Hinga & 17 others v Retirement Benefits Appeals Tribunal & another; Kenya Airports Authority Superannuation Scheme & another (Interested Parties) (Judicial Review Application E191 of 2024) [2025] KEHC 4535 (KLR) (Judicial Review) (8 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4535 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E191 OF 2024

RE ABURILI, J

APRIL 8, 2025

BETWEEN

STEPHEN WAHOME HINGA & 17 OTHERS & 17 OTHERS & 17 OTHERS & 17 OTHERS .... APPLICANT

AND

RETIREMENT BENEFITS APPEALS TRIBUNAL .... 1ST RESPONDENT

ATTORNEY GENERAL .... 2ND RESPONDENT

AND

KENYA AIRPORTS AUTHORITY SUPERANNUATION SCHEME .... INTERESTED PARTY

RETIREMENT BENEFITS AUTHORITY .... INTERESTED PARTY

RULING

1. The application before this Court is the applicant's Chamber Summons application dated 28th August 2024. The application seeks leave to apply for an order or certiorari to quash the judgement and orders of the 1st respondent dated 29th February 2024 in RBAT No. 9 of 2021 – Stephen Wahome Ihiga & 16 Others –vs- Retirement Benefits Authority and Another.

2. It also seeks for leave to apply for an order of Mandamus compelling the 1st respondent to determine the applicants appeal filed on 26th May 2021 in accordance with the *Retirement Benefits Act* and the Kenya Airports Authority Superannuation Scheme Rules.

3. The application is based on the grounds on its face and the affidavit of Stephen Wahome Ihiga.

4. The applicants' case is that they are former Kenya Airports Authority employees and members of the Kenya Superannuation Scheme, governed by an irrevocable Trust Deed and Rules dated 11th August 1995 and last amended on 2nd October 2006.

5. It is their case that on or about 14th June 2013 they discovered that their pension benefits had been underpaid due to alleged misrepresentation, concealment and non-disclosure of material facts.

6. The 1st interested party is said to have continued to calculate their benefits at 12% as provided under the 1995 Trust Deed and rules instead of calculating the same using the updated 2006 Trust Deed and rules, which entitles them to 40% of their last salary.

7. Aggrieved by this they filed a complaint to the 2nd interested party vide a letter dated 14th June 2013 but it was dismissed on 3rd May 2021. They appealed the decision to the Retirement Benefits Appeals Tribunal (RBAT), which also dismissed the appeal on 29th February 2024.

8. The applicants argue that the 2006 Trust Deed entirely replaced earlier versions and has been upheld in past court decisions. They claim the Tribunal's decision was irrational, unreasonable, procedurally unfair, and violated their rights. They now seek the court's intervention, alleging abuse of power by the Tribunal and requesting justice and fairness in the matter.

Responses

9. The respondents filed a replying affidavit sworn by Fred Gekonde who introduces himself as the clerk of the 1st respondent on 27th September 2024.

10. The respondents' case is that the Retirement Benefits Appeals Tribunal (RBAT) heard and determined Appeal No. 9 of 2021 (Stephen Wahome Ihiga & 17 Others v. Retirement Benefits Authority & Another), delivering its judgment on 29th February 2024. Further that the appeal challenged the use of the 2002 Trust Deed and Rules in calculating the applicants' pension benefits. However, the applicants had already retired around 2002, before the 2006 amendments (introducing the 40% pension rule) came into effect.

11. It is contended that since the applicants were no longer contributing members post retirement, and therefore they were not entitled to benefits under the 2006 Trust Deed. The respondents also urge that the judicial review application is premature, incompetent, and an abuse of court process, as the appeal was already determined. They further argue that the applicants are re-litigating the same issue and that they have also not met the legal threshold for judicial review.

12. According to the respondents the applicants are attempting to achieve unjust enrichment by claiming benefits under rules enacted after their retirement. The respondents urge the court not to interfere with the 1st respondent's discretionary powers.

13. The 1st interested party in response to the application filed a preliminary objection dated 31st October 2024 and replying affidavit sworn on 4th November 2024 by Juliana Makau.

14. The main ground raised in the 1st interested party's preliminary objection is that the instant matter is res judicata as the court in its judgment of 23rd November 2018 in Judicial Review Application No.338 of 2018(Consolidated with Judicial Review Application No.479 of 2017) Republic vs. Retirement Benefits Appeal Tribunal &2 others Ex parte Kenya Airports Authority Staff Superannuation Scheme reverted the matter to the Tribunal and that the same had been determined with finality.

15. The 1st interested party in its replying affidavit also contends that some of the applicants initially lodged a complaint on 30th May 2007, which was dismissed. They lodged an appeal before the 1st respondent which was determined on 23rd February 2012 and subsequently the 1st interested party filed JR No.223 of 2012 where the court in its judgment of 30th April 2013 quashed the decision of the 1st respondent.

