



**Republic v Retirement Benefits Authority & 3 others; Nyakwara
 (Exparte Applicant) (Judicial Review Application E218 of 2024)
 [2025] KEHC 4246 (KLR) (Judicial Review) (2 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4246 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 JUDICIAL REVIEW**

JUDICIAL REVIEW APPLICATION E218 OF 2024

RE ABURILI, J

APRIL 2, 2025

BETWEEN

REPUBLIC APPLICANT

AND

RETIREMENT BENEFITS AUTHORITY 1ST RESPONDENT

KENYA FORESTRY RESEARCH INSTITUTE 2ND RESPONDENT

ELPHINE KWAMBOKA 3RD RESPONDENT

RETIREMENT BENEFITS APPEALS TRIBUNAL 4TH RESPONDENT

AND

NORAH MORAA NYAKWARA EXPARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted by the Court on 27th September 2024, the Applicant filed a notice of motion dated 30th September 2024. The motion is brought pursuant to Articles 10, 23, 47, 48, 159, 165 and 259 of *the Constitution*, Sections 4 and 11 of the Fair Administrative Actions Act, Order 53 Rule 1(3)(4) of the Civil Procedure Rules and Sections 8 and 9 of the *Law Reform Act*.
2. In the motion, the Applicant seeks for an Order of Certiorari quashing the 4th Respondents decision in Civil Appeal No.1 of 2024 issued on 19th September 2024 apportioning the distribution of retirement benefits of the Late Tom Omani Nyakwara. She also seeks an Order of Prohibition for purposes of stopping the 1st and 2nd Respondents and their agents from releasing the retirement benefits of the Late Tom Omani Nyakwara to any person including the 3rd Respondent and her children. The Applicant



- further seeks an Order of Mandamus compelling the 2nd Respondent to release all the dues and benefits belonging to the deceased.
3. The notice of motion is supported by a statutory statement dated 27th September 2024 and verified by the affidavit sworn on 23rd September 2024 by the Applicant.
 4. The dispute giving rise to the ex parte Applicant's Motion dated 30th September 2024 arose from the distribution of death benefits of Tom Omani Nyakwara (deceased). He was an employee of the 2nd Respondent and a member of the Forestry Research Institute Defined Contribution Retirement Benefits Scheme. Upon his demise, both the ex parte Applicant and the 3rd Respondent claimed death benefits from the trustees of Kenya Forestry Research Institute Defined Contribution Retirement Benefits Scheme.
 5. The ex parte Applicant in her claim averred that she was the deceased's mother. The 3rd Respondent on the other hand averred that she was the deceased's spouse and that they had one child together. The 3rd Respondent further averred that she and the deceased were living with another child from her previous relationship, and that the deceased financially supported that child and the child was therefore a dependant of the deceased.
 6. Pursuant to Section 36A of the [Retirement Benefits Act](#), the 2nd Respondent proceeded to conduct investigations and, in a decision, communicated vide a letter dated 19th September 2023, found that the benefits of the deceased be distributed between the ex parte Applicant and the 3rd Respondent in the ratio of 90:10 respectively.
 7. Aggrieved by this determination, the 3rd Respondent requested the 1st Respondent to review the trustees' decision as provided for under Section 46 of the [Retirement Benefits Act](#). The Chief Executive Officer of the 1st Respondent made a decision on the matter on 6th November 2023.
 8. The 3rd Respondent was dissatisfied with the 1st Respondent's decision, and she lodged an Appeal No. 1 of 2024 before the 4th Respondent.
 9. As required under Rule 8 of the Retirement Benefits (Tribunal) Rules, 2000, the Chief Executive Officer of the 1st Respondent filed a statement before the 4th Respondent in response to the statement filed by the 3rd Respondent. The 4th Respondent delivered its judgment in Appeal No. 1 of 2024 on 19th September, 2024.
 10. According to the ex parte Applicant, the 4th Respondent arrogated itself judicial powers in violation of Article 159 of [the Constitution](#) by entertaining without jurisdiction or reasonable cause; that the 3rd Respondent's appeal against the decision of the 1st Respondent was done thirty days out of the statutory timelines set under Section 48(1) of the [Retirement Benefits Act](#), Cap 197 Laws of Kenya.
 11. It is the Applicant's case that the 4th Respondent's decision is unfair and biased. Further, that the Tribunal erred in law and in fact by drawing an unfounded inference that the 3rd Respondent was a wife to the late Tom Omani on the basis of cohabitation, inconsistent with the provisions of Article 45 of [the Constitution](#).
 12. The Applicant also urges that the Tribunal erred by unlawfully and contrary to Article 27 of [the Constitution](#), discriminating the duly recognized beneficiaries of the deceased as documented in his insurance card and giving an unfair advantage to Cailer Kwamboka and Jeff Guy without satisfying itself that they were the legitimate children of the deceased.
 13. The applicant further claimed that the Respondent's letter is misconceived, improper in the eyes of the law and is meant to obstruct the Applicant's right to pursue legal redress under Article 50 of the



