REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. CIVIL APPLICATION NO. 223 OF 2012

IN THE MATTER OF AN APPLICATION BY THE TRUSTEES –KENYA AIRPORTS AUTHORITY STAFF SUPERANNUATION SCHEME AND THE KENYA AIRPORTS AUTHORITY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITON

AND

IN THE MATTER OF THE GOVENRMENT PROCEEDIGNS ACT (CAP 40), LAWS OF KENYA

AND IN THE MATTER OF THE RETIREMENT BENEFITS ACT, NO 3 OF 1997

BETWEEN

REPUBLIC .....APPLICANT

VERSUS

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

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE RETIREMENTS BENEFITS AUTHORITY.....3RD RESPONDENT

EX – PARTE

KENYA AIRPORTS AUTHORITY STAFF SUPERANNUATION SCHEME (suing thro' its trustees Julius F. O. Onyango, John Tito, John Thumbi, Yatich kangungo and Ken Kaunda)

AND

KENYA AIRPORTS AUTHORITY

AND

STEPHEN WAHOME IHIGA & 16 OTHERS..INTERESTED PARTIES

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 29th May 2012 filed the same day, the *ex parte* applicants herein, **Kenya Airports Authority Superannuation Scheme** (hereinafter referred to as the 1st applicant) **and Kenya Airports Authority** (hereinafter referred to as the 2nd applicant), seek the following orders:

1. **An order of certiorari remove to the High Court to quash the orders of the 1st Respondent dated 23rd February 2012 in RBATC No. 7 of 2010.**
2. **An order of prohibition to restrain the 1st Respondent from hearing and or entertaining any further proceedings in RBATC No. of 2010.**
3. **An order of prohibition to restrain the 3rd Respondent from acting in compliance with any of the orders of the 1st Respondent issued on 23rd February 2012**
4. **Costs of this application be provided for.**

EX PARTE APPLICANT'S CASE

2. The said Motion is supported by Statutory Statement filed 25th May 2012 and Verifying Affidavit sworn on 24th May 2012 by **Ken W Kaunda**, a Trustee and the Trust Secretary of the Board of Trustees of the 1st applicant.

3. According to the deponent, the 1st Applicant is a public service Defined Benefits ("DB") staff superannuation scheme commenced in 1996 and registered with the 3rd Respondent under the ***Retirement Benefits Act*** (the 1997 Act). The 1st Applicant, it is deposed, is sponsored by the 2nd applicant which is a publicly funded authority and that under a DB scheme, although a member may contribute toward his or her pension, pension benefits are based on the member's length of service and final salary hence any shortfall between contributions and pension benefits are met by the sponsor in this case the 2nd applicant. According to the deponent, the Appellants in Retirement Benefits Appeal Tribunal Case (RBATC) No 7 of 2010 (hereinafter "the Appellants") were members of the 1st Applicant who retired between the years 2004 and 2007. In 2006 following an actuarial valuation (based on projections of salary escalations and contributions by active members), a decision was made to enhance the pensions of members retiring from 1st July, 2006 and this enhancement meant that all persons retiring from that date would draw a pension of not less than 40% of their final pensionable salary. This decision did not affect the Appellants' pensions and did not apply retrospectively. Those of the Appellants (being two) who retired after 1st July, 2006 who benefited from the amendments. Therefore the 1st Applicant amended its Trust Deed and Rules on 2nd October 2006, which rules were supplemental to the Trust Deed and Rules dated 11th August, 1995 and 26th June, 2002 which Trust Deed and Rules were approved by the 3rd Respondent herein and duly registered in accordance with the provisions of the ***Retirement Benefits Act***, Act No 3 of 1997 ("the 1997 Act"). In the year 2011, all public service staff superannuation schemes were required by Treasury to convert from DB schemes to Define Contribution ("DC") schemes. Due to the cost of this conversion, the Board of Trustees of the 1st Applicant Fund took a decision to freeze the Fund pending the establishment of the DC scheme. According to him, the 1st Applicant Fund did not accept any new members from 1st July 2011 and does not receive any contributions whether from its members or the sponsor from that date. On 30th May, 2007 the appellants wrote to the Chief Executive Officer of the 1st Interested Party raising four (4) complaints, only one of which was in relation to the differential in pension. To this the 3rd Respondent responded stating that it had investigated the complaints of the appellants who stated, in regards to the differential in pension, that such differential did not affect the Appellants in any manner prohibited by law.

