



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISC. APPL. JR. NO. 203 OF 2012

BETWEEN

**REPUBLIC
 APPLICANT**

AND

**RETIREMENT BENEFITS APPEALS TRIBUNAL 1ST
 RESPONDENT**

**THE ATTORNEY GENERAL 2ND
 RESPONDENT**

AND

**STANBIC BANK OF KENYA STAFF PENSION SCHEME
 INTERESTED PARTY**

EXPARTE

**EDWIN NGESA NYAMBORO 1ST
 APPLICANT**

**ROSE GACHUKI 2ND
 APPLICANT**

**FRANCIS KALOKI MAINGI 3RD
 APPLICANT**

**JAMES MUSALIA AGALOMBA 4TH
 APPLICANT**

**STEPHEN KINYANJUI NGATA 5TH
 APPLICANT**

**STANBIC BANK OF KENYA STAFF PENSION
SCHEME**

JUDGMENT

Introduction and background

1. These two consolidated matters arise from a judgment delivered on 28th November 2011 and reasons for the judgment given on 23rd February 2012 (“the judgment”) by the Retirement Benefits Appeals Tribunal (“the Tribunal”) sitting in Nairobi in ***Civil Appeal No. 4 of 2011, Edwin Ngesa Nyamoro and 15 Others v Retirement Benefit Scheme***. The fifteen appellants in appeal are the *ex-parte* applicants (“the applicants”) in **Misc. Appl. JR No. 203 of 2012** while ***Stanbic Bank of Kenya Staff Retirement Benefit Scheme*** (“the Scheme”) is the *ex-parte* applicant in **Misc. Appl. JR No. 310 of 2012**.

Decision of the Authority

2. In order to understand the matter, it is important to set out its history. The appeal to the Tribunal arose from a decision of the Retirement Benefits Authority (“the Authority”) contained in a letter dated 22nd November 2010 written by the Chief Executive. In that letter he dealt with complaints raised by former employees of Stanbic Bank Kenya Limited in relation to the Scheme. In the said letter the Chief Executive appreciated the issue before him as follows, *“Having established that the entire bone of contention was the pension accrual factor, where the complainants were claiming that they should be paid based on a factor of 1/16 while the Trustees insisted the correct basis for calculation was a factor of 1/60, the Legal Department embarked on a review of voluminous documents submitted in this matter ..”*
3. The Authority investigated the matter and considered the arguments raised by all the sides. It also engaged the Commissioner of Income Tax to confirm the authenticity of the documents lodged with the Commissioner and the tax position of the scheme that would shed light on the issue under inquiry. The Authority then concluded that, *“Despite the exercise the Authority has been unable to find any copy of a validly executed Deed of Amendment amending Rule 5 (b) of the Stanbic Bank Pension Scheme increasing the pension calculation factor from 1/60 to 1/16. Indeed the Trust Deed talks about “one-sixtieth” while the member booklet states it is as “one-sixteenth.”*”
4. As regards the booklet which the complaints relied upon to buttress their argument, the Authority noted, *“The Scheme rules booklet that is issued to staff is not the primary document for the purposes of pension calculation. It is the secondary document and in the event of a conflict with the Trust Deed and rules, for whatever reason, the contents of a validly executed trust and filed Trust Deed will take precedence. The Authority cannot rely on the booklet for purposes of pension calculation.”*

The Appeal

5. The complainants were dissatisfied with the decision of the Authority and filed an appeal to the Tribunal. The issue before the Tribunal was the interpretation of the Scheme Trust Deed and particular rule 5(b) of the Rules which was to be applied in calculating the benefits due to the applicants. In considering the issue, the Tribunal expressed itself thus, *“It is common ground that Rule 5(b) of the 2nd respondent’s Rules is to be applied in calculating the benefits due to the Appellants.”* Accordingly, it framed the issues for consideration as follows;
 1. *Whether an amendment was in 1994 made to the 2nd respondent’s rules to change the pending factor from 1/60 to 1/16.*

2. *Whether a pension factor of 1/16 is to be applied in calculating the benefits due to the appellants?*
 3. *Whether a pension factor of 1/60 is to be applied in calculating the benefits due to the appellants*
 4. *Who should pay costs?*
6. On the one hand, the appellants argued that the factor of 1/16 was proper amendment to the rules and the booklet containing the rules and regulations issued to the beneficiaries relied upon reflected the correct position. The Scheme, on its part, argued that the factor of 1/60 was reflected in the Deed of Trust and rules which was the primary document and any amendment could only be effected by another deed signed sealed and delivered and approved by the Commissioner of Income Tax.
 7. After weighing the evidence and arguments, the Tribunal concluded that there was no change to rule 5(b) and that the proper factor for calculating benefits to be applied was 1/60 and not 1/16. It ordered that costs assessed at Kshs. 15,000/= plus disbursement be paid by the scheme to each appellant.

