



IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISC. CIVIL APPLICATION JR NO. 331 OF 2012

BETWEEN

REPUBLIC.....APPLICANT

AND

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

THE RETIREMENTS BENEFITS AUTHORITY.....2ND RESPONDENT

TELEPOSTA PENSION SCHEME.....3RD RESPONDENT

AND

JOHNSON MURIGU NDORIA.....1ST INTERESTED PARTY

MACKENZIE M. MOGERE.....2ND INTERESTED PARTY

TELKOM KENYA LIMITED.....3RD INTERESTED PARTY

EX PARTE

WILLY JEREMIAH OMBESE

JUDGMENT

Introduction

1. After the grant of leave, the *ex-parte* applicant (“the applicant”) filed a Notice of Motion dated 12th September 2012 in which he sought the following prayers;

1. *An order of certiorari to remove to this Honourable Court to be quashed the decision of the Retirement Benefits Appeals Tribunal made on the 23rd February 2012 purporting to direct that the Retirement Benefits of given pensioners be calculated on their consolidated salaries.*

2. *Further and in the alternative to prayer one above, an order of mandamus compelling the Retirement Benefits Appeals Tribunal to review the decision made on 23rd February 2012 in*

light of the interests of the pensioners who directly benefit from the Scheme and were not at the Senior level management level.

2. The application is supported by the verifying and supplementary of the applicant sworn on 22nd August 2012 and 16th May 2014 respectively. The applicant also relies on the Statutory Statement dated 22nd August 2014. The other parties have also sworn affidavits. The 3rd respondent has filed a replying affidavit sworn on the 8th March 2013 by Peter K Rotich, the Administrator and Trust Secretary. The 3rd interested party supports the application through the affidavit of Lawrence Karanja, its Legal Officer, sworn on 5th September 2013. The 1st and 2nd interested parties oppose the application on the basis of the affidavit sworn on 2nd September 2013 by the 1st interested party. The parties have also filed written submissions.

Background

3. The basic facts emerging from the depositions are not in dispute. Telkom Kenya Limited (“Telkom”), the 3rd interested party, incorporated the Teleposta Pension Scheme (“the Scheme”), the 3rd respondent, on 1st July 1997 as the custodian of pension and retirement benefits of its employees and former employees of the defunct Kenya Posts and Telecommunications Corporation.

4. By a circular dated 8th May 2000, titled “*Review of terms and conditions of service of Management Staff,*” Telkom communicated a policy decision which introduced a consolidated pay package for its management staff. The consolidated comprised the basic salary, house allowance, car allowance, leave allowance, utilities allowance and entertainment allowance. The salary terms, in particular the level of allowances, were once again revised in a circular dated 1st July 2002.

5. As a result of the decision, Telkom began to make deductions from its employees’ salaries based consolidated salary. In a letter dated 17th February 2003, Alexander Forbes, the actuaries, advised Telkom that its policy of calculating the pension based on the consolidated salary would have a debilitating effect on the Scheme. As a result Telkom resolved to reverse its decision to making deductions based on the basic salary. It also resolved to refund the staff effected the deductions made between July 2002 and June 2003.

6. Following the change in the salary structure, the 1st and 2nd interested parties filed two separate complaints before the Retirement Benefits Authority (“RBA”), the 2nd respondent. The complaint by the first interested party was that the Scheme has calculated and paid him retirement benefits using a wrong final pensionable salary. The RBA investigated the complaint and found that the complaint had no merit and dismissed it on several grounds. It held that the appellant’s pension contribution was 7.5% of the basic pensionable salary. That the Trustees of the Scheme sought instructions from the Sponsor, Telkom, what the pensionable salary was and it is on that basis that the benefits were worked out and despite the new salary structure, the Trust Deed and the Rules were not amended and that the Scheme refunded the excess pension contribution deducted from the appellants consolidated new salary.

7. The 1st interested party appealed to the Retirement Benefits Appeals Tribunal (“RBAT”), 1st respondent. He argued that once the new salary structure was approved by Telkom and that the monthly pension contribution was deducted, the pension vested in him and that he had a legitimate expectation to be paid the pension based on the new salary structure. The decision of the RBA was reversed and Telkom was ordered to re-calculate the appellant’s pension based on the full salary earned at the date of retirement.

The Decision

8. In its decision the RBAT framed, *inter alia*, the following principal issues for determination;

1. Who determines salary at which pension is to be calculated (pensionable salary)?

2. Is the 2nd respondent bound by the decision of the Sponsor to consolidate the Appellant's salary for purposes of calculating the pension benefits?