4. On or around 25th July, 2008, more than a year after the decision of the 3rd Respondent, the Appellants filed suit against the Applicants, being HCCC 340 of 2008 which was withdrawn by a Notice to withdraw the suit dated 11th January, 2011 served on 5th May, 2011. On 23rd November, 2010, the Appellants

applied to the 1st Respondent, and on 15th February, 2011, the 3rd Respondent and the appellants recorded a consent allowing this application in the absence of the applicants. On 11th October, 2011, the 1st Respondent issued directions that the parties supply Written submissions and the judgement of the 1st Respondent was delivered on 23rd February, 2012. Based on the advice received from legal counsel, the deponent believes that the decision of the 1st Respondent to allow the appeal out of time or enlarging the time for filing such appeal is *ultra vires* as no such power to do so in provided for by the 1997 and moreover, section 34(b) of Cap 395 provides an express limitation period of 12 months from the date of the action complained of. It is therefore contended that the 1st Respondents actions in hearing and determining RBATC No. 7 of 2010 is in excess of its jurisdiction under section 48 of the 1997 Act which permits appeals only from the Chief Executive officer of the 3rd Respondent and further, the 1st Respondent's actions in hearing and determining matters in RBATC No. 7 of 2010 together with evidence which was never placed before the Chief Executive Officer of the 3rd Respondent were *ultra vires* the 1997 Act insofar as the 1st Respondent abrogated the powers of the CEO of the 3rd Respondent under section 5 of the 1997 Act.

5. It is therefore contended that the orders of the 1st Respondent described herein above are, in light of the following factors, unreasonable and irrational: the provisions of the Trust Deed dated 2nd October, 2006 which stated itself to be supplemental to the Trust Deeds dated 11th August 1995; 26th June 2002 and 2nd October 2006 and the freezing of the 1st Applicant scheme which has no other source of funding save for its sponsor. In the deponent's view, the 1st Respondent's orders have the effect of extending retirement benefits under the 2006 amendments to pensioners who retired prior to this date, whose benefits had crystallized and who had already enjoyed their benefits. To him, the likely cost of the arrears as ordered by the 1st Respondent if applied to all members is estimated at Kshs 59 million which cost will be borne by the 1st Applicant from a frozen fund. The increase in accrued liabilities, on the other hand, is estimated at Kshs 89 million, which cost will be borne by the 2nd applicant. However, the 1st applicant will be unable to meet these arrears and liabilities without using funds held on trust for its current members, or relying on public funds through its sponsor - the 2nd applicant. Effectively, the 1st Respondent has ordered the 1st applicant to pay off the appellants' arrears with funds held on trust for members and the result will be a worsening of the 1st applicant's funds by Kshs 145 million and should other members also apply for enhanced benefits following the 1st Respondent's orders the deficit will be higher.

6. It is therefore his view that the 1st Respondent's orders are unreasonable and irrational as no reasonable party could have arrived at a decision with consequences as drastic as those outlines above. Further, the decision of the 1st Respondent in making the orders described herein above is unreasonable, irrational and tainted with bias as the appellants before the 1st Respondent did not pray for the orders given by the 1st Respondent either in the Memorandum of Appeal or the Statement of Facts dated 22nd November, 2010 in RBATC No. 7 of 2010.

7. Based on the advice he believes that the order of the 1st respondent in ordering the 3rd respondent to supervise compliance, by the applicants with the orders of the 1st Respondent is *ultra vires*, unreasonable and irrational as they purport to confer powers on the 3rd respondent that are quasi – judicial in nature and contrary to its capabilities and functions provided for under sections 3,5 and 45 of the 1997 Act; the order of the 1st Respondent in ordering that the 3rd Respondent be at liberty to appoint an Interim Administrator, to enforce compliance by the applicants with the orders of the 1st Respondent is ultra vires as it purports to illegally expand the statutory powers of an Interim Administrator contrary to section 45 (5) of the 1997 Act; and the orders of the 1st Respondent circumvent the decision making process outlined by sections 46 and 48 of the 1997 Act and breach the rules of natural justice as well as the applicant's legitimate expectation concerning the statutory decision making process.