The Applications

8. In *Misc. Appl. JR No. 203 of 2012*, the applicant seeks the following orders;
 - a. *That an order of certiorari to bring before this Honourable Court for the purposes of quashing the Judgment of the Retirement Benefits Appeals Tribunal dated 23rd February 2012 delivered at Nairobi in Tribunal appeal No. 4 of 2011.*
 - b. *That an order of mandamus directing the Tribunal to determine the Appeal No. 4 in accordance with the interested parties Amended Trust Deed and Rules 1994.*
 - c. *That the costs be in the cause.*
9. Mr Amadi, counsel for the applicants, attacked the decision of the Tribunal on, inter alia, the following grounds which are set out on the face of the motion for consideration;
 1. That the Tribunal prejudiced the applicants in failing to independently verify the accuracy of the statistics supplied to the appellants actuary to enable the computations to be done.
 2. That the Tribunal abdicating their duties to independently investigate whether the correct accrual factor was indeed 1/16 and assumed that the Trustees were telling the truth, failing to verify whether the factor of 1/60 was correct and whether the trustees availed any conflicting statistics other than those used by the applicants actuary.
 3. That the Tribunal failed to uphold the applicants actuary report on non –legal grounds and without any justifiable cause.
 4. That the Tribunal failed to give a hearing to the applicants’ actuary to respond to the calculations presented to the Trustees before reaching a decision and this amounted to arbitrariness and miscarriage of justice.
 5. That the Tribunal acted in total disregard to the Rules of procedure by failing to take into account the gravity of the claim and consider in detail each of the appellants claim in its own merits and failing to allow the appellants to submit on their claim.
 6. That the Tribunal failed to appreciate and hold that the Rules of the Scheme are legally binding.
 7. That the Tribunal failed to consider that the Trust Deed rules were amended in 1994 and a copy was indeed stamped on 23rd February 2005 and initialled by an Assistant Commissioner of Income Tax.
 8. That the Tribunal failed to consider that the amendment saw the accrued factor used to determine the benefits payable to the Applicants change to 1/16 from the initial 1/60.
 9. That the Tribunal failed to take into account that the applicants claim of 1/16 was indeed supported by a letter jointly written on 14th September 2004 by Walker Kontos, then and now the advocates for both the scheme and sponsor and Nzioka & Company advocates then the advocates for the 1st applicant.
 10. That the Tribunal failed to consider that on 27th July 2003, Ivy Nyarango, who was a legal officer

- of Stanbic Bank (K) Limited signed an affidavit on oath which was filed at the Milimani Commercial Courts on 24th July 2003 by the Bank's Advocates, M/s Walker Kontos Advocates annexing the banks Staff Pension Scheme Rules which also on page 4 rule 5(b) confirms the accrual factor as 1/16 of the Pensionable salary.
11. That the Tribunal failed to consider that in the letter, Rules similar to the ones stated in (c) above defining the accrual factor as 1/16 were annexed together with other documents for the Authority to use to determine the manner of calculating the 1st applicants claim. It is reasonable to conclude that counsel had instructions and both parties then accepted the accrual factor of 1/16.
 12. That the failed to uphold a report prepared by the applicant's Actuary and produced in Court in Misc. Civil Application No. 797 of 2005 as the report of the Authority. The report was adopted on a High Court Order issued on 6th July 2007.
 13. That the Tribunal failed to find that the Trust Deed dated 11th January 1978 does not contain the method of computation of pension benefits and the same are contained in the Rules of the Scheme.
 14. That the Tribunal failed to find the Rules of the Scheme were amended severally without a corresponding amendment to the Trust Deed as follows;
 - i. On 24th December 1993, the Trustees amended the Rules of the Scheme to reduce the normal Retirement Age from 60 to 55 and changed the qualifying age for early retirement from 55 to 50. In this instance there was a corresponding amendment and filing of a new Trust Deed.
 - ii. On 24th March 2000 there was a further amendment to the Scheme Rules 5(g) which increased the maximum commutable amount from kshs.360,000 to Kshs 540,000/= the original Rules of 19789 had a maximum commutable amount of Kshs.120,000/= Similarly, the particular amendment of the Scheme Rule did not necessarily result to an amendment of the Trust Deed.
 15. That the Tribunal failed to find the amendment of the 1994 Scheme Rules followed a similar pattern and there was no need for the amendment of the Trust Deed itself.
 16. That the Tribunal failed to find that the Trustees had already made a provision in their Books of Accounts dated 31st December 2007 for Kshs.251,151,707/= as the amount due to the applicants and others upon the conclusion of the complaint.
 17. That the Tribunal failed to find out the basis of the provision made by the Trustees with regard to the Applicants claim of Kshs.251,151,707/=
 18. That the Tribunal failed in making an assumption that all the applicants were paid their pension using a factor of 1/60 whereas some of the applicants like James Musalia Agalomba and Stephen Kinyanjui Ngata were not paid at all.
10. In response to the applicant's case the respondent and interested party took a common position. They argued that the applicants' case is one for appeal rather than judicial review and that the Tribunal considered the material before it and determined the issues that were framed for consideration. They urged the court to dismiss the application.
11. Mr Gichuhi, counsel for the Scheme, submitted that the Tribunal addressed itself to the issue that was before the Authority for determination, that is, the accrual factor provided in the Trust Deed and came to the proper conclusion after examining all the facts and evidence and therefore the applicants had not established any error entitling the court to intervene.
12. In **Misc. Appl. JR No. 310 of 2012**, the Scheme seeks to set aside the decision of the tribunal to the extent that it was ordered to pay costs assessed at Kshs.15,000/00 plus disbursements for each appellant. The principle ground for this attack is that the Tribunal disregarded the **Retirement Benefits (Tribunal Rules) 2000** which limit party and party costs where no specific sum is claimed or awarded to a maximum of Kshs.10,000/00. The Scheme argues that the award of Kshs.15,000/00 to each appellant was in excess of jurisdiction.