Kenyan Constitution. It is urged that the 4th Respondent acted beyond its jurisdiction by drawing conclusions about the existence of a marriage between the deceased and the 3rd Respondent, despite evidence (such as a letter from the chief's office) indicating that no legal marriage existed.

14. She also challenges the 4th Respondent's decision that one Cailer Kwamboka (C.K) is the biological child of the late Tom Omani Nyakwara on grounds that the same was based on a birth certificate whose authenticity is questionable and which conflicted with other evidence.

The 1st Respondent's case

15. In response to the application, the 1st Respondent filed a Replying Affidavit sworn by Anthony Kiarahu who introduced himself as the 1st Respondent's Deputy Director for Legal Services. The 1st Respondent's case is that the Chief Executive Officer of the 1st Respondent has jurisdiction under Section 46 of *Retirement Benefits Act* to review the decision of a trustee of the scheme to ensure that such decision is made in accordance with the provisions of the relevant scheme rules which the scheme is established.
16. According to Mr. Kiarahu, the 1st Respondent is functus officio regarding this dispute as its Chief Executive Officer determined and issued his decision on 6th November 2023, and he thereafter filed a statement as required under the Retirement Benefits (Tribunal) Rules, 2000, once his decision was impugned before the 4th Respondent. Reliance was placed on the Supreme Court case of Albert Chaurembo Mumba & Others vs. Registered Trustees of Kenya Ports Authority Pensions Scheme & Others Petition No. 3 of 2016 where the apex Court is said to have summarised that the 1st Respondent's Chief Executive Officer, when discharging his quasi-judicial role, is an arbiter of first instance and the 4th Respondent thereafter exercises appellate jurisdiction.

The 2nd Respondents Case

17. The 2nd respondent in its Replying Affidavit sworn by Mr. Ali Dzitu Fundi, the Acting Trust Secretary on 5th February 2025 deposes in contention that it is a sponsor of an occupational pension scheme, Kenya Forestry Research Institute Defined Contribution (KEFRI DC) Retirement Benefits Scheme, an incorporated trust separate from the sponsor.
18. Further, that the Applicant ought to be ordered to amend the instant application to join the proper parties as the 2nd Respondent is not only wrongfully joined into this suit but is also an unnecessary party and/or stranger to this suit.
19. According to the 2nd Respondent, following the deceased's demise, as per the Scheme Policy Rules and as buttressed under Regulation 23 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulation, the Scheme Board of Trustees were expected to pay out his pension benefits to his nominee.
20. However, that the deceased by the time of his passing had not nominated a beneficiary, and this implied that the Scheme Board of Trustees were invited to, as per the aforementioned Regulation as read together with regulation 24 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulation to exercise their discretion in distributing the available benefits to the deceased's dependants.
21. Additionally, it was contended that in order to aid the Scheme, the Trustees received and reviewed supporting documents submitted by the 3rd Respondent and the Ex-Pate Applicant as well as representations made by the parties in support of their respective positions.



22. It is also the 2nd Respondent's case that against the backdrop of the documentation and the due diligence conducted, it opined that the extent of dependency of the 3rd Respondent and her children was at the moment incapable of determination on the other hand and that to the satisfaction of the Trustees, the ex parte Applicant had proved dependency to a great extent.
23. Informed by that finding, the trustees took the considered view to distribute Tom Omani Nyakwara's (Deceased) pension benefits between the 3rd Respondent and Exparte Applicant in the ratio of 10:90 respectively.
24. That it is that distribution decision that led to the ex parte Applicant seeking a review of the 2nd Respondent's decision, from the 1st Respondent. Thereafter, the 3rd Respondent filed an appeal against the 1st Respondent's decision before the 4th Respondent culminating in the impugned decision herein.
25. It is the 2nd Respondent's argument that the procedure adopted by the 4th Respondent in issuing its impugned decision is not marred by any illegality, irregularity or irrationality to invite this Honourable Court to issue the judicial review orders.