8. The deponent contends that he is aware the orders issued by the 1st Respondent which were not sought

in the Memorandum of appeal and the statement of Facts dated 22nd November, 2010 in RBATC No. 7 of 2010 shall occasion substantial harm, prejudice and loss to the members currently making contributions to the 1st applicant whose funds stand to be lost to the Appellants. He believes that there is a real danger that unless the orders sought herein are granted the appellants may commence/continue execution proceedings in furtherance to the 1st Respondent's orders. Based on information he believes that the advocates of the appellants have filed an application before the 1st respondent to summon the 3rd respondent to show cause why he has not appointed an Interim Administrator to enforce compliance with the orders of the 1st Respondent which application was meant to come up before the 1st respondent on 28th may, 2012. He is also aware that the 3rd Respondent has written to the Applicants demanding compliance with the orders of the 1st Respondent within 10 days of the date of the letter. According to him, it is in the interest of fairness and justice that this Honourable court does grant the applicant the reliefs as prayed.

INTERESTED PARTIES' CASE

9. In opposition to the application, **Stephen Wahome Thiga**, one of the interested parties herein swore a replying affidavit on 29th June 2012 which was filed on the same date.

10. In the said affidavit, he deposed that based on the advice received from his Advocates on record, he believes that the Application is bad in law and a gross abuse of the court process to the extent that the issues raised have been addressed and adjudicated upon in the Retirement Benefits appeal Tribunal in Civil Appeal No. 7 of 2010. In his view based on the same advice he believes that the limitation prescribed by Limitations of Actions Act does not apply to any action by a beneficiary under a trust which is an action in respect of fraud or fraudulent breached of trust to which the trustee was a party or privy and consequently their claim against the applicants is an equitable claim which cannot be defeated by limitation. Further, the Tribunal under section 49 of the ***Retirement Benefits Authority Act*** and Rule 12 of the ***Retirement Benefits (Tribunal) Rules***, 2000 has power equivalent to that of the subordinate court in discharging its duties on appeal and hence just like the Subordinate Court under the Civil Procedure Act, has the jurisdiction to enlarge time within which pleadings may be filed. It is his further view that the section of the law which indicates the period of lodging an appeal as 30 days is worded in permissive terms. This therefore gives discretion to the Tribunal to enlarge time as it may deem fit.

11. He deposes that by letter dated 30th May, 2007 they informed the 3rd Respondent of their dissatisfaction with the decision of of Kenya Airports Authority and that of the Chief Executive Officer of the Retirement Benefits Authority and requested for his intervention and that that all issues that were subject to the determination of the Tribunal were raised with the authority in the said letter and the same were decided upon by the authority vide their letter of 16th July, 2007. According to him the contents of paragraph 4 of the application are untrue and none of the evidence put before this Honourable court by the applicants in their application supports such a conclusion. Further, it is deposed that it is the duty of courts and Tribunals to always zealously guard citizen's rights and the Retirement Benefits Appeals Tribunal has acted justly by safeguarding the interested parties from the fraudulent acts of the applicants. On the advice received from his advocates, he believes that the functions allocated to the 3rd Respondent are fairly incidental to or consequent upon those things which the law has authorized it to undertake and the powers conferred to it were not expressly prohibited under the founding statute, ***Retirement Benefits Act*** No. 3 of 1997. In further response to paragraph 6 of the said application, he deposes that the 1st respondent was vested with powers by a statute to appoint an interim administrator to look at the welfare of the members of any trust scheme in the event that the Trustees fails to comply with the law and the 1st respondent was in order by authorizing the 3rd respondent to appoint an interim administrator therefore it has properly exercised this power conferred to it by the ***Retirement Benefits Act*** No 3 of 1997)

12. Further, based on legal advice received from his advocates, it is deposed that in response to paragraph 7 of the application the decision making process envisaged under section 46 and 48 of the ***Retirement Benefits Act*** No. 3 of 1997 is a directory procedure which merely serves as a guide the non-observance of which does not render the resultant decision invalid. In any case, it has not been indicated by the Applicants in what terms does the Memorandum of Appeal and the accompanying statement of facts

violate the provisions of section 46 and 48 of the Retirement Benefits Act. According to him, the prescribed rules of natural justice and the universal demands of due process and fair play were observed before the decision was arrived at in RBAT No. 7 of 2010 and hence none of the evidence put before this Honourable Court by the applicants in their application support the conclusion in paragraph 9 of the application. To him, the Applicants will not suffer any loss and/or prejudice for giving to them what is rightly theirs. Therefore the orders sought in this application ought in the interests of justice and fairness to be refused and the said application dismissed with costs since the issues now being raised by the applicants had been raised at the Tribunal and determined on merit and Judicial Review remedies being only available to challenge the decision making process do not go to the merit of the decision made.