16. A fresh complaint was filed on 14th June 2013, involving both new and previous complainants, but it was summarily dismissed by the Retirement Benefits Authority. According to the 1st interested party the matter went through several rounds of litigation, including appeals and judicial review applications, which eventually led to a rehearing and a detailed decision by the Tribunal in 2020, directing the Authority to consider the complaints afresh on merit.

17. The Authority is said to have issued a fresh determination on 13th May 2021, which the applicants again appealed under RBAT Appeal No. 9 of 2021. It is urged that the Tribunal heard the matter and dismissed the appeal in a judgment delivered on 29th February 2024, finding that the applicants were not entitled to benefits under the 2006 Trust Deed as they had already retired by then.

18. The 1st interested party urges that the Tribunal's decision was lawful, rational, and procedurally sound, and that judicial review is not warranted, as the applicants are merely attempting to re-litigate issues already decided. It is argued that judicial review should only examine the process and not the merits of the decision, and that the Tribunal acted within its powers, considering all relevant matters. The 1st interested party also states that granting leave would violate the principle of finality in litigation and risk conflicting decisions on the same dispute.

19. The 2nd interested party also filed a replying affidavit sworn by Anthony Kiarahu on 22nd October 2024.

20. According to the deponent the Chief Executive Officer of the Retirement Benefits Authority has the authority under Section 46 of the *Retirement Benefits Act* to review decisions of scheme trustees to ensure they are in compliance with the provisions of the relevant scheme rules or the Act under which the scheme is established.

21. It is the 2nd interested party's case that on 1st August 2013, the applicants lodged a complaint regarding the trustees' failure to increase their pension. The CEO reviewed the matter and, in a detailed decision dated 13th May 2021, declined to overturn the trustees' decision.

22. Dissatisfied, the applicants appealed under Section 48 of the Act, resulting in Appeal No. 9 of 2021, which was dismissed by the Tribunal on 29th February 2024. It is argued that the 2nd interested party, having discharged its statutory duty, is now functus officio and has been wrongly joined to these proceedings.

23. The deponent further believes that the current judicial review application is an abuse of court process, as it amounts to a re-litigation of a matter that has already been fully addressed by the Tribunal and superior courts.

Submissions

24. The application was canvassed by way of both written and oral submissions.

25. The applicants filed written submissions dated 14th February 2025 and their counsel Ms. Atieno together with counsel for the other parties also made oral submissions before the court on 5th March 2025.

26. The applicants in their submissions argue that the doctrine of res judicata does not apply to their current application. They rely on Section 7 of the *Civil Procedure Act* and the Supreme Court decision

in John Florence Maritime Services Ltd v Cabinet Secretary, Transport [2021] KESC 39, which laid out the three key ingredients of res judicata.

27. They contend that while the issues raised may be similar to those in Judicial Review No. 338 of 2017 and No. 479 of 2017, the applicants in the current case are different individuals and were not parties to those prior suits. The only commonality is that they were all employees of Kenya Airports Authority and members of the 1st interested party. Moreover, they assert that the cause of action is not static, but continuous since pension is paid monthly, each underpayment gives rise to a new and independent cause of action. Hence, res judicata does not apply.

28. The applicants further submit that their constitutional rights under Article 47 of *the Constitution* of Kenya have been violated. They argue that the decision-making process leading to the 1st respondent's judgment was not expeditious, lawful, reasonable, or procedurally fair. They also cite Article 57, which guarantees special protections for older persons like them, noting that they are being denied the right to live in dignity and pursue personal development due to reduced pension benefits.

29. They emphasize that judicial review proceedings are concerned not with the merits of a decision but with the process by which it was arrived at. In this regard, they rely on Municipal Council of Mombasa v Republic (*CA 185/2001*) and Pastoli v Kabale District Local Government Council [2008] 2 EA 300, where the court clarified that judicial review focuses on illegality, irrationality, and procedural impropriety.

30. They also rely on Kenya National Examination Council v Republic ex parte Gathenji and Multiline Services Ltd v Nairobi County [1997] eKLR where the court is said to have observed that "the order must command no more than the party against whom the application is made legally bound to perform".

31. They also submit that they have met the requirement of an arguable case and to support this position the rely on the case of Multiline Services Limited v Nairobi City County Government [2023] KEHC 23794 (KLR).

32. Ms. Atieno in her oral submissions also submitted that the 1st respondent in reaching the decision it did acted in disregard of judicial precedence of its own decision in RBAT No.4/2012 upheld by the Court of Appeal.

33. The respondents in their submissions dated 5th February 2025 argue that the applicants' application is an abuse of the court process, as the issues raised have already been conclusively determined in earlier proceedings.

