



Editorial Summary

1. *Civil Appeal*
2. *Civil Practice and Procedure*
3. *Application Notice of Motion 18th August 2010*

LEAVE TO FILE APPEAL OUT OF TIME

3.1 *Subject of tribunal*

Retirement Benefits Appeals Tribunal.

3.2 *Decision made on 26th March 2009.*

3.3 *Applicant ordered to pay claimant's retirement benefits of Ksh. 143,462,55.*

3.4 *Dissatisfied with decision and prays that leave be granted to appeal to this High Court.*

4. *Application opposed*

4.1 *The Civil Procedure Act Section 79G CPA for leave to appeal out of time deals with subordinate court.*

4.2 *There is no right of appeal.*

4.3 *Delay inordinate and partial compliance had been attempted.*

5. *Held:*

i) *Application dismissed.*

ii) *No right of appeal to the High Court.*

6. *Case Law:*

7. *Advocates :*

i) *P.N. Nyaga instructed by M/s J.M. Njenga & Co Advocates for*

applicant

ii)
Advocates for respondent

M.S. Oduor instructed by M/s Ochieng, Kibet & Ohaga & Co

THE BOARD OF TRUSTEES OF NEW KENYA CREAMERIES LTD

(JUNIOR)

**STAFF PENSION SCHEME.....APPLICANT/
ORIGINAL APPELLANT**

VERSUS

**RETIREMENT BENEFITS AUTHORITY.....RESPONDENT/
ORIGINAL RESPONDENT**

(Being an appeal arising from the judgment and order of the Retirement Benefits Appeals Tribunal-Justice (Rtd)

Shaikh M Amin (Chairman), Barnabas G. Kariuki, Antony P. Davies and Joseph K. Kamiri (members)

delivered on 26th March 2009 in Civil case No. 1/09)

R U L I N G

Application for leave to file an appeal out of time Chamber Summons 18th August 2010

I. PROCEDURE

1. The applicants, M/s Board of Trustees of New Kenya Co-operative Creameries Limited (junior) Staff Pension Scheme filed the present application dated 18th August 2010 for leave to appeal against the decision of the Retirement Benefits Appeals tribunal that was determined on 26th March 2009.
2. The application was brought under Section 3A Section 79G of the Civil Procedure Act Laws of Kenya. The former Order XLIX rule 5 Order L rule 1 Order XXXIX rule 1,2, & 3 and 9 of the Civil Procedure Rules and all other enabling provisions of the law.
3. The reasons given for the delay was due to the previous advocate of the intended appellants who failed to take action and therefore this should not be visited upon the appellants.
4. The application was opposed on grounds that this matter does not fall under the subordinate court to qualify to be heard on appeal in the High Court.

II BACKGROUND

5. The retirement benefits schemes are regulated under the Retirement Benefits Act 1997. A chief executive may appoint an administrator, manager or trustee to make appropriate decision to a board. If certain decisions are made, the same is thereafter placed before the chief executive officer for review or a tribunal.

6. If a party is not satisfied with the decision of the chief executive officer they are permitted to file an appeal to the Retirement Benefits Appeals Tribunal.

7. In this matter, the chief executive officer of the Retirement Board Authority (RBA) ordered the appellant to pay one Zacharia Andere Okumu all his vested benefits when in fact the scheme of the applicant was never the successor of the defunct Kenya Co-operative Creameries unionisable Staff Retirement Benefits Scheme.

8. A total of Ksh. 143,662.55 was ordered to be paid.

9. The applicants delayed in filing an appeal against this decision to the Retirement Benefits Appeals Tribunal.

Leave was nonetheless given to appeal against the decision of 24th October 2008, on the 9th February 2009. The appeal filed on 28th January 2009 was accordingly deemed to have been filed on time.

10. The Retirement Benefits Appeal Tribunal, then held in its decision on 24th March 2009, that the decision of 24th October 2008 was correctly decided.

The appellants were held to be liable to pay the complainant the sum of Ksh. 143,462.55 as accrued in Kenya Co-operative Creameries (Unionisable Staff) Pension Scheme.

11. The tribunal on appeal admitted that the litigation before it was peculiar.

12. The applicant took no action. The time to file appeal to the High Court lapsed. It is by the application of 18th August 2010 that they now pray for leave to file the appeal out of time.

13. The reasons for the delay in filing the appeal was due to the mistake of the former advocate. If leave could be granted, the applicant prayed, to file the appeal out of time.

14. In reply, the respondent stated that this matter is not a subordinate court that one could appeal to the High Court. The rules and section are for the subordinate court. We are dealing with an appeals tribunal. Leave to appeal out of time is not available to the appellant.

IV OPINION

15. It is under the Retirement Benefits Act 3 of 1997 that provides a system of appeal under its Part IV Section 46(1) of the Act.

16. All appeals lies to the chief executive officer. If there is dissatisfaction with decision made, then the appeals would be to the tribunal. The enforcement of the orders would be made through the High Court of Kenya.

17. It is the Hon. Chief Justice who is to make rules to provide for the appeals and to the appeals tribunal. In the interim the Civil Procedure Act would apply **“as if the matter appealed against were a decree of a subordinate court exercising original jurisdiction.”**

18. So far, no rules have made by the Hon. the Chief Justice LR 12/2000 known as the Retirement Benefits rules 2000. The procedure of the civil rules would follow between the tribunal chief executive officer and the appeals tribunal.

19. In all instance there is no where in the act or rules stating that an appeal would be to the High Court from the appeals tribunal. If the intention of the act was to be so it would have clearly stated as such. As one would have in the Registered Land Act Cap 301 Law of Kenya where an appeal from the decision of a minister lies with the High Court.