13. In conclusion, it is his view that all issues that are being raised by the applicants herein were raised at the Tribunal and determined and the rules of Natural procedure were effectively followed by the tribunal. Prior to the enlargement of time by the Tribunal to enable them file the appeal, they made an application dated 16th November, 2011 which was heard on merit by both parties and a decision was made. It is deposed that the complaint that they had lodged at the Retirement Benefits Authority was done by them without the representation of an Advocate and upon getting the response from Retirement Benefits Authority they were dissatisfied and instructed an advocate to file a case in the High court. As laymen they failed to note that they ought to have lodged an appeal at the Tribunal. However, upon getting legal advice, they were informed by our advocates to withdraw the court case and file an appeal at the Tribunal hence the withdrawal of the case in the High court was a pre-requisite to the proceedings with the Tribunal case.

14. According to the deponent, the Tribunal is empowered under Article 159(2)(d) of the Constitution of Kenya to do substantive justice to litigation and not to be bogged down by mere technicalities. To him, it is speculative for the applicants to allege that once they are paid as per the court order, other claimants will lodge a claim against the applicants since the order of the Tribunal was specific to the 17 applicants and there is no justification to deny them their rights just because the applicants are apprehensive that other undisclosed persons may also pursue their rights with them. It is contended that the interested parties are retirees who continue to suffer as a result of the applicant's blatant breach of the law and acts of impunity against members of the scheme and that in any case, the pension scheme is distinct from the Kenya Airports Authority. The law, according to the deponent, is clear that a sponsor of a scheme cannot interfere with the management of the scheme and ***The Kenya Airports Act*** does not apply to the scheme as the scheme is governed by its Trust Deed and Rules. Equally, the ***Government Proceedings Act*** has no application to the pension fund which is a trust and not a corporation. According to him, the application lacks is merit and the orders prayed for in the application ought to be refused.

15. According to legal advice from his advocates, by the amendment to the Trust Deed and Rules deleted the whole of the 1995 and 2002 Trust deeds and Rules and thus the whole rules including that which was applicable to them was substituted to the effect that it applies to all beneficiaries of the scheme. It is his contention that the judgement delivered by the 1st respondent has duly been signed and the allegations by the applicants are in bad faith and an attempt to divert the attention of the court.

EX PARTE APPLICANT'S SUBMISSIONS

16. On behalf of the *ex parte* applicants, it was submitted that the *ex parte* applicants challenge the decision of the Tribunal on four main issues as follows: (i) The Tribunal's decision to allow the filing of an appeal more than three years after the decision sought to be appealed from was ultra vires as the Tribunal lacls the jurisdiction to do so; (ii) The Tribunal acted unreasonably and ultra vires by hearing and determining matters which were not placed before the Chief Executive Officer of the Retirement Benefits Authority; (iii) The Tribunal acted unreasonably, ultra vires and in breach of the rules of natural justice by making orders that it neither had the power to make nor were the same prayed for; and (iv) In addition to the above the Tribunal made orders that were so drastic in their consequences that no reasonable Tribunal could have arrived at such a decision.

17. In the applicants' view, since the Tribunal has not responded to the issues raised herein the only issues which the interested party can respond to are purely issues of law, namely the jurisdiction of the

Tribunal.

18. It is submitted that under section 48(1) of the ***Retirement Benefits Authority Act***, No. 3 of 1997 ("the Act") an appeal against the decision of the Authority or the Chief Executive Officer may be made within thirty days of the receipt of the decision. This provision, it is submitted, also appears in rule 4(1) of the ***Retirement Benefits (Tribunal) Rules***, 2000 ("the Rules"). It is submitted that the decision that gave rise to the appeal before the 1st Respondent was the decision of the Chief Executive Officer dated 16th July 2007. However, the interested parties instead of appealing against the decision within the said 30 days filed a suit before this Court, being HCCC No. 340 of 2008 which was withdrawn on 11th January 2011 and on realising that the period for appealing had lapsed sought for enlargement of time for filing the appeal and without hearing the applicants who were parties to the appeal, the 1st respondent recorded a consent between the interested parties and the 3rd respondent allowing the application. Subsequently, the 1st respondent heard an application for enlargement of time between the interested parties and the applicants and allowed the same. At the hearing of the appeal the issue of jurisdiction of the 1st respondent was raised and it is that determination which is the subject of these proceedings.

