rights, it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary. But in the las resort it is the intention behind the legislation which has to be ascertained and the rule of construction is only one of the factors to which regard must be had in order to ascertain that intention."**

21. The foregoing got approval in the case of **S.K Macharia & Another vs. Kenya Commercial Bank Limited & Others, SCK Application No.2 of 2011** where the Supreme Court stated that:

> **"A retroactive law is not unconstitutional unless it inter-alia impairs obligations under contracts, divests rights or is constitutionally forbidden. Cited in Overseas Private Investment Corporation & Others vs. Attorney General & Another Petition 319 of 2012 to buttress this,** in **Kenya Bankers Association & Others vs. Minister of Finance & Another (2002) 1 KLR 61, the Court noted that a statute which takes away or impairs vested rights acquired under existing laws, or creates new obligations or imposes a new duty in respect of transaction**

already past, must be presumed to be intended not to have retrospective operation"

22. It was submitted that section 38(1) of the ***Retirement Benefits Act*** clearly impairs the vested rights of the Applicant to use an employee's pension to offset his loan liabilities. It imposes new duty or obligation on a party and therefore, if the legislature intended it to have a retroactive application, it would have stated so. However, though the Act was assented to on 22nd August 1997, Section 38(1) of the Act commenced on 21st August 2000 and therefore did not have a retrospective effect. The Applicant cannot therefore be faulted to have violated the said provisions when it used the Interested Party's pension to offset his loan liabilities as it was not illegal before the section was operationalized.

23. It was further submitted that section 38(1A) of the Act was amended in 2009 and the ***Retirement Benefits (Mortgage Loans) Regulations*** were enacted to operationalize the same. Thus, the Respondent can only investigate complaints by members of the scheme where it is alleged that the scheme used pension to offset liabilities between 2000 to 2009. As the Applicant had used the Interested Party's pension to offset his loan liabilities in 1998 – when the same was not an offence- the Retirement Benefits Authority had no jurisdiction to investigate the same and impose sanctions. It further follows that the Appeals Tribunal made an error in law in stating that Section 38(1) of the Act can apply retrospectively and clothe the Authority with the jurisdiction.

24. It was the applicant's case that the Respondent failed to find out that the Retirement Benefits Authority erred in law by failing to consider all the evidence tabled before it vide the letter dated 15th October 2015 and give justifiable reasons as to why it admitted the recanted documents. It was submitted based on **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 Others [2016] eKLR**, that is that a decision maker has to give reasons for an administrative action which reasons for the decision ought to be justifiable and not just any other reason. To the applicant, bad faith is such a vague reason that did not explicitly give the Applicant the specific reason why the Authority admitted recanted or withdrawn Statement of Accounts. Actionable and specific reasons ought to have been given by the Authority as it common in practice and law for a party to withdraw, recall and recant any document and where such document is recanted, it has no probative value. Thus, the failure by the Authority to give specific reasons why it admitted recanted document and for the Respondent to make such a finding violated the provisions of Article 47 of the Constitution and the sections 4(3)(d), 5(d)(i), 6(1), 6(2)(a) and 6(4) of the **Fair Administrative Action Act** require written reasons for administrative decision. In support of this position the applicant relied on **Judicial Service Commission vs. Hon. Justice Mutava Mbalu, Civil Appeal No. 52 of 2014,** where **Githinji JA** in considering the duty to give reasons for administrative action in light of Article 47(2) of the Constitution held that reasons for decision should be given as a matter of right where a right under the Bill of Rights has been or is likely to be adversely affected by the administrative action and not otherwise; that the right to be given written reasons for the decision can be limited by law for a reasonable and justifiable cause.

25. It was contended that as no justifiable reasons were given as to why recanted documents was admitted by the Authority, the impugned decision of the Respondent is bad in law. In addition to the above, the finding and decision of the Respondent are in law unreasonable in the absence of an evidential foundation for arriving on the finding that Applicant should pay Kshs 6,035,901.41 to the Interested Party this constitutes an error of law. Indeed, where a body takes into account irrelevant considerations, any decisions arrived at become unlawful.

26. It was submitted that the decision of the respondent will deny the appellant it's right to property and will further result into unjust enrichment by the interested party contrary to Article 40 of the Constitution which guarantees the right to property which is defined under Article 260 to include any vested or contingent right to, or interest in or arising from money, choses in action or negotiable instruments.