The 3rd Respondent's response

26. The 3rd Respondent also filed a Replying Affidavit sworn by herself on 6th February 2025. It is her case that at the time of his demise she lived together with Tom Omani Nyakwara as husband and wife, a fact well known to the Applicant and her son and that out of the union, she bore a daughter Cailer Kwamboka (C.K). It is also her case that Tom Omani Nyakwara also had a step-son Jeff Guy (J.G).
27. It was her case that throughout the proceedings leading to this matter, the Applicant always claimed that the children and the 3rd respondent were not entitled to the deceased's retirement scheme benefits and further that she had not been named a nominee under his scheme and as such, the benefits were to be distributed to his family. According to her, the authenticity of her daughter's birth certificate was confirmed by the Registrar of persons.
28. The third respondent also deposed that the report submitted to court by the trustees also confirmed that two of the deceased's cousins knew her as she had been introduced by the deceased as his wife and Cailer Kwamboka (C.K) as his daughter. Further, that her mother also confirmed that she knew the deceased as her husband.
29. According to the 3rd Respondent, the Applicant is trying to sneak in an appeal in the guise of a judicial review as the Tribunal did not abuse its powers and acted within its mandate. It is her contention that the Applicant wants to solely benefit from the deceased's pension at the expense of the children and herself who were being maintained by the deceased at the time of his death.
30. It is also urged that the Applicant cannot purport to have the court compel the DNA samples of Evans Ocharo Bwogando (E.O.B.) extracted for purposes of establishing the paternity of the minor Cailer Nyaboke (C.N.) yet he was neither a party in the initial proceedings nor a party herein. She deposes that the Applicant cannot start introducing new facts and or evidence that were not brought up in the initial proceedings.

The 4th Respondents response

31. The 4th Respondent filed a Replying Affidavit sworn by Fred Gekonde who introduces himself as the Clerk of the Retirement Benefits Appeal Tribunal. According to Mr. Gekonde, during the hearing before the 4th Respondent, it became clear that the 3rd Respondent and the deceased were staying together as husband and wife, together with the two minors for some time and therefore there was



presumption of marriage. That it also became apparent that Cailer Nyaboke (C.N.) was the biological daughter of the deceased and Jeff Guy (J.G) was the stepson of the deceased.

32. It is also deponed that the 4th Respondent also noted that although the 3rd Respondent supplied the trustees with the birth certificate which they confirmed to be authentic, the said Trustees went ahead and ignored the best interests of the children in violation of Article 53 of *the Constitution* and section 8 of the Childrens Act hence the 4th Respondent's Judgement dated 19th September 2024.
33. It is the 4th Respondent's further case that the instant application does not meet the threshold for granting judicial review orders as the applicant has not proved that the 4th respondent acted with illegality, irrationality and impropriety as alleged. According to the 4th respondent, the Ex parte Applicant is determined to pursue unjust enrichment since she does not take into account the needs of the deceased's nuclear family and that since she did not prove dependency during the hearing of the matter by the 4th Respondent, her claim is baseless.

Further Affidavit

34. The Ex parte Applicant filed a Further Affidavit sworn on 17th February 2025. In the affidavit, the maintains that the Kenya Forestry Research Institute Defined Contribution Retirement Benefits Scheme, vide a letter dated 19th June 2023, acknowledged that the Board had during the oral hearing been notified that the 3rd Respondent was married to a third party and not the Late Tom Omani Nyakwara.
35. Further, that the Board of Trustees also acknowledged that upon conducting independent investigations, they had not established the dependency of the 3rd Respondents and her children but despite review of documentation and information issued by the 3rd respondent and the Applicant, the 2nd Respondent made the misconceived decision to distribute the benefits of the deceased between the 3rd Respondent and the exparte applicant.

Submissions

36. All the parties filed written submissions. The ex parte Applicant filed written submissions dated 17th February, 2025. The 1st Respondent's dated 21st February 2025, the 2nd Respondent's dated 25th February, 2025, the 3rd Respondent's dated 24th February 2025 and the 4th Respondent's dated 10th February 2025.
37. According to the applicant, jurisdiction is everything and without it, a court or judicial authority has no power and it must down its tools in respect of a matter before. In support of this position, she relies on Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd [1989] KLR 1, [1989] eKLR]. She also refered to the definition of jurisdiction in the Halsbury's Laws of England (4th Ed.) Vol. 9 and as stated in the case of Constantine Joseph Advocates LLP v Attorney General [2022] eKLR.
38. The Applicant also placed reliance on the case of Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling) par. 68 where the Court succinctly discussed the centrality of jurisdiction in proceedings.
39. It is submitted that the 4th Respondent acted ultra vires by entertaining a time-barred appeal without leave and that it also exceeded its jurisdiction under the *Retirement Benefits Act* by improperly determining the existence of a marriage and recognizing the 3rd Respondent and her children as beneficiaries despite contrary evidence.