19. It is submitted, based on **R vs. Shoreditch Assessment Committee *ex parte* Morgan [1910] 2 KB 859 at 880** and **Anisminic Ltd vs. Foreign Compensation Commission [1969] 2 AC 147** that it is trite law that a public body cannot decide on the limits of its jurisdiction, such limits being statutory. It is therefore submitted that the Tribunal reached a wrong decision as to the width of its powers and that rule 12 of the Rules as read together with Order 50 rule 6 of the Civil Procedure Rules were inapplicable as the power to enlarge statutory constraint must be equally statutorily donated. Relying on **Kenya National Examinations Council vs. Republic *ex parte* Geoffrey Gathenji Njoroge & Others [1997] eKLR**, it is submitted that as a creature of a particular statute, the Tribunal could do only that which its creator statute authorised it to do. Since rule 4(1) of the Rules is framed in mandatory terms that an appeal shall be lodged within thirty days, it is submitted that a holistic interpretation of the Act and the Rules clearly limit the jurisdiction of the Tribunal hearing the appeals and do not vest it with the jurisdiction to enlarge the same hence the Tribunal dealt with a matter it had no right to deal with.

20. While relying on **R vs. Nortehrn & Yorks Regional Health Authority *ex parte* Trivedi [1995] 1 WLR 961, 974**, it is submitted that the jurisdiction of the appeal unit is statutory and cannot be extended by agreement hence in the instant case the Tribunal could not extend time by agreement of the parties before it. It is therefore submitted that the Tribunal had no jurisdiction to entertain the appeal and the judgement should be quashed and further proceedings prohibited.

21. It is further submitted that since there is an elaborate appeal procedure provided in the Act culminating into an appeal to the Tribunal from the decision of the Chief Executive Officer, under section 48(1) of the Act the Tribunal's jurisdiction to hear an appeal from the decision of the Chief Executive Officer is limited to matters that are before the Chief Executive Officer and has no jurisdiction to supervise the decision of the manager, administrator, custodian or trustees of the scheme. In this case, it is submitted that the Tribunal considered matters which were not subject to the supervision of the Tribunal reliance is placed on the authority of **R (Alconbury Developments Ltd) vs. Secretary of State for the Environment Transport and the Regipons [2001] UKHL 23**.

22. It is further submitted that there was a glaring and fundamental disparity between what the interested parties prayed for in their Complaint to the Chief Executive Officer whose decision was the subject of the appeal to the Tribunal and the orders of the Tribunal including the issue of costs which were not sought.

23. Apart from that it is submitted that the Tribunal made orders that it did not have powers to make in particular the orders that the Retirement Benefits Authority supervises compliance with the Tribunal's orders and be at liberty to appoint an interim Administrator of the *ex parte* applicants to enforce compliance with the said orders. In the applicants' view the functions of the Authority under section 5 of the Act do not include supervising compliance with the orders of the Tribunal and similar powers do not appear in the Act. In any case the provisions of section 45 of the Act which stipulate circumstances under which an Interim Administrator can be appointed were not considered hence the Tribunal failed to

consider relevant matters and abrogated to itself the powers of the Chief Executive Officer and the Authority in making the said order and proceeded to grant powers to the Interim Administrator which are not statutorily given to it.

24. Based on **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1948] 1 KB 223, 233-234**, it is submitted that the Tribunal made orders that were so unreasonable and drastic in their consequences that no reasonable tribunal could have arrived at such a decision. It is submitted that the Tribunal made orders which unreasonably and unfairly burden the retirement benefits of current contributors to the pension scheme, who are future pensioners, to the tune of Kshs 145 million.

25. It is therefore submitted that the Court ought to allow the application with costs.

INTERESTED PARTIES' SUBMISSIONS

26. On behalf of the interested parties it is submitted that the interested parties as the beneficiaries of the decision sought to be quashed are entitled to submit on the nature and extent of the proceedings at the tribunal and since they also participated in the proceedings thereat any failure by the 1st respondent to respond to these proceedings does not in any way limit the extent to which the interested parties can respond.