The Determination

13. The issue for determination is whether the Tribunal exceeded its jurisdiction, denied the applicants

their right to natural justice or reached an unreasonable and or arbitrary decision. The scope of judicial review was aptly summarised by Githua J., in **Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012[2012]eKLR** where she stated; *“It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates”* (See **Republic v Kenya National Examinations Council ex parte Geoffrey Gathenji and 9 Others Civil Appeal No. 266 of 1996**).

14. It is not in dispute that the Tribunal had jurisdiction to deal with the matter before it and the issue for determination before the Authority and the Tribunal was how the applicants’ benefits should be calculated. It is also not in dispute that the Tribunal was determining an appeal from a decision of the Authority contained in the letter dated 22nd November 2010 under **section 48** of the **Retirement Benefits Act**. This is important because the matter was exhaustively investigated and researched by the Authority upon the applicants’ complaint. The Tribunal mandate as an appellate body was to review the evidence and confirm that the Authority acted within the law.
15. The grounds upon which the applicants’ attack the Tribunal’s decision, which I have set out at paragraph 9 above, are in essence grounds of appeal seeking to review the merits of the decision. The applicants require the court to reconsider all the evidence and decide whether the Tribunal came to the correct conclusions. The issue before the Authority and the Tribunal was the applicable factor, whether 1/60 or 1/16, used in calculating the retirement dues. The obligation of the Scheme to the beneficiaries flows from the Trust Deed and the rules and it is apparent from the evidence that the Authority in investigating the applicant’s complaints scrutinised the relevant documentation to determine whether the proper factor was used. Both the Authority and the Tribunal considered these matters and came to a decision that they were entitled to.
16. I am thus unable to detect any error that would attract orders of certiorari and in the circumstances, the Tribunal’s decision cannot be assailed and since the decision must stand, an order of mandamus cannot be issued.
17. This brings me to the issue of costs. The issue of costs is governed by **rule 13** and **14** of the **Retirement Benefits (Tribunal) Rules 2000**. **Rule 12** empowers the Tribunal to make an order of costs on an appeal while **rule 14** provides that the Tribunal in making an order for costs shall be guided by a scale of costs set out in the Schedule to the Rules. **Paragraph (3)** of the **Schedule of Costs** provides, *“In any appeal by the nature of which no specific sum is claimed or awarded in the decision of the Tribunal; such costs as the Tribunal in its discretion awards but not less than Kshs. 3,000/= if the Chief Executive Officer has not filed a statement of facts in reply and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) not to exceed Shs. 10,000/=.”*
18. I agree with the Scheme, that the Tribunal exceeded its jurisdiction in awarding each applicant 15,000/00. In my view, the appeal was one appeal against a single decision of the Authority hence, no costs could be awarded in favour of each appellant. The motion succeeds to that extent.

Disposition

19. In the result, the final orders are as follows;

- a. The Notice of Motion dated 22nd June 2012 in ***HC Misc. Appl. JR No. 203 of 2012*** is dismissed.
- b. The Notice of Motion dated 2nd August 2012 in ***HC Misc. Appl. JR No. 310 of 2012*** is allowed to the extent that the judgment dated 23rd February 2012 is quashed to the extent that *ex-parte* applicant was condemned to pay each appellant Kshs.15,000/= plus costs and disbursements.
- c. There shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 9th day of September 2013.

D.S. MAJANJA

JUDGE

Mr Amadi instructed by Koceyo and Company Advocates for the ex-parte applicants.

Ms Maina, Litigation Counsel, instructed by the State Law Office for the 1st respondent.

Mr Gichuhi instructed by Walker Kontos Advocates for the interested party.