3. Did the decision of the Sponsor to consolidate the Appellant's salary as a basis for calculating pension require an amendment of the 2nd respondent's Rules?

4. If 3 above is in the affirmative, what is the effect of failure to do the amendment?

9. On the first issue, it held that the Sponsor, Telkom, was entitled to determine the salary used by the Scheme to calculate the pension payable. On the second issue, the Tribunal concluded that decision to pay the 1st interested party on the basis of the consolidated salary did not require an amendment of the Trust Deed and Rules. Consequently, on the fourth issue it found that the failure to amend the Trust Deed and Rules did not affect the appellant and even if it did, the Scheme could not take advantage of its failure to amend the Rules to the detriment of the 1st interested party.

10. The decision of the RBAT in **Cause No. 2 of 2009** is contested and the issue in contention in this matter is the formula for calculating the pension and whether it is based on the consolidated salary or the basic salary.

The Applicant's case

11. The applicant is a pensioner. He avers that the Scheme was a contributory defined benefits scheme sponsored by Telkom Kenya Limited. It later changed to a closed scheme which means that it does not have any new member contributions. The applicant states that during his employment he contributed 7.5 % of his pensionable monthly salary through monthly payroll deductions.

12. The applicant submits that the decision in **RBAT Cause No. 2 of 2009** is illegal because the Scheme's Trust Deed and Rules only envision a situation where pension is calculated on the basis of the basic salary and not the consolidated salary. He adds that the decision is unreasonable as there was no amendment to the Trust Deed and Rules permitting the Scheme to calculate and pay out pensions based on the consolidated salary.

13. The applicant submits that the decision in **RBAT Cause No. 2 of 2009** contravenes the Scheme's Trust Deed and Rules and is likely to impact negatively on the monthly pension of other pensioners and may lead to collapse of the Scheme. The applicant submits that the RBAT failed to consider the effect their decision would have on the majority members of the Scheme. The applicant also contends the decision is unfair and discriminatory as it only affects a category of individuals who are subjected to differential treatment from the majority of the members.

14. The applicant urges the court to quash the decision of the RBAT in order to protect the Scheme from collapse.

3rd Respondent's Case

15. The Scheme supports the application to quash the RBAT decision. The Scheme's case is that it is a contributory scheme with pensionable employees contributing 7.5% of their basic salary. It avers that in calculating an employee's pension, the Trustees are strictly guided by the Trust Deed and Rules, which clearly states that pensionable salary is a member's basic salary. It relies on Rule 1 of its Rules which states; "*basic salary shall mean a member's basic rate of pay as determined by the Employer but shall not include housing allowance, extra duty allowance, entertainment allowance, cost of living allowance, special remuneration for performing special duties or acting in a vacant office, locomotion or subsistence allowance, gratuity fee, honorarium or bonus of any kind, overtime payment or any other payment whatsoever.*"

16. The Scheme avers that decision by RBAT ordering it to re-calculate the 1st interested party's pension

based on the full salary he earned at the date of his retirement and that it pays interest on any monies unpaid to the appellant since the 11th July 2003 has considerable effect on the Scheme and other pensioners. It will affect approximately 80 members of the senior management staff and have a detrimental effect on the financial health of the Scheme.

17. The Scheme contends that its actuary, Alexander Forbes, advised in the letter dated 17th February 2003, that if other members of the management staff seek to have their pension re-calculated based on their consolidated salary, there is a high chance that the Scheme will be at great risk and this will have a devastating financial effect on it. The Scheme has 7,737 members who are currently drawing pensions from it, 1949 members who have deferred their pensions and 549 members who are currently receiving pension benefits of deceased members and as such it would be unfair and a substantial loss incapable of being cured to put the pensions and livelihoods of all these beneficiaries of the scheme in jeopardy.

18. The Scheme submits that basic salary is that compensation paid to an employee by the employer without the allowances and other benefits because it is the minimum compensation for work rendered while the consolidated salary is the basic salary with additional allowances and other benefits which are compensation to the employee joined with all remunerative factors placed in one basket. Counsel for the Scheme relied on the case of ***Joseph Kipkorir Tanui v Telkom Kenya Limited Industrial Court Cause 254 of 2010 (Unreported)*** to buttress the argument. It was held in that decision that the basic salary is a de-consolidated item and a stand-alone payment.

19. Counsel for the Scheme submits that defined benefits schemes are set up generally to provide pensions in accordance with the length of service and salary received at the appropriate times. He further submits that the administration of the fund requires that a minimum funding requirement is maintained in the fund so that the employer is responsible for maintaining the assets of the fund at a level which it will be able to meet its obligations and this process is conducted on the basis of actuarial calculations as to the exposure of the fund on its assets and investment performance.

20. The thrust of the 3rd respondent's argument is that the RBAT failed to understand the relationships between the parties. It contends that there is a contractual relationship between the employee-contributor and the employer as to the employer's obligation to maintain the level of funds. That the Trustees of the Scheme owe investment and management obligations not only to the employee-contributor but to the employer as well. The Scheme submitted that its Board of Trustees comprise representatives from the employees and different cadres of employees interests must be protected by the Trustees and this is why the ***Retirement Benefits Authority Act*** is structured so that the retirement funds operate in a manner that will enable the benefits to members to be paid in accordance with the rules and applicable legislation and to protect beneficiaries from potential conflicts.

21. The Scheme also argues that the parties to an employment contract are the employer and the employee and the parties to the trust deed are the employer and the trustees therefore the basic legal position is that an employer and an employee cannot purport to amend the trust deed by their own contract without taking further steps to make amendments to the Trust Deed and Rules which would have involved the approval of the Trustees, consultation with the actuary and the approval of the Retirement Benefits Authority.

22. Counsel for the Scheme further submits that the ***Retirement Benefits Act*** acknowledges the potential for conflicts in application of the ***Act*** and that is why it requires approvals before certain acts are effected such as requiring the approval of the RBA, not providing different pension factors for members employed by the same sponsor, not increasing any retirement benefit unless the same has been recommended and certified by an actuary. It therefore avers that the RBAT decision was contrary to the law and ought to be quashed.

23. Counsel for the Scheme submits that question before the RBAT involved the increase of pension payments and it was the duty of the Tribunal to take into account the financial implications on the Scheme and that the Scheme could only make payments in accordance with its Deed and Rules.

3rd Interested Party's Case

24. Telkom supports the application to quash the decision by RBAT. Telkom's case is that the Trust Deed and Rules govern the administration of the Scheme and that according to Rule 1, the pensionable salary means the member's annual basic salary. It contends that the definition of the pensionable salary has never been amended.

25. Telkom avers that the circular dated 8th May 2000 which introduced a consolidated pay package for its management staff and the subsequent circular dated 1st July 2002 did not make any reference to any change to the pensionable salary. Mr Karanja depones that when Telkom received a report from its actuaries detailing the debilitating effect the implementation of the policy decision would have on the Scheme, it decided to reverse the policy decision at its 32nd Board Meeting of the 8th of July 2003 by retaining the consolidated salaries as a take home package and reversing the pension contribution for management staff to basic pay. It thereafter resolved to refund the staff the deduction that has been made between July 2002 and July 2003.

26. Following the resolution Telkom remitted the refunds to the affected management staff and they confirm that none of the amounts withheld by them for the affected period were remitted to the Scheme. Telkom takes the position that the matter in issue is the formula and/or computation employed by the Scheme in calculating the amount paid to them as pension on their basic as opposed to the consolidated salary. Telkom states that the decision of the RBAT is clearly erroneous and contrary to the Trust Deed and Rules. It avers that if the impugned decision is allowed to stand it will set a bad precedent that can lead to a floodgate of cases and thus affect their ability to fulfil their obligations to other employees who are entitled to pension from the Scheme.

1st and 2nd Interested Parties Case

27. The 1st and 2nd interested parties oppose the application and support the decision of the RBAT. They contend that Telkom, on its own volition established and implemented a new pensionable salary structure for its management staff. It directed the Scheme to calculate and pay their pensions benefits accordingly and in compliance with the Trust Deed and Rules. The interested parties aver that the Tribunal reviewed the actuaries report and found the same to be irrelevant. They add that the reversal of the new pensionable salary structure came after their retirement and as such this reversal was irrelevant.

28. The 1st and 2nd interested parties contest the position that they were refunded their respective deductions based on the consolidated salaries. They aver that the Tribunal ordered that their pension benefits be calculated based on their full and final pensionable salary. They further contend that the alleged danger of the Scheme collapsing is mere speculation, conjecture and wishful thinking. It is their view that the RBA is the regulator and supervisor of the Scheme in regard to their financial status, investments, evaluation, periodic auditing of assets amongst others. It receives annual audited accounts of the Scheme and therefore with all this information, it did not consider the RBAT award as having a devastating financial effect on the scheme as is alleged.