27. While reiterating the contents of the replying affidavit that any limitation of actions prescribed by any other Act of Parliament does not apply to any action by a beneficiary under a trust which is an equitable claim, it is submitted that under section 20(1) of the Limitation of Actions Act, Cap 22, which provisions was reinforced in **Benson Hugo Mwangi & 40 Others vs. N B K and 8 Others HCCC No. 89 of 2008**, a claim based on trust is an equitable remedy cannot be defeated by statute of limitations. It is further submitted that since the Tribunal has under section 49 of the Act and rule 12 of the Rules powers equivalent to those of the subordinate court under the Civil Procedure Act to enlarge the period within which pleadings may be filed, all the powers given to the subordinate under section 95 of the Civil Procedure Act are similarly conferred upon the Tribunal. Since section 48 of the Act is worded in permissive terms, it is submitted that this allows the Tribunal to exercise its discretion in favour of the appellants. In support of this submission the interested parties rely on **Consolata Mungai and Others vs. Stanbic Bank Kenya Ltd HCCC No. 56 of 2008** and **Jimmy Kaulu and 14 Others vs. Stanbic Bank of Kenya Ltd HCCC No. 983 of 2004**. It is therefore submitted that whereas section 48(1) of the Act allows the Tribunal to extend time for filing pleadings before it, rule 4(1) of the Rules only relates to the documents to accompany the Appeal which shall accompany the Appeal but not the time for filing of the Appeal.

28. In the interested parties' views since the order extending time was made in an application in which both parties were heard on merits and a decision made and as the applicants had the opportunity to challenge the decision thereof but did not do so and six months have since lapsed certiorari cannot be issued to quash the decision made after six months.

29. According to the interested parties, apart from the issues of costs, interests and a statement showing the computation of the benefits, all the other issues were raised. Whereas with respect to costs and interests, the interested parties did not have to plead the same as the same follow the cause and interests is in the discretion of the Tribunal the issue of benefits was only meant to supplement and enforce the order of the tribunal. According to them the appointment of an Interim Administrator of the Applicant is not a substantive order but is only a default order on enforcement should the trustees fail to comply with the orders of the tribunal and that such orders are not prohibited under the statute. According to them the decision making process envisaged under section 46 and 48 of the Act is a directory procedure which merely serves as a guided the non-observance of which does not render the resultant decision invalid. Since the issues raised herein had been raised at the Tribunal and determined on merits, it is submitted that the rules of natural justice were effectively followed and this application should be dismissed with costs as judicial review remedies are only available to challenge the decision making process and not the merit of the decision made.

30. Further submissions simply reiterate what is stated in the replying affidavit filed herein.

DETERMINATIONS

31. After considering the foregoing this is the view I form of the matter. The first issue for determination is whether the interested parties could respond to all the issues raised herein in the absence of a response from the Respondents. To determine this issue it is important to properly understand the scope of the judicial review proceedings. The purpose of judicial review was explained in **Republic vs. Kenya National Examinations Council *ex parte* Geoffrey Gathenji Njoroge and 9 Others** (supra) where it was held:

> **"the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment."**

32. Judicial review deals with the decision making process and not the merits of the decision made. Accordingly, it is not correct to hold that the interested parties herein could not respond to the issues raised herein save for the issue of jurisdiction. The interested parties were similarly parties to the impugned proceedings and are properly entitled to respond to the decision making process followed by the 1st respondent.

33. It is the applicant's submission that a public body cannot decide on the limits of its jurisdiction, such limits being statutory. In my view this broad statement is not entirely correct. As was held in **R vs. Shoreditch Assessment Committee *ex parte* Morgan** (supra) what the law states is that:

> **"No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction…"**

34. In my view a tribunal is properly entitled to make a decision on the limits of its jurisdiction. However, whatever decision it makes is not final but is subject to a review by the Court. As aptly put in **Anisminic Ltd vs. Foreign Compensation Commission** (supra):

> **"if one party submits to a tribunal that its powers are wider than in fact they are, then the tribunal must first deal with that submission. But if they reach a wrong conclusion as to the width of their powers, the court must be able to correct that – not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on true construction of their powers, they had no right to deal".**

35. In other words the issue of jurisdiction must first be dealt with by the tribunal before proceeding further depending on the outcome of the issue. However, the tribunal ought not to down its tools at the mere mention of the word "jurisdiction".