34. The respondents invoke the doctrine of res judicata under Section 7 of the *Civil Procedure Act*, arguing that the matter has been directly and substantially in issue in prior proceedings between the same parties and has been finally determined by a court of competent jurisdiction. In support, they rely on the case of George W. M. Omondi & another v National Bank of Kenya Ltd & 2 others [2001] eKLR, where the court held that res judicata bars not only issues that were raised and determined, but also those that ought to have been raised in the earlier suit, and that parties cannot evade this doctrine by adding new parties or causes of action in subsequent litigation.

35. Additionally, the respondents submit that the applicants' demand for benefits under a Trust Deed that came into effect after their retirement amounts to unjust enrichment. They refer to Stephen Karanja Kibuku v Safaricom Limited [2018] eKLR, where the court held that unjust enrichment arises where a party is unjustly enriched at the expense of another, and such party is required to make restitution to

the other party. In conclusion, the respondents submit that the application lacks merit and they urge the court to dismiss it.

36. The 1st interested party filed written submissions dated 26th November 2023.

37. It is contended that it is well established that judicial review focuses on the decision-making process rather than the merits of the decision itself and in support of this position reliance is placed in the case of Republic v Director of Immigration Services & 2 others Ex-parte Olamilekan Gbenga Fasuyi & 2 others [2018] eKLR.

38. It is submitted that leave should only be granted if the applicant can demonstrate that there is an arguable case that warrants further investigation at a full hearing as was stated in Republic v County Council of Kwale & Another ex-parte Kondo & 57 Others [1996].

39. On res judicata the 1st interested party relies on the case of Republic v District Land Registrar Kilifi Lands Office; Kombo & Another [2024]eKLR. The 1st interested party also refers to the Court of Appeal case of Nicholas Njeru v Attorney General & 8 others [2013] eKLR where the court is said to have observed that the doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation.

40. Additionally, it is submitted that judicial review is not an appellate process and should not be used to challenge the substance of a decision. Reliance is placed in the case of Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002].

41. It is submitted that; the applicants have failed to provide any valid grounds to demonstrate that the 1st respondent acted unlawfully or unreasonably in making the decision under review. The 1st respondent is said to have followed due process, considered all relevant issues, and acted within its lawful powers. As such, the applicants have not demonstrated an arguable case, and their application should be dismissed and to support this position reliance is placed in the case of Njagi vs. Muchiri & another (Judicial Review E006 of 2023) [2024]eKLR.

42. The 1st interested party further submits that allowing this application to proceed would enable the applicants to re-litigate issues that have already been conclusively addressed, thus violating the principle of finality in litigation.

43. The 2nd interested party also filed written submissions dated 21st February 2025. It is submitted that the applicants were given ample opportunity to present their case, and there is no evidence suggesting they were denied the right to be heard. Further that the applicants seem to be asking the court to review the merits of the 1st respondent's decision.

44. The 2nd interested party also submits that the chief executive officer of the 2nd interested party discharges a quasi-judicial role as was summarised by the Supreme Court in Albert Chaurembo Mumba & Others vs. Registered Trustees of Kenya Ports Authority Pensions Scheme (Petition No. 3 of 2016).

45. The 2nd interested party also points out that the requirement to seek leave in judicial review, as outlined in Order 53 Rule 1 of the Civil Procedure Rules, is so as to eliminate at an early stage any frivolous, vexatious or hopeless applications and as such it should only be granted if the court finds an arguable case. Reliance is placed in the case of Republic vs. County Council of Kwale & another; Ex parte Kondo & 57 Others.

46. Further that the power to grant leave is discretionary and that it should be exercised judiciously. The case of Vivo Energy Limited v National Land Commission [2020] eKLR is relied on where the court observed that the court ought no to delve into the merits when considering an application for leave.

47. It is submitted that in this case, the applicants fail to provide sufficient evidence of illegality, irrationality, or procedural impropriety. Further that, the application mainly expresses dissatisfaction with the decision, which is akin to an appeal rather than a valid ground for judicial review.

48. The 2nd interested party concludes that the applicants have not met the required threshold for granting leave to initiate judicial review proceedings and urges the court to dismiss the application.

Analysis and determination

49. It is well established that when a preliminary objection is raised on the court's jurisdiction, the court must first determine this issue before considering the merits of the case.

50. This principle is rooted in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696, where the Court of Appeal for East Africa, through Law, JA, and Newbold, P., held that a preliminary objection is a pure point of law, such as an objection to the jurisdiction of the court, which, if argued as a preliminary point, may dispose of the suit. The Court also emphasized that such an objection should not involve the examination of facts or the exercise of judicial discretion, which could unnecessarily increase costs and complicate issues.