27. The applicant contended that the destruction or disposal of documents is lawful in so far as it is done with no intention to hinder justice yet the Respondent found out, without evaluating the evidence and submissions before it, that there was no retention policy with Archives Solution Limited as no agreement was shown to exist, yet the letter that forwarded the documents was from the Chairman of the Applicant and further, the issue before the Respondent was not whether or not there existed and Agency

Relationship between the Applicant and Archives Solutions Limited. The Responded formed an erroneous question and answered it erroneously. In this respect the applicant relied on **McCabe vs. British American Tobacco Australia Services Ltd (BAT) 2002 VSCA 197** where the Plaintiff claimed for damages, both general and exemplary, for personal injury allegedly sustained by her through smoking the cigarettes of the defendant. The Plaintiff filed an application to strike out Defence following discovery that the Defendants had destroyed some documents under their 'Document Retention Policy'. The application to strike out the defence was allowed but the Defendants appealed and the order was set aside by the Court holding that where one party alleges against the other for destruction of documents before the commencement of the proceedings to the prejudice of the party complaining, the criterion for the court's intervention (otherwise than by drawing adverse inferences, and particularly if the sanction sought is striking out of the pleading) is whether that conduct of the other party amounted to an attempt to pervert the course of justice or, if open, contempt of court occurring before the litigation was on foot. It was contended that in this case the destruction or disposal of documents was lawful in so far as it was done with no intention to hinder justice. Indeed, the documents were destroyed under the company policy and the balance struck between the right of any company to manage its own documents by retaining them or destroying them, and the right of the litigant to have resort to the documents of the other side. The Respondent thus acted contrary to the rules of natural justice by ignoring the evidence before it and the submissions made by the Applicant in addition to forming erroneous issues for determination leading to a wrong decision.

28. It was therefore submitted that the impugned judgment of the respondent is contrary to the various provisions of section 7(2) of the ***Fair Administrative Action Act, 2015*** and hence it was prayed that the Notice of Motion dated 10th November 2016 be allowed as prayed.

Respondent's Case

29. In opposition to the application the Respondent filed the following grounds of opposition:

> 1. **THAT the Application is frivolous vexatious and an abuse of court Process.**
>
> 2. **THAT this an Appeal disguised as a Judicial Review Application. The grounds upon which this application is premised are grounds of appeal not judicial review.**
>
> 3. **THAT an order of declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced**
>
> 4. **THAT the application is an abuse of the principles of Judicial Review and is meant to ground the operations of the Retirement Benefits Appeals Tribunal.**
>
> 5. **THAT the application is based on contradictory allegations which borders on mere belief, suspicion and speculations and hence incapable of any Judicial Review determination.**

30. It was submitted on behalf of the Respondent that the Retirement Benefits Appeals Tribunal in granting the orders herein remained faithful to its powers and mandate and did not divert from the same contrary to what is alleged herein.

31. It was contended that the applicant's prayers for declarations are not available in judicial review and reference was made to **Republic vs. Director of Public Prosecution & another Ex Parte Chamanlal Vrajlal Kamani & 2 Others [2015] eKLR** where the Court cited **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354 and** expressed itself as hereunder:

> **"Currently, a declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before granting the declarations sought. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is**

found in the affidavits filed in support of the application."

32. The Respondent also relied on the Constitutional Court of South Africa case of **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99,** in which **Chaskalson, P** expressed himself as follows:

> **"Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution…Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was "the main crucible" for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control."**

33. To the Respondent, the High Court's jurisdiction in judicial review is circumscribed by the provisions of the ***Law Reform Act*** which confers to the court the jurisdiction to issue any of the three judicial review orders; section 8 of the Act provides that the High court shall not issue any of the orders in the exercise of its civil or criminal jurisdiction, it goes further to state that the orders will be issued in any case where the High Court in England is by virtue of the provisions of section 7 of the ***Administration of Justice (Miscellaneous provisions) Act, 1938***, of the United Kingdom empowered to make an order of Mandamus, Prohibition or Certiorari the High Court shall have power to make like order. In support of its case the Respondent relied on **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43, Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR, Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR, Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited, Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012[2012] eKLR**, **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others (2012) e KLR.**