36. That brings me to the issue whether or not the Tribunal had the powers to enlarge the time for the filing of an appeal to it. The applicants contend that since the period for filing an appeal to the Tribunal is provided for under the Act, a provision for enlargement of time must similarly be donated by the statute itself. The interested parties' position, however, is that since under section 49 of the Act, the Tribunal has similar powers as those of a subordinate court, under the provisions of section 48(1), rule 12 of the Rules as read with section 95 of the Civil Procedure Act and Order 50 rule 6 of the ***Civil Procedure Rules***, the Tribunal has the powers to extend time for filing a pleading.

37. Section 48(1) of the Act provides as follows:

> ***Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the***

provisions of this Act or any regulations made thereunder may appeal to the Tribunal within thirty days of the receipt of the decision.

38. Rule 12 of the Rules on the other hand provides as hereunder:

In matters of procedure not governed by these Rules or the Act, the Tribunal may adopt the Civil Procedure Rules made under the Civil Procedure Act where applicable.

39. Before going further, it is clear that what this provision imports from the ***Civil Procedure Act*** are the ***Civil Procedure Rules*** in matters not governed by the Rules or the Act. Section 3 of the Civil Procedure Act on the other hand provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

40. It follows that where there is a special jurisdiction or power conferred, or any form or procedure prescribed, by or under any other law, the provisions of the ***Civil Procedure Act*** are inapplicable. Since Rule 12 of the Rules does not import into the Act the provisions of the ***Civil Procedure Act*** including section 95 aforesaid, that section is inapplicable to proceedings under the Act.

41. With respect to Order 50 rule 6 of the Civil Procedure Rules the same provision has been the subject of judicial pronouncements. In **Wilson Osolo vs. John Ojiambo Ochola & Another Civil Appeal No. 6 of 1995** the Court of Appeal expressed itself as follows:

"There was quite clearly a fundamental error on the part of the superior Court in granting such an extension of time as section 9(3) of the Law Reform Act, Cap 26 Laws of Kenya, quite clearly shows that an application for leave to apply for an order of certiorari cannot be made six months after the date of the order sought to be quashed…It can readily be seen that order 53 rule 2 (as it then stood) is derived verbatim from s. 9(3) of the Law Reform Act. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act….There is no provision for extension of time to apply for such leave in the Limitations of Actions Act (Cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here….It therefore is apparent that the extension of time granted by Platt, J. was a nullity. Any steps taken thereafter are therefore of no consequence."

42. Further reference may be made to **Eliakim Munda vs. Oremo Owana Civil Application No. Nai. 148 of 1991 and Thomas Achuch Ako vs. Special District Commissioner of Kisumu And Another Civil Appeal No. 27 of 1989.**

43. It follows that the provisions of Order 50 rule 6 of the Civil Procedure Rules do not apply to extension of time for filing an appeal provided under section 48(1) aforesaid.

44. Whereas the interested parties have submitted that the provisions of the ***Limitation of Actions Act*** do not apply, the issue herein is not limitation imposed under the said Act but limitation imposed by a special statute which is the subject of these proceedings which statute does not provide for enlargement of time.

45. On jurisdiction, Madan, J (as he then was) in Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC NO. 1546 of 1971 (HCK) [1972] EA 525 held:

"It is axiomatic that when a statutory tribunal sits to administer justice, it must in accordance with the law as Parliament so clearly intended…..Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions

precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction. What is forbidden is to question the correctness of a decision or determination which it was within the area of their jurisdiction to make…….The phrase "to make such order thereon as it deemed fit" giving powers to a statutory tribunal must be strictly construed. Powers must expressly conferred; they cannot be a matter of implication……..If the legislature had considered that the tribunal had power under that provision to award large sums by way of compensation to a landlord, for example, whose antiques had been damaged by the negligence of a tenant leaving the tap running in the flat above it, it would have surely continued the right of appeal……Therefore the orders made by the tribunal for payment of compensation for the carpet and the signboard were *ultra vires*……In the vast majority of cases the court will not seek to interfere with the decisions of statutory tribunals but such a tribunal must act in accordance with the law and where it fails to do so the Court will not hesitate to intervene."

46. In the present case, the allegation is that there is absence of formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry by the virtue of the appeal having not been instituted within the 30 days period provided under the Act. Further it is submitted that the extension of time that was purportedly granted was without jurisdiction. I have already held that the Tribunal had no powers both under the Civil Procedure Act and Civil Procedure Rules to extend time for filing the appeal. It has not been alleged that apart from those provisions there is an express provision under the Act which permits the Tribunal to extend time.