29. The 1st and 2nd interested parties take the position that there was no need to amend the Trust Deed and Rules and these powers rested with the Scheme. They submit that any amendment, revocation or modification would in any event not reduce the benefit of a pensioner or dependent or affect the accrued benefit of any member except with the consent of the pensioner, dependent or member. They further submit that it was incumbent upon the 3rd respondent to initiate the amendment as provided for in Rule 15 of the Trust Deed and Rules and that it should not shift blame for their omission and/or inaction on any other person.

30. The 1st and 2nd interested parties maintain that the Trust Deed and Rules and the **Retirement Benefits Authority Act** have no provision for the refunding of pension contributions that had been deducted. According to the 1st and 2nd interested parties, Rule 9(a) and 10(a) of the Trust Deed and **Regulation**

20(1) of the **Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations (Legal Notice Number 119 of 2000)** provide unequivocally that pension contributions once deducted shall be vested in the members' pension benefits immediately. According to them, Telkom had no right to take away benefits that had already accrued as a result of the earlier determination the pensionable salary.

31. The interested parties supported the RBAT's decision and relied upon the decision of **Director of Pensions v Cockar** [2000] 1 EA 38 where the Court of Appeal ordered the Director of Pensions to pay the respondent his full pensionable emoluments as at the date of his retirement based on his last salary.

Determination

32. This judicial review application stems from RBAT **Cause No. 2 of 2009** in which the Tribunal held that the Sponsors action in reversal of the new salary payable to the appellant and backdating the same was held to be void. The Tribunal also ordered the RBA to re-calculate the Appellant's pension based on the full salary he earned on the date of retirement together with costs and interests.

33. Before I consider the matter it is important to outline the purpose of judicial review. It is now well established that judicial review is concerned not with the merits of the decision but the decision-making process. Essentially judicial review involves an assessment of the manner in which the decision is made, it is not an appeal and the jurisdiction is exercised in a supervisory of the manner to ensure that public powers are exercised in accordance with the basic principles of legality, fairness and rationality.

34. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli v Kabale District Local Government Council and Others** [2008] 2 EA 300 in which the Court cited with approval **Council of Civil Unions v Minister for the Civil Service** [1985] AC 2 and **An Application by Bukoba Gymkhana Club** [1963] EA 478 at 479 and held, "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 ...Illegality is when the decision-making authority commits an error of law in the process of taking 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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 Procedural Impropriety is when there is a 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."

35. Likewise in **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 (Unreported)**, "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."

36. As I intimated earlier in the judgment, the central issue before the RBA and RBAT was how the pensionable salary of an employee was determined in the circumstances?

37. In the Scheme Trust Deed and under the Schedule referred to as the Rules of the Pension Scheme, the

following definitions are germane to the dispute;

Basic Salary shall mean a member's basic rate of pay as determined by the Employer but shall not include housing allowance, extra duty allowance, entertainment allowance, cost of living allowance, special remuneration for performing special duties or acting in a vacant office, locomotion or subsistence allowance, gratuity fee, honorarium or bonus of any kind, overtime payment or any other emolument whatsoever. [Emphasis mine]

Pensionable Salary shall mean a member's annual basic salary."

Final Pensionable Salary means Pensionable Salary in the last year of Pensionable Service.

38. All benefits arising from the Scheme must be determined in accordance with the Trust Deed and Rules. A Pension Scheme does not involve one beneficiary but several beneficiaries who rely on the consistent application of the Scheme Trust and Deed and Rules to ensure that benefits are evenly and fairly distributed. All the parties agree that the terms basic salary and pensionable salary were never amended to include, "housing allowance, extra duty allowance, entertainment allowance, cost of living allowance, special remuneration for performing special duties or acting in a vacant office, locomotion or subsistence allowance, gratuity fee, honorarium or bonus of any kind, overtime payment or any other emolument whatsoever."