51. the Supreme Court, in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR, noted that the purpose of a preliminary objection is twofold: it serves as a shield to prevent wastage of judicial time and resources and protects the public interest by ensuring judicial time is only spent on deserving cases. The Court also stressed that such objections should not be used as a sword to dispose of cases prematurely or avoid judicial scrutiny.

52. In the case of Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR, the Court reiterated that a preliminary objection is a point of law raised based on the assumption that the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what I sought requires judicial discretion.

53. Jurisdiction must always be determined first, as without it, the court has no authority to continue with proceedings. The importance of this principle was affirmed in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, where the court held that without jurisdiction, the court must "down its tools." In this case, the respondents and interested parties have argued that the court lacks jurisdiction to entertain the applicant's application dated 28th August 2024, claiming it is res judicata, having been conclusively determined. Section 7 of the *Civil Procedure Act*, Cap 21, defines res judicata, stating that no court shall try any suit or issue that has already been directly and substantially in issue in a previous suit between the same parties and has been decided by a competent court.

54. The Black's Law Dictionary (10th Edition), defines res judicata as an issue that has been definitively settled by judicial decision, requiring three essentials: an earlier decision on the issue, a final judgment on the merits, and the involvement of the same parties or parties in privity with the original parties.

55. The principle prevents the reopening of litigation on the same cause of action, ensuring there is no multiplicity of actions involving the same parties. However, as observed in Njangu v Wambugu (Nairobi HCCC No. 2340 of 1991, unreported), if parties are allowed to endlessly litigate the same issue, it would defeat the purpose of the doctrine res judicata. Furthermore, in Siri Ram Kaura v M.J.E. Morgan (*CA 71/1960*), the Court of Appeal emphasized that the discovery of fresh evidence,

without new circumstances, does not justify bypassing res judicata. To reopen a case, the new fact must substantially alter the case and could not have been discovered with reasonable diligence at the time of the original proceedings.

56. In reviewing the present case, the court finds that the applicants are not re-litigating the same issues previously determined but are raising a challenge based on alleged procedural unfairness, irrationality, and abuse of discretion in the decision made by the Tribunal on 29th February 2024. Judicial review does not concern the merits of a decision but rather the process by which the decision was made. The applicants are entitled to challenge the legality, rationality, and procedural propriety of the administrative action, even if the substantive issue has previously arisen.

57. Moreover, the record shows that the applicants' complaint dated 14th June 2013 was based on alleged misrepresentation, concealment, and non-disclosure, giving rise to a fresh cause of action.

58. The Tribunal in 2020 directed a merit-based reconsideration of the complaint, culminating in the impugned 2024 decision, a decision the applicants are now entitled to challenge on administrative law grounds. The court also notes that the current application includes parties who were not party in the prior litigation, or who are relying on facts or legal issues not conclusively determined in earlier proceedings.

59. Applying the doctrine of res judicata in this case and at this stage would hinder access to justice as envisaged under Articles 48 and 50(1) of *the Constitution*. Therefore, the preliminary objection raising the ground of res judicata is declined and overruled, and the applicants are permitted to proceed with their judicial review application, noting that res judicata issue can still be canvassed in the main application if leave to apply is granted, assuming that indeed, at the hearing, it appears that the issues being raised herein have been conclusively determined by a court of competent jurisdiction and between the same persons or [persons litigating on behalf of the applicants herein.

60. On the issue of leave to apply for judicial review orders, the court has considered the applicants' chamber summons, statutory statement, and verifying affidavit, along with the responses from the respondents and interested parties. The court must exercise discretion judiciously when granting leave under Order 53 of the Civil Procedure Rules, ensuring that the application is not frivolous, statute-barred, or an abuse of process.(see Sylvana Mpabwanayo Ntaryamira v Allen Waiyaki Gichuhi & another [2016] KEHC 4176 (KLR).

61. At the leave stage, the court does not examine the merits of the case but merely assesses whether the applicant has an arguable prima facie case. Judicial review remedies, being discretionary and of last resort, should only be granted if no other efficacious remedy is available, as outlined in Republic v County Council of Kwale Exparte Kondo & 97 Others (Mombasa HCC Miscellaneous Application No. 384/96) and Permanent Secretary Ministry of Planning & National Development Exparte Kaimenyi (2006) 1EA 353.

62. In this case, the court finds that the applicants have raised serious and arguable issues that warrant further investigation at the substantive hearing. The claim is not frivolous, and the applicants have a legitimate basis for challenging the decision made by the 1st respondent.

63. Therefore, leave is granted to institute judicial review proceedings, in terms of prayers No.1 and 2 of the chamber summons. The substantive motion to be filed within 21 days of today's date in a fresh file. Each party bear its own costs.

64. This file is closed

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF APRIL 2025

R.E. ABURILI

JUDGE