47. Therefore the inescapable conclusion which this Court arrives at is that the Tribunal had no jurisdiction to enlarge the time for filing the appeal against the decision of the Chief Executive Officer, errors by the interested parties in filing a suit instead of lodging an appeal notwithstanding, even if there was a consent entered into between the interested parties and the 3rd respondent, such consent cannot operate against the law. As was held by **Sir William Duffus, P** in **Shyam Thanki & Others vs. New Palace Hotel Ltd Civil Appeal No. 26 of 1971 [1972] EA 199** all the courts…..are created by statute and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction, which it does not possess.

48. That, however, is not the end of the matter. According to the interested parties, the decision whether or not to extend time was made after the parties were heard and after the decision enlarging time, the applicants did not challenge the decision with the result that the six months provided for commencing proceedings for certiorari had lapsed. That brings to question whether in cases where a Tribunal's challengeable on the absence of conditions precedent, certiorari may issue to quash the final decision. Unlike in an appeal where the challenge is normally directed at a particular decision, section 9(2) of the Law Reform Act provides:

"In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

49. It is therefore my view that where the Tribunal's jurisdiction to embark on an inquiry depends upon the presence of certain formalities or things which are conditions precedent, and a preliminary determination is made as to the existence or otherwise of such conditional precedent, a party aggrieved by the decision may either challenge the decision at that point or seek to challenge the proceedings arising therefrom as long as the application for leave to challenge the same is made within six months of the final determination. As was held by **Nyamu, J** (as he then was) in **Republic Vs. Kajiado Lands Disputes**

Tribunal & Others *ex parte* Joyce Wambui & Another Nairobi HCMA. No. 689 Of 2001 [2006] 1 EA 318, if an award is made without jurisdiction, it is a nullity and anything out of a nullity is a nullity due to the maxim *ex nihilo nihil fit* – out of nothing comes nothing hence despite the irregularities the Court cannot countenance nullities under any guise since the High court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role as it has powers to strike out nullities. Where a decision is a nullity, it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. You cannot put something on nothing and expect it to stay there, as it will collapse. See **Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169.**

50. Accordingly, I find the interested parties' contention that the applicants are time barred from challenging the order enlarging time is without merits.

51. With respect to the authorities cited, in **Consolata Mungai and Others vs. Stanbic Bank Kenya Ltd** (supra) the Court dealt with the issue whether or not the preliminary objection was properly raised and found that that was not the stage at which the issue of jurisdiction of the Court ought to have been dealt with. Accordingly the court did not deal with the objection raised on its merit. In **Jimmy Kaulu and 14 Others vs. Stanbic Bank of Kenya Ltd** (supra) the issue was whether or not the availability of an alternative remedy provided for in the Act ousted the jurisdiction of the Court and the Court held, rightly in my view, that since the remedy provided under the Act was not effective as it does not provide machinery for enforcement of the said resultant decision the Court's jurisdiction was not ousted. In my view whereas no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect, statutes which confer jurisdiction on Tribunals are to be construed strictly.

52. Having determined the issue of jurisdiction and taking into account the decisions of this Court with respect to jurisdiction of this Court on matters arising from the Act in question, I do not intend to deal with the other issues raised herein so as not to prejudice any actions which may be commenced to challenge the merits of the issues raised since in my view the raised of the issues are likely to touch on the merits and exercise of discretion on the part of the 1st respondent.

ORDER

53. In the result the Notice of Motion dated 29th May 2012 succeeds. Consequently:

a. **An order of certiorari is hereby issued removing into this Court the orders of the 1st Respondent dated 23rd February 2012 in RBATC No. 7 of 2010 and the same are hereby quashed.**
b. **An order of prohibition is hereby issued restraining the 1st Respondent from hearing and or entertaining any further proceedings in RBATC No. of 2010.**
c. **An order of prohibition is hereby issued to restrain the 3rd Respondent from acting in compliance with any of the orders of the 1st Respondent issued on 23rd February 2012.**
d. **However, as the applicants could have avoided the escalation of costs by filing these proceedings immediately the decision enlarging time was made, I award half of the Costs of this application to the applicants to be borne by the 1st respondent**.

Dated at Nairobi this day 30th of April 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nderitu for Mr Koceyo for Interested Parties

Mr Ondati for ex parte applicants

Ms Mbilo for Miss Masaka for the Respondent