39. The issue of basic salary has also had judicial imprimatur in **Joseph Kipkorir Tanui v Telkom Kenya Limited (supra)** where Rika J., observed as follows, "[3.4] The fundamental issue in this dispute is whether the Respondent applied the correct basic salary in retiring the claimant. The parties were both not clear in their understanding on the term "basic" and "consolidated". Basic salary is that compensation paid to an employee by the employer, without the allowances and other benefits. It is the minimum compensation for work rendered. It is a standalone payment. It can be read alone from the payslip as a de-consolidated item. Consolidated salary is the basic salary with additional allowances and other benefits. Compensation to the employee is joined, with all remunerative factors placed in one basket. The personnel circular issued by the Respondent on 8th May, 2000 properly distinguished what is basic from what is consolidated. The parties do not seem to have followed this line drawn by the circular in their subsequent interpretation of their employment relationship."

40. It is also not in dispute that Telkom issued the dated 8th May 2000 Personnel Circular No. 1A of 2000. Although the circular stated that, "the consolidated pay package comprised of Basic Salary, House Allowance, Car Allowance, Leave Allowance, Utilities Allowance and Entertainment allowance as applicable in line with the various grades." Para 13 thereof stated that, "All Permanent Employees shall continue to contribute seven and a half per cent (7.5%) of their basic salary towards the pension scheme as will be reflected in the pay slip." It is very clear that this circular did not change the fact that the basic salary continued to be a standalone payment for purposes of the pension.

41. In my view, any pension payments to be made by the Scheme are anchored by the definition of "basic salary." While the Sponsor/Employee the right to determine the quantum of the basic salary, the Trust Deed and the Rules are clear that the basic salary excludes other allowances. The Trustees have a duty to pay the pension based on the basic salary as defined and any other or further payment would require an amendment of the Trust Deed and Rules. Rule 15 of the Scheme Trust Deed and Rules deals with Amendment of Deed and Rules. It provides as follows, "The Trustees may at any time and from time to time with the approval of the Employer and the Commissioner of Income Tax amend, revoke or modify by deed any of the provisions of this Deed and with the approval of the Employer and the Commissioner of Income Tax the Trustees may by resolution in writing passed at a meeting duly called and constituted and signed by all of them amend any of the provisions of the rule .."

42. According to Rule 9 of the **Income Tax (Retirement Benefits Rules) 1994**, "Where an alteration is made to scheme regulations, the trustee of the scheme shall immediately inform the Commissioner in writing thereof and such alteration shall not be effective unless written approval is received from the Commissioner."

43. Under the **Retirement Benefits Act** and more specifically the **Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000, Regulation 16** on amendment provides;

(1) A scheme may amend its rules as specified in the rules, but no such amendment shall be valid—

(a) If it purports to invalidate or reduce accrued rights and interests of the sponsors and members of the scheme;

(b) If it purports to effect any right of a creditor of the scheme, other than as a member thereof;

(c) Unless it has been approved by the Authority and registered as provided in paragraph (3).

(2) Within thirty days from the date of the passing of a resolution for the amendment of the scheme rules a copy of such amendment shall be transmitted by the trustees to the Authority for registration:

Provided that if any such amendment affects the financial position of the scheme, the trustees shall transmit to the Authority a certificate signed by an actuary.

(3) Where the Authority finds that any such amendment is consistent with the Act, and is satisfied that the financial soundness of the scheme will not be affected, it shall within sixty days register the amendment and return the copy of the resolution to the trustees with the date of registration endorsed thereon, and such amendment shall be deemed to take effect as from the date determined by the scheme concerned, or, if no date has been so determined, as from the date of registration.

44. The purpose of the Trust Deed and the Rules is to define the relationships between the Sponsor and the Scheme on one hand and Scheme and the beneficiary or employee on the other hand. Each relationship is independent of each other and as pointed out by counsel for the Scheme the purpose of Rules and the **Retirement Benefits Act** is to reduce conflicts of interest between the parties. The Trustees have a duty to act independently and satisfy themselves of legality of their acts hence the decision of the RBAT to the extent that it holds that the Scheme was bound to comply with the Sponsor's instructions goes against the principle I have outlined. To extend the argument further, then there would have been no need to define the "basic salary" in the Trust Deed if the matter was entirely within the discretion of the Sponsor.

45. Having outlined the process of amendment above, it is clear that the RBAT arrived at its decision by ignoring the clear provisions of the Trust Deed and the **Retirement Benefits Act** and Regulations made thereunder.

46. The 1st and 2nd interested parties argue that in amending the rules the Trustees should not make alterations and modifications that will reduce the benefit of a pensioner or dependent or affect the accrued benefit of any member except with the consent of such pensioner or dependent or member. This argument is grounded on a false premise that the pension is calculated on another basis other than that provided in the Trust Deed and Rules. The pension that cannot be reduced is the pension contemplated and calculated in accordance with the Trust Deed and Rules. An erroneous basis upon which the pension is calculated cannot confer an irrevocable benefit to the beneficiary. It is only upon the Scheme's constitutive documents that the 1st and 2nd interested parties can base their legitimate expectation.

47. In Minute 129 of 2003 of the Telkom Board expressed itself as follows, "*The Managing Director informed the Board that although it had previously approved consolidation of salaries for management staff, it had come to the realisation of management that the said consolidation had created huge financial liabilities to the Pension Scheme and was difficult to implement. He further informed the Board that*

commutation of pension benefits based on consolidated salaries was in contravention with the provisions of the Retirement Benefits Authority Act. The management was therefore proposing reversal of pension contribution to old basic pay, while retaining consolidated salaries for management staff but only as a take home package. It further proposed that the deductions for pension purposes would with effect from 1st July, 2003 be based on the old basic and backdated to July, 2002. The difference in recovered contributions from 1st July 2002 to 30th June 2003 was to be returned back to staff. The Board discussed the matter at length and after deliberation approved the reversion of Pension contribution to old basic pay as proposed by the management in order to conform with provisions of Retirement Benefits Act, and the retention of consolidated salaries for management staff as ‘take home package’” [Emphasis mine]

48. Although the 1st and 2nd interested parties contend that the Trust Deed and Rules do not permit refunds, the position in this case is that the refund is due from Telkom and not the Scheme. Telkom bears the liability for wrongfully deducting any sums greater than the contribution mandated by the Trust Deed and Rules and if any sums were wrongfully deducted, then Telkom is obliged to refund the same together with interest thereon. The Trustees cannot be ordered to pay more any other sum other than that permitted by the Trust Deed and Rules.

49. The RBAT and the 1st and 2nd interested parties relied on the case of ***Director of Pensions v Cockar [2000] 1 EA 38*** where the Court of Appeal held the pension of the Chief Justice was to be calculated in accordance with the salary earned at least three years prior to retirement, hence it was contrary to the law for Director of Pension to insist on calculating the pension on the basis of the statutory salary. The case at hand is clearly distinguishable. The case did not concern a contributory pension scheme. It involved the construction of the specific rules governing pensions in the public service. In this instance and for purposes of the interested parties, the “*Final Pensionable Salary*” is not the final consolidated salary but the final “*basic salary*” the pensioner was earning prior to retirement which is the basis for calculating the retirement dues.

50. In opposing the application, the 1st and 2nd interested parties contended that there two matter related to the present case; Nairobi HCCA No. 141 of 2012 and Nairobi Constitutional Petition Number 16 of 2013. Apart from citing the cases, they did not provide details of the case nor demonstrate that they affected the present case in one way or another.

Conclusion and Disposition

51. In light of what I have stated above, the RBAT clearly failed to take into account and appreciate relevant matters particularly the obligation of the Scheme Trustees to calculate and pay the pension in accordance with the Trust Deed and Rules, the ***Retirement Benefits Act*** and the Regulations thereunder. The basis for calculation of the pension was the basic salary which was defined under the Trust Deed and Rules and that the same could not be varied except by an amendment to the Trust Deed. The decision of the RBAT directing the Trustees of the Scheme to make payments otherwise than in accordance with the Trust Deed and the Rules and is in therefore irrational and unreasonable and must therefore be quashed.

52. As the order for mandamus was sought in the alternative, it is not necessary to grant the same. The effect of quashing the decision of the RBAT is that the decision of the RBA remains.

53. In the circumstances, the Notice of Motion dated 12th September 2012 is allowed on the following terms;

a. An order of certiorari to remove to this Honourable Court to be quashed the decision of the Retirement Benefits Appeals Tribunal in Civil Appeal No. 2 of 2009 made on the 23rd February 2012 purporting to direct that the Retirement Benefits of given pensioners be calculated on the basis of their consolidated salaries.

b. There shall be no order as to costs.

SIGNED BY

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 18th day of JULY 2014.

I. LENAOLA

JUDGE

Mr Okindo instructed by Wangechi Munene and Company Advocates for the *ex-parte* applicant.

Mr Aloo instructed by Mwaura and Wachira Advocates for the 3rd respondent.

Mr Odero instructed by Meshack Odero and Company Advocates for the 1st and 2nd interested parties.

Ms Mate instructed by Iseme Kamau and Maema Advocates for the 3rd interested party.