40. The Applicant further cited the case of *Bromley London Borough Council vs Greater London Council* [1983] 1 AC 768 at [821] where the court laid down the principles of reasonability and the case of *Republic v Public Procurement Administrative Review Board & others Ex-parte Rongo University* [2018] eKLR where the Court observed that a court reviewing the reasonableness of a decision focuses on whether the decision-making process is justified, transparent, and intelligible, and whether the decision falls within a defensible range of acceptable outcomes based on facts and law.
41. Further, that unreasonableness is assessed through three key principles: (i) *Wednesbury* unreasonableness reflects the legislative intent that statutory powers must be exercised reasonably; (ii) a decision is unreasonable if it falls outside the range of choices permitted by that legislative intent; and (iii) a decision is unreasonable if no reasonable decision-maker could have reached it in the given circumstances.
42. The Applicant also submits that the 4th Respondent reviewed the 3rd Respondent's appeal based on affidavit evidence, unlike the 2nd Respondent, who had live testimony and site visits. It is also her submissions that the 1st Respondent considered all records and reports. Further, that the 3rd Respondent failed to provide documentary evidence that she was the deceased's wife, relying only on a birth certificate, which the ex parte Applicant contested with documents showing different names for the minor and the father.
43. The Applicant relies on the cases of *Republic v Retirement Benefits Authority & another; Kilonzi & 119 others (Exparte Applicants) (All suing as members of the Zamara Fanaka Retirement Fund (Pension Scheme)) (Judicial Review E129 of 2021) [2023] KEHC 26572 (KLR)* cited with approval the decision in *Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others* [2005] 1 KLR 280 on the principle of legitimate expectation.
44. On the parameters for judicial review, she relies on the cases of *Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd* (2002) eKLR and *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39*.
45. The 1st Respondent in its submissions reiterates that it is neither a necessary nor a proper party to the proceedings but has been misjoined as it had discharged its statutory and quasi-judicial role and no reliefs are due from it.
46. It relied on the case of *Republic v Communications Authority of Kenya ex-parte Geonet Communications Limited & 5 others* [2016] KEHC 8085 (KLR) where the court observed that judicial review orders are all discretionary and that the court has wide discretion whether to grant relief and if so, what form of relief to grant.
47. On the scope of judicial review, the 1st Respondent relies on the case of *Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001* and a submission made that as was held by the court in the case of *Peninah Nadako Kiliswa vs. Independent Electoral & Boundaries Commission (IEBC) & 2 Others* [2015] eKLR, the ex parte Applicant is obliged to demonstrate that the impugned decision was illegal and/or irrational and/or procedurally improper.
48. The 1st Respondent also submits that the prayer for an order of prohibition against it is wholly misconceived as the ex parte Applicant seeks to prohibit it from releasing the retirement benefits of the late Tom Omani Nyakwara, However, it does not hold or manage any such benefits as it is a regulatory body established under the *Retirement Benefits Act* (Cap 197) with a statutory mandate to inter alia, supervise retirement benefits schemes and protect the interests of members.



49. It is submitted that all benefits are remitted to registered retirement benefits schemes and that in this case, Kenya Forestry Research Institute Defined Contribution Retirement Benefits Scheme, not the 1st Respondent. As such, it is contended that the 1st Respondent lacks the capacity to release the said benefits, and the relief sought is therefore fundamentally flawed.
50. The 1st Respondent argues that similarly, the 2nd Respondent, as the deceased's employer, only remitted contributions and has no control over the funds. It is urged that the request for a mandamus order is also untenable, as the 2nd Respondent has no legal duty to release the benefits. The 1st Respondent also submits that the court cannot grant unenforceable orders compelling actions beyond the Respondents' legal powers.
51. The 2nd Respondent submits that a decision subjected to judicial review should therefore be such that it remedies a decision that is otherwise marred with illegality, irrationality or procedural impropriety. It is also its submission that jurisdiction is derived from legislation, *the Constitution* or both. According to the 2nd Respondent, the 4th Respondent exercising its jurisdiction as vested under Section 48 of the *Retirement Benefits Act* entertained the appeal lodged before it.
52. Further, that all parties involved in the appeal were heard before the impugned decision was made and that the 4th Respondent concerned itself with the issues raised by the 3rd Respondent; which issues informed the submissions and responses filed by the Respondents in the appellate decision. Also, that it is against this backdrop that the 2nd Respondent holds the persuaded view that the 4th Respondent took into account relevant matters.
53. On this court's discretion to grant judicial review orders, the 2nd Respondent relies on the case of Republic v Communications Authority of Kenya Ex-Parte Geonet Communications Limited & 5 Others [2016] KEHC 8085 (KLR).
54. On the prayer of mandamus, the 2nd Respondent urges that the prayer for an order of mandamus against it is wholly misconceived and untenable as the 2nd Respondent does not hold or manage any such benefit schemes and as such, it lacks the capacity to release the said benefits, and cannot be compelled to release what it does not hold. It is submitted that similarly, the order of prohibition cannot issue.
55. The 3rd Respondent on the other hand in her submissions reiterates that the Applicant herein has filed an appeal in the guise of a judicial review application as she is seeking the court to examine facts and alter the decision of the 4th Respondent and which this honorable court cannot. She relies on the case of Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo [2015] eKLR where the court observed that:
- “Where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review....”.
56. On the issue of DNA testing, it is submitted that this court does not sit as a trial or appellate court but its role is to determine whether a quasi-judicial body acted within its mandate. The 3rd Respondent further submits that the Applicant has not demonstrated a prima facie case that would compel the court to call for the exhumation of the deceased's remains and or the collection of samples for purposes of conducting a DNA test from a 3rd party who is not privy to these proceedings and in support of this argument, the case of In re Estate of AKJR also known as AJKR also known as AJKR also known as AJKR also known as RAK (Deceased) [2024] KEHC 8109 (KLR) is relied on.



57. The 4th Respondent in its submissions identifies two main issues for determination: whether its actions were unreasonable and breached constitutional principles, and whether the applicant should be granted the requested orders.
58. Regarding the first issue, it is submitted that the Tribunal relied on Section 1.18 of the Kenya Forestry Trust Deed to define "dependents" and determined that the deceased's presumed spouse (the 3rd Respondent), her stepson, and the deceased's biological daughter were rightful beneficiaries. Further that citing Section 119 of the *Evidence Act* (Cap 80), the 4th Respondent presumed the existence of a marriage between the deceased and the 3rd Respondent based on cohabitation.
59. This presumption, it is submitted, remained valid as the Applicant failed to provide strong, distinct, and conclusive evidence to rebut it as was held by the Supreme Court in the case of *Mary Nyambura v. Paul Ogari Mayaka*; Petition No. 9 of 2021.
60. On the second issue, it is submitted that the applicant seeks to quash the 4th Respondent's decision, claim sole entitlement to the benefits, and request a DNA test. According to the 4th Respondent, judicial review should only intervene where a statutory body acts outside its jurisdiction or unreasonably and reliance is placed on the case of *Republic v. Commissioner of Customs Services Ex-Parte Africa K-Link International Ltd* (HC Misc. JR No. 157 of 2012). The 4th Respondent reiterates that the applicant failed to demonstrate any illegality or unreasonableness in the Tribunal's decision.
61. Additionally, the 4th Respondent submits that denying the deceased's children their share of the benefits would contravene Article 53(1) of *the Constitution* and Section 8 of the Children's Act 2022, which prioritize the best interests of children.
62. Further, that the request for DNA testing is intrusive and unjustified under Article 24 of *the Constitution* and to support this position the cases of *FKW v. DMM* [2015] eKLR and *FAAF v. RFM & 2 others* (Civil Appeal E043 of 2022) are relied on where the courts emphasized that DNA testing should only be ordered when a prima facie case is established. Furthermore, that in the court in the case of *James Apeli & Enoka Olasi v. Priscilla Buluku* [1985] KLR 777 reaffirmed that the court should respect the deceased's assumed wishes and avoid unnecessary exhumation.

Analysis and determination

63. I have considered the judicial review application, the opposition thereto and the parties' respective written submissions. Parties have submitted and argued at length on the merits and demerits of the application for judicial review orders. In my view, the main issue for determination is whether the 4th Respondent had the jurisdiction to hear the 3rd Respondent's appeal under section 48(1) of the *Retirement Benefits Act*.
64. Section 48 of the *Retirement Benefits Act* provides as follows:
 48. Appeals to the Tribunal
 1. 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.
 2. Where any dispute arises between any person and the Authority as to the exercise of the powers conferred upon the Authority by this Act, either party may appeal to the Tribunal in such manner as may be prescribed.



65. It is clear that the section explicitly states that an appeal against a decision made by the Authority or the Chief Executive Officer, such as the one dated 6th November, 2023 before this court, must be filed within a specified time frame from the date of the decision being contested.
66. This provision is designed to set a statutory timeline within which appeals must be lodged, to ensure timely resolution of disputes and prevent undue delay in the process.
67. In this case, the 4th Respondent allowed, heard, and determined an appeal that was filed outside the statutory time limit, which contravenes Section 48(1). The 3rd Respondent's Memorandum of Appeal was received by the 4th Respondent on 5th January 2024. This according to my calculations was 29 days over the 30-day period stipulated under section 48 of the Act.
68. This issue raises fundamental concerns about the 4th Respondent's jurisdiction to entertain such an appeal beyond the prescribed period. The principles governing jurisdiction are well-settled. In *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* [1989] KLR 1, the Court of Appeal held that jurisdiction is everything, and without it, a court has no authority to make any further steps in a case.
69. This Court in the case of *Sino Hydro Corporation Limited v Tumbo t/a Dominion Yards Auctioneers* [2022] KEHC 15545 (KLR) observed as follows;

“Where an appeal or proceeding is filed outside the stipulated timeliness in law, the only cure would have been for the appellant to file a substantive application seeking for leave of court to file the appeal out of time or to admit the appeal out of time. It is now over one year since the application subject of this ruling was filed, seeking to strike out this appeal and the appellant has not found it necessary to file such application for leave to enlarge time for filing of an appeal as contemplated in the Auctioneers Rules. Instead, his counsel argues quite vigorously that section 79G of the *Civil Procedure Act* is applicable and reprobates by saying that the delay was not inordinate hence this court can invoke its discretion to enlarge time. That in my humble view is not an acceptable argument from an advocate of this court to merely submit for arguments' sake.

Where a proceeding or appeal like this particular one is filed out of the stipulated statutory timeline, the court is deprived of jurisdiction to hear and determine the appeal on its merits. The appeal is stale. It is incompetent before this court and without jurisdiction, a court of law cannot make any one more step as its decision amounts to a nullity. (see *R. Wendo J in Transmara Sugar Co Ltd v J.N Marwa Ikimwanya Auctioneers limited and another*[2022]eKLR (March 31, 2022).

See also the decision by Ogola J (December 20, 2021) at Eldoret High Court in *Jafred Wamukoya & Gideon Osundwa v Kennedy Shikuku T/A Eshikhoni Auctioneers & Ibrahim Muhamed* [2021]eKLR where the learned judge struck out with costs an application filed by way of a reference to challenge assessment of auctioneers costs, which application was filed outside the 7-day period prescribed under rule 55(5) of the Auctioneers Rules.

I can't agree more that where proceedings are filed outside the timelines stipulated in law, the court is deprived of jurisdiction to determine such proceeding which is incompetent and a nonstarter.

Accordingly, I find this appeal incompetent. It is hereby struck out for having been filed out of the stipulated statutory timelines without leave of court being sought to enlarge the time.



70. In *Gichuhi & 2 others v. Data Protection Commissioner; Mathenge & another* (Interested Parties) [2023] eKLR, the court held that the Office of the Data Protection Commissioner (ODPC) acted beyond its jurisdiction by making a determination beyond the statutory 90-day period prescribed under Section 56(5) of the Data Protection Act. The court emphasized that the ODPC's jurisdiction was inherently linked to this timeframe, and any decision rendered outside this period was a nullity. The court held that:

“Jurisdiction was everything, it was what gave a court or a tribunal the power, authority and legitimacy to entertain a matter before it. A decision made by a court of law without jurisdiction was a nullity ab initio (from the beginning), and such a decision was amenable to setting aside ex debito justitiae (as a matter of right).

“As at the time of determination, January 6, 2022, the period within which the respondent had to investigate and determine the complaint had already lapsed. Pursuant to the provisions of section 56(5) of the Data Protection Act (the Act) the ODPC had a time-bound jurisdiction to investigate and determine the complaint. When the 90 days' period ended, the respondent jurisdiction also came to an end by way effluxion of time.

“Courts and tribunals could not flout the timelines expressly provided for in law. The moment the 90 days ended, the respondent's jurisdiction also lapsