



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR. MISCELLANEOUS APPLICATION NO. 381 OF 2013**

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

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE RETIREMENT BENEFITS APPEALS TRIBUNAL**

**AND**

**IN THE MATTER OF LAW REFORM ACT CHAPTER 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA AND CIVIL  
PROCEDURE RULES, 2010 (ORDER 53)**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**RETIREMENT BENEFITS APPEALS TRIBUNAL .....2<sup>ND</sup> RESPONDENT**

**EX-PARTE KENYA AIRPORTS AUTHORITY STAFF**

**RETIREMENT BENEFITS SCHEME**

**AND**

**RETIREMENT BENEFITS AUTHORITY.....1<sup>ST</sup> INTERESTED PARTY**

## JUDGEMENT

### Introduction

1. By a Notice of Motion dated 5<sup>th</sup> November, 2013 filed the following day, the *ex parte* applicant herein, **Kenya Airports Authority Staff Retirement Benefits Scheme**, seeks the following orders:
1. **This Honourable Court be pleased to grant an order of certiorari, to remove and bring to the High Court for the purposes of quashing, the decision of the 2<sup>nd</sup> Respondent herein in Retirement Benefits Appeals Tribunal Appeal No. 4 of 2012 Joseph Sembei Mutua vs. Retirement Benefits Authority and Kenya Airports Authority Staff Retirement Benefits Scheme delivered on 29<sup>th</sup> August, 2013 (hereinafter referred to as the appeal) directing the Applicant herein to calculate and pay the Appellants' benefits as calculated therein.**
2. **This Honourable Court be pleased to grant an order of prohibition directed at the 2<sup>nd</sup> Respondent herein prohibiting it from proceeding any further with proceedings in Retirement Benefits Appeals Tribunal No. 4 of 2012 Joseph Sembei Mutua v Retirement Benefits Authority and Kenya Airports Authority Staff Retirement Benefits Scheme or enforcing the decision it delivered on 29<sup>th</sup> August, 2013.**
3. **Costs of this application be provided.**

### Ex Parte Applicant's Case

2. The said Motion was supported by Statutory Statement filed 28<sup>th</sup> October, 2013 and Verifying Affidavit sworn on 16<sup>th</sup> October, 2013 by **Margaret Munene**, the applicant's legal counsel.
3. According to the deponent, the 2<sup>nd</sup> Interested Party was an employee of Kenya Airports Authority and a member of the Applicant, who was retrenched from his employment on 28<sup>th</sup> February, 2004. It was deposed that the Applicant computed the pensionable salary due to the 2<sup>nd</sup> Interested Party and paid to him a cash lump-sum, at his option, in the sum of Kshs.2,686,635/= and continued to make a payment of Kshs.47,965/= as monthly pension.
4. Aggrieved by the said computation, 2<sup>nd</sup> Interested Party complained to the 1<sup>st</sup> Interested Party, which found that the payments made were in order and thus did not deal with the Complaint. Subsequently, the 2<sup>nd</sup> Interested Party lodged an appeal to the 2<sup>nd</sup> Respondent which appeal was opposed by the Applicant on *inter alia* the joinder of the Applicant in the proceedings; the applicable rules in calculating the pensionable salary due to the 2<sup>nd</sup> Interested Party; and the manner in which the computation was undertaken.
5. It was deposed that the 1<sup>st</sup> Interested Party also opposed the appeal and filed a statement of defence, statement of facts and written submissions.
6. Thereafter the matter came up for hearing severally and on 10<sup>th</sup> July, 2013 the matter came up for judgment, wherein the 2<sup>nd</sup> Respondent ruled that the appeal was merited and allowed the same, but the reasons for the decision were deferred and given on the 29<sup>th</sup> August, 2013.
7. In the applicant's view, the decision of the 2<sup>nd</sup> Respondent was arrived at without jurisdiction hence its decision making process is subject to review by this Honourable Court.
8. Despite that the 1<sup>st</sup> Interested Party has demanded payment of the of sums as directed by the 2<sup>nd</sup> Respondent, which is an enhanced figure over and above the monthly pension it has been paying out while the 2<sup>nd</sup> Interested Party has also demanded that the Applicant complies with the order of the 2<sup>nd</sup> Respondent within a period of 14 days.
9. According to the deponent, the Applicant is apprehensive that since it manages funds on behalf of

- members, it may not recover payments paid out to the 2<sup>nd</sup> Interested Party and it shall continue paying the monthly pension it has been paying and in the event that this application is not allowed then it shall make the payments as duly ordered.
10. It was submitted on behalf of the ex parte applicant that the ***Retirement Benefits Act, Cap 197 Laws of Kenya***, (hereinafter referred to as “the Act”) does not expressly state the powers of the 2<sup>nd</sup> Respondent when hearing an appeal from the 1<sup>st</sup> Respondent. Based on **Choitram vs. Mystery Model Hair Salon [1972] EA 525**, it was contended that “a provision giving powers to a statutory tribunal must be strictly construed. Powers must be expressly conferred; they cannot be a matter of implication.”
  11. It was therefore submitted that the 2<sup>nd</sup> Respondent’s decision conducting calculations on the 2<sup>nd</sup> interested party’s pension dues and directing the ex parte applicant to abide therewith was without jurisdiction.
  12. It was further submitted that the 2<sup>nd</sup> Respondent’s decision failed to factor in the tax element in its decision as mandated by sections 3(2)(c) and 8 of the ***Income Tax Act*** as read with Rule 5(d)(i) of the Third Schedule to the same Act. In support of this submission reliance was placed on **Republic vs. Retirement Benefits Appeals Tribunal & 5 Others ex parte Willy Jeremiah Ombese [2014] eKLR** and **Republic vs. BPRT & Another ex parte Davies motor Corp. [2013] eKLR**.
  13. It was contended that the impugned decision was irrational and unreasonable for failure to take into account relevant considerations and taking into account irrelevant ones based on the application of rule 4 of the ***Trust Deed and Rules***.

### **1<sup>st</sup> Interested Party’s Case**

14. The 1<sup>st</sup> Interested Party supported the application vide a replying affidavit sworn by **Dr Edward Odundo**, its Chief Executive Officer on 14<sup>th</sup> October, 2014.
15. According to him, the 2<sup>nd</sup> Respondent proceeded on wrong principles of law in allowing the 2<sup>nd</sup> interested party’s appeal. According to the deponent, the 2<sup>nd</sup> Interested Party was retrenched by his employer in 2004 at the age of 46 years after 7.72 years of service hence it was an error of law for the 2<sup>nd</sup> Respondent to direct that the 2<sup>nd</sup> Interested Party’s pension be calculated under paragraph 4(a) and (b) of the *ex parte* Applicant’s Amended Scheme Rules, 2006 which apply to normal and early retirement respectively and not rule 4(f) which apply to retirement upon reorganization or redundancy.
16. It was contended that since the 2<sup>nd</sup> Interested Party himself admitted that he was retrenched, under the said Rules the *ex parte* applicant was under mandatory statutory obligation to apply the said rule 4(f) hence the 2<sup>nd</sup> Respondent proceeded in excess of its jurisdiction in applying rules which do not apply to the 2<sup>nd</sup> Interested Party and had no jurisdiction to direct compliance with Rules 4(a) and (b) of the said Amended Rules where only Rule 4(f) applies.

### **2<sup>nd</sup> Interested Party’s Case**

17. In opposition to the application, the 2<sup>nd</sup> Interested Party, **Joseph Sembei Mutua**, filed a replying affidavit sworn on 12<sup>th</sup> November, 2013.
18. According to him, the Application as framed does not lie for the grant of Judicial Review Orders and that all the grounds relied upon in the Application are grounds of Appeal and not Judicial Review since they relate to the merits or otherwise of the decision of the Tribunal, which ordinarily are not grounds for Judicial Review.
19. It was contended that the Tribunal acted within its jurisdiction as conferred under Section 48 of the Act and the procedure followed by the Tribunal was fair and lawful and each party was allowed to file their documents and submit accordingly. Similarly, all the rules of Natural Justice were followed.
20. To the 2<sup>nd</sup> interested party there is no error of law as the calculations adopted by the tribunal took into account the issue of taxation of the benefits payable to him. Moreover, the Applicant never

raised such an issue in their pleadings and submission before the Tribunal and therefore the same cannot form a basis for Judicial Review.

21. It was therefore averred that the Application has had no merit, an abuse of Court process, frivolous and filed in bad faith to delay the conclusion of this matter hence the application ought to be dismissed with costs.

### **Determinations**

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

23. It was contended on behalf of the applicant that the 2<sup>nd</sup> Respondent did not have jurisdiction to order the Applicant to calculate the benefits due to the 2<sup>nd</sup> Interested Party as its jurisdiction was only limited to review of the decision of the 1<sup>st</sup> Interested Party.

24. Section 49 of the Act which confers the powers of the 2<sup>nd</sup> Respondent provides as follows:

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

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

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

***(4) The Tribunal shall have power to award the costs of any proceedings before it and to direct that costs shall be paid in accordance with any scale prescribed for suits in the High Court or to award a specific sum as costs.***

***(5) All summons, notices or other documents issued under the hand of the chairman of the Tribunal shall be deemed to be issued by the Tribunal.***

***(6) Any interested party may be represented before the Tribunal by an advocate or by any other person whom the Tribunal may, in its discretion, admit to be heard on behalf of the party.***

25. It is clear that the section does not expressly confer upon the 2<sup>nd</sup> Respondent powers to grant certain reliefs in the exercise of its appellate jurisdiction apart from the power to “summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents”; “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”; “take into consideration any evidence which it considers relevant to the subject of an appeal before it”; and “award the costs”. There is for example no express power to review the evidence presented before the 1<sup>st</sup> interested party.

26. In **Choitram vs. Mystery Model Hair Salon** (supra), **Madan, J** (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them.

27. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal such as Rent Control Board, the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication and that a Tribunal is a creature of statute and

- has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon (supra); Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461.**
28. In **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** (supra) the Court proceeded to hold that if the legislature had intended that the tribunal should have power to award compensation in respect of the complaints the subject of the appeal it would have made specific provision as the power to award compensation must be express and cannot be implied. Compensation for damage is a matter for the ordinary court on whose jurisdiction pecuniary limits have been placed. If this provision were to be interpreted as giving jurisdiction to the tribunal to award compensation it is unlimited. Indeed it exceeds the jurisdiction of the High Court since no right of appeal is given.
29. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly.
30. It must however be appreciated that a Tribunal must necessarily have powers to effectuate its decisions. As was correctly appreciated in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval** (supra), the exercise of the powers to exercise jurisdiction in all civil matters implies the power to adjudicate on the matters investigated and a duty imposed or power granted by the legislature carries with it the power necessary for its performance and execution. The implied power must be read into the statute in order to enable the express power or jurisdiction expressly conferred, to be effectually exercised. It is difficult to see what useful purpose mere advice, legally unenforceable, would serve in disputes of the kind covered. Similarly in **Khimji Gordhandas & Another vs. Chanrasen Narotam & Others [1957] EA 223**, it was held that the implied power must be read into the Statute in order to enable the express power, or the jurisdiction expressly conferred, to be effectually exercised.
31. It is therefore clear that where there are express powers donated to a Tribunal, it must necessarily be implied that the Tribunal also has the powers to effectually exercise the expressly conferred powers. In this case, however the Act does not expressly confer on the 2<sup>nd</sup> Respondent the jurisdiction to grant substantive reliefs. In an appeal as opposed to a review, the powers of the appellate Tribunal must be expressly conferred.
32. It is therefore not without some regret that I have to reach a conclusion that the 2<sup>nd</sup> Respondent had no jurisdiction to grant the orders outside those expressly conferred on it by section 49 of the Act. Whereas the effect of this decision is to render the 2<sup>nd</sup> Respondent's existence virtually purposeless, this Court cannot countenance a situation where a Tribunal's powers are not circumscribed by the parent statute. To do so would be to create a monster in the name of a statutory Tribunal.
33. It is however hoped that the Attorney General will expeditiously put into motion a process by which the ***Retirement Benefits Act, Cap 197 Laws of Kenya*** can be amended in order to expressly confer the necessary powers on the 2<sup>nd</sup> Respondent.
34. On the applicability of the provisions of paragraph 4 of the *ex parte* Applicant's Amended Scheme Rules, 2006, the parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account**

relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

35. In Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285 and *Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60*.
36. In East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327, it was held:

“It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal’s decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly..... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court’s to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise..... Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction.....Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction.” [Emphasis mine].

40. In Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others, Civil Application No. 307 of 2003, Omolo JA stated as follows;

“The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way.”

37. In this application it is contended that the 2<sup>nd</sup> Respondent erred in directing that the 2<sup>nd</sup> Interested Party's pension be calculated under paragraph 4(a) and (b) of the *ex parte* Applicant's Amended Scheme Rules, 2006 which apply to normal and early retirement respectively and not rule 4(f) which apply to retirement upon reorganization or redundancy. Assuming that position was correct, that would amount to the 2<sup>nd</sup> Respondent misconstruing the *ex parte* applicant's regulations or rules. However as was held in **East African Railways Corp. vs. Anthony Sefu** (supra) an allegation that a Tribunal has misconstrued the provision of the law or regulation does not entitle the court to question the decision reached in judicial review proceedings. Whereas that may be a ground of appeal, it does not amount to a ground for judicial review. It ought to be appreciated that there is a distinction between taking into account relevant or irrelevant matters which are grounds for judicial review and merely misconstruing a statutory provision or regulation which do not ipso facto constitute grounds for judicial review.
38. The mere fact that some discomfort may be occasioned to the applicant or that a decision may place the *ex parte* applicant in a precarious position *per se* has never been a ground for judicial review.
39. In the premises I find no merit in the contention that the 2<sup>nd</sup> Respondent erred directing that the 2<sup>nd</sup> Interested Party's pension be calculated under paragraph 4(a) and (b) of the *ex parte* Applicant's Amended Scheme Rules, 2006 which apply to normal and early retirement respectively and not rule 4(f) which apply to retirement upon reorganization or redundancy. That ground was more appropriate to an appeal than judicial review.
40. However in light of my finding with respect to the 2<sup>nd</sup> Respondent's jurisdiction, the Notice of Motion dated 5<sup>th</sup> November, 2013 succeeds and is allowed.

### **Order**

41. In the result:

- a. **An order of certiorari is hereby issued removing into this Court for the purposes of being quashed the decision of the 2<sup>nd</sup> Respondent herein in Retirement Benefits Appeals Tribunal Appeal No. 4 of 2012 Joseph Sembei Mutua vs. Retirement Benefits Authority and Kenya Airports Authority Staff Retirement Benefits Scheme delivered on 29<sup>th</sup> August, 2013 directing the Applicant herein to calculate and pay the Appellants' benefits as calculated therein which decision is hereby quashed.**
- b. **An order of prohibition is hereby issued directed at the 2<sup>nd</sup> Respondent herein prohibiting it from proceeding any further with proceedings in Retirement Benefits Appeals Tribunal No. 4 of 2012 Joseph Sembei Mutua v Retirement Benefits Authority and Kenya Airports Authority Staff Retirement Benefits Scheme or enforcing the decision it delivered on 29<sup>th</sup> August, 2013.**
- c. **In the unique circumstances of this case there will be no order as to costs.**

42. It is so ordered.

**Dated at Nairobi this day 23<sup>rd</sup> day of February, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Angwenyi for the Applicant***

***Mr Odhiambo for the Respondent***

***Mr Ilako for the 1<sup>st</sup> Interested Party***

***Cc Jiljane***