34. It was submitted that in order for an applicant to move the Court into giving orders on the ground that a tribunal has committed an error of law, the applicant must demonstrate that there is indeed a mistake that goes to the jurisdiction of the tribunal. Misinterpretation of the law is not sufficient to move a judicial review application. In the Respondent's view, this Application is an appeal disguised as a Judicial Review Application and should therefore not be entertained as there is a clear distinction between an appeal and judicial review proceedings. In Judicial review the court is only concerned with the fairness of the process under which the impugned decision or action was reached. Once a judicial review court gives a clean bill

of health to the process, it must down its tools without considering the merits of the decision for to do so would amount to usurping the power of the body that was mandated by the law giver to make the decision and relied on the Court of Appeal's decision in **Municipal Council of Mombasa vs. Republic & Another (2002)e KLR** where it was held that in judicial review:

> "**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 of did he take into account irrelevant matters? These are the kind of the 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 ore there was not sufficient evidence to support the decision –and that, as we have, is not the province of judicial review".**

35. It similarly relied on **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** where the learned Judge quoting a decision of the Court of Appeal stated:

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

36. The Respondent further appreciated that judicial review orders of certiorari, mandamus and prohibition are public law remedies and the court has the ultimate discretion to either grant or not to grant the remedies to the successful applicant and contended that the applicant had not demonstrated any breaches of the law or procedure which would entitle this court to intervene in this matter and grant the orders sought. It had not been demonstrated that the Respondent is in breach of any statutory provision or that they acted in excess or without jurisdiction or breached rules of natural justice envisaged in a particular statute. Thus the application does not meet the basic tenets of judicial review application and should be dismissed which the Respondent urged the Court to do.

Interested Party's Case

37. On his part, the interested party's case was that judgment was delivered on 9h September, 2016 by the Retirement Benefits Appeals Tribunal wherein the Applicants Appeal was dismissed and as a result, upheld the decision of the Retirement Benefits Authority dated 9th November, 2015 wherein he was awarded Kshs.6,035,901.41/=. It was contended that the Retirement Benefits Appeals Tribunal followed due procedure in its determination and accorded the Applicant with a fair hearing which the applicant attended and was heard in accordance with article 47 of the constitution of Kenya and section 7 of the ***Fair Administrative Actions Act, 2015***.

38. In his view, the Tribunal conducted a fair hearing in accordance with article 50 of the Constitution of Kenya where all parties adduced and propounded their evidence and the Tribunal came to its determination in a fair and objective manner as stipulated in Article 47 of the Constitution of Kenya and section 7 of the ***Fair Administrative Actions Act, 2015*** and correctly interpreted the law by finding that the applicant breached he law by applying his pension to offset his mortgage liabilities in 1998. It was averred that the Tribunal correctly interpreted the law by finding that the provisions of law, equity and common law protect his pension benefits irrespective of when the ***RBA Act*** came into force. In his view, the Tribunal correctly interpreted the law and section 38(1) of the ***RBA Act*** in applying the said law to his situation since his pension benefits remain unpaid todate at the time when the ***RBA Act*** is in force.

39. He further averred that the Tribunal interpreted the law and fact in failing to admit the purported corrected his Statement of Accounts provided by the Applicant which was an afterthought and held correctly that the Statement of Account provided vide the letter dated 30th June, 2015 was his correct

Statement of Account. Consequently, the Tribunal interpreted the law and fact in finding that the Applicants withdrawal of his statement of Account dated 30th June, 2015 was in bad faith when the Applicant was provided a detailed chronology of events and he accompanying documents in a letter the Retirement Benefits Appeals Tribunal interpreted the law by using his statement of Account dated 30th June, 2015 provided by the Human Resources Manager of Heritage Insurance Company as the custodian of his employment data as opposed to the Statement of accounts provided to the Tribunal by the Applicant vide the letter dated 15th October, 2015 which was made as an afterthought to derogate form the Applicants own admissions. He took the view that the Retirement Benefits appeals Tribunal interpreted the law and fact in finding that the Applicant had failed to adhere to the Regulation 8(2) of the ***Retirement Benefits (Occupation Retirement Benefits schemes) Regulations, 2000*** in administration of his retirement benefits when the Applicant had provided documentary evidence vide a letter dated 15th October, 2015 of his Statement of accounts and explain how his pension was used to offset my loan liabilities.

40. The interested party averred that the Retirement Benefits Appeals Tribunal interpreted the law and did not breach the rules of natural justice or fail to accord the Applicant a fair hearing or threaten it with criminal sanctions since the Applicant participated in all proceedings before the Tribunal. According to him, the decision of the Retirement Benefits Appeals Tribunal would not amount to his unjust enrichment since he had not authorized the use of his pension contribution to offset his mortgage debt. Accordingly, the Retirement Benefits Appeals Tribunal was not biased in making the decision and did not ignore the history of the matter and the documents provided by the Applicants vide the letter dated 15th October, 2015. To the contrary, the Retirement Benefits Appeals Tribunal interpreted the law and facts in finding that the Applicants had acted unlawfully and illegally in acting without his express instructions in assigning his pension benefits contrary to the law. It was therefore his position that it is in the interest of justice that judgment be sustained as the same is in accordance to the law and was issued having taken into account the facts and law and followed due procedure before its determination whereinafter justice was served.

41. The interested asserted that the application is frivolous, vexatious and lacks merit and ought to be dismissed.

Determinations

42. I have considered the cases of the various parties as presented in this application.

43. The issues raised herein calls for an insight as to the scope of judicial review. According to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

44. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the

body in question to remain accountable.

45. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

46. The foregoing position reflects the traditional jurisprudence on judicial review. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

47. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

48. In this case the applicant contended that based on the material on record the Respondent arrived at an incorrect decision. However as long as there is material on record on the basis of which the Tribunal could have arrived at a decision either way, this Court exercising its judicial review jurisdiction would not interfere since to do so would amount to substitution of the decision by the Tribunal based on a decision arrived at on merits.

49. The applicant contended that the Respondent ought to have given reasons as to why it found that the applicant's recanting of the contents of the earlier statement was made in bad faith. In my view what the law contemplates is that the reasons for the decision be given. In this case the decision was that the earlier statement was the correct one and the reason for doing so was that the subsequent statement was made in bad faith. It may well be that the reasons given were inadequate but inadequacy of reasons while may be a basis for faulting the decision on an appeal, is seldom a reason for doing so in judicial review proceedings.

50. It was contended that declaratory orders cannot be issued in judicial review proceedings. It is however my view that the decisions relied upon for this position were pre-***Fair Administrative Action Act*** decisions. One of the remedies under the ***Fair Administrative Action Act*** is the remedy of declaration.

Accordingly those decisions that purported to restrict the judicial review remedies to certiorari, mandamus and prohibition are nolonger good law.

51. The Applicant however relied on the doctrine of estoppel based on section 120 of the ***Evidence Act***. It is however well settled that the doctrine of estoppel cannot be raised against the operation of statute. See **Prof. Peter Anyan'g Nyong'o and 10 Others vs. Attorney General of Kenya & Others [2007] 1 EA 5; [2007] 2 EA 5; [2008] 3 KLR (EP) 397.** Similarly in **Republic vs. Public Procurement Complaints, Review And Appeals Board & Another Ex Parte Kenya Airports Authority [2005] 1 KLR 628,** it was held that there can be no estoppel against a statute, for estoppel cannot supersede the law of the land. Conversely, as an admission on a point of law cannot found an estoppel, representations of law, not fact cannot be found as an estoppel. It follows that if the law was that the interested party's dues from the scheme could not be used to offset the loan, it is immaterial whether the interested party had consented to the said action since such action was unlawful and as equity follows the law, once the law prescribed a specific provision, equity cannot derogate from the law.

52. The question is therefore whether the applicant was barred by the law from applying the interested party's dues towards the settlement of the interested party's liability to the sponsor. It was averred that at a time of termination of his contract on 25th September 1996, the employee agreed to offset any liabilities to the Sponsor from any other benefits due to him. In support of this contention the Applicant relied on the letter dated 25th September, 1996 from the Sponsor to the interested party terminating the interested party's employment and threatening to dispose of the interested party's plot. It was further indicated that if the proceeds of the sale were insufficient to clear the outstanding mortgage, the shortfall would be recovered from any benefits due to the interested party from the company and in addition that the Sponsor would recover any other debts owing by the interested party to the Sponsor which the Sponsor was legally liable to pay on behalf of the interested party. The letter required the interested party to acknowledge its receipt by signing a copy thereof. There is a signature on the said letter which purports to be that of the interested party. It is however clear that that letter does not expressly signify the interested party's consent to the offsetting of his dues from the applicant to the interested party as alleged by the applicant.

53. In the foregoing premises the Respondent's finding that the interested party did not give any valid instructions express or implied to the applicants to apply his retirement benefits to settle the liability with the Sponsor cannot be faulted. It follows that the issue of lack of jurisdiction cannot also be sustained.

54. The applicant's faulted the Respondent for having applied section 38(1) of the ***Retirement Benefits Act*** retrospectively. That provision provides as hereunder:

> ***No scheme funds shall be—***
>
> ***(a) used to make direct or indirect loans to any person; or***
>
> ***(b) invested contrary to any guidelines prescribed for that purpose; or***
>
> ***(c) invested with a bank, non-banking financial institution, insurance company, building society or other similar institution with a view to securing loans, at a preferential rate of interest or for any other consideration to the sponsor, trustees, members or the manager of such scheme.***
>
> ***or in the case of scheme funds which comprise any statutory contributions, be placed in any investment other than Government securities or infrastructure bonds issued by public institutions.***

55. As rightly found by the Respondent, both the alleged authorization by the interested party or application of his retirement benefits did not fall within the categories contemplated under the foregoing provisions. However the Respondent found that at the material time the relevant statute, Scheme Rules and the common law requirements of fiduciary duty adequately prevented the applicants from applying the interested party's retirement benefits in the manner they allege to have done. Whereas the Respondent could have erred in their understanding of the said instruments, such misunderstanding could only be a

ground for an appeal as opposed to judicial review. This as the position adopted in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** where it was held that:

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

56. With respect to the contention that it was unreasonable to condemn the Applicant to pay the Interested Party Kshs.6,062,610.61 in addition to the costs on the upper scale to the Authority and the Interested Party yet the Interested Party's pension was used to offset his mortgage liabilities in 1998, I have already found that I cannot fault the Respondent for finding that the interested party did not expressly authorise the offsetting of his pension towards his liabilities to the Sponsor. With respect to the sum due, I associate myself with the position in of **Majanja, J** in **Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where the learned Judge cited with approval the decision of **Githua J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012[2012] eKLR** as follows:

> **"It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates**."

57. The Court of Appeal in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others (2012) e KLR** similarly expressed itself as follows:

> **"…it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of natural justice of that the decision was irrational. The Judicial review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly. The High Court erred in essence in treating the Judicial Review Application as an appeal and in granting review orders on the grounds which were outside the scope of Judicial Review jurisdiction".**

58. In **Municipal Council of Mombasa vs. Republic & Another (2002)e KLR** the Court of Appeal expressed itself as follows:

> "**The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters of did he take into account irrelevant matters? These are the kind of the 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 ore there was not sufficient evidence to support the decision –and that, as we have, is not the province of judicial review".**

59. I have considered the decision of the Tribunal in respect of this issue and it is clear that the Tribunal extensively dealt with the same before arriving at its decision. Whereas it may well be that the decision could be faulted on merits, it is not for this Court to find that the Tribunal could not legally arrive at that decision. It is only an appellate Tribunal that is entitled to reverse the Tribunal on its findings on merits and substitute its findings for those of the Tribunal.

60. It was contended that to uphold the decision of the Tribunal would confer upon the interested party an unjust enrichment. That may be so. However, as was held in **Githunguri vs. Jimba Credit Corporation Ltd (No.2) [1988] KLR 838:**

> **"Although eyebrows may be raised on the morality of the applicant's contention that he should be allowed to keep for himself as much as Kshs 90,000,000/= of depositor's money for no consideration, this is a court of law not of morals and if the applicant's contention is well founded in law, the court's clear duty is to give effect to it."**

61. Having considered this application, I find no merit in the applicant's case which I hereby dismiss with costs.

62. It is so ordered.

Dated at Nairobi this 24th day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kigata for Mr Allen Gichuhi for the Applicant

Miss Miana, J for the Respondent

Miss Maina L for the interested party

CA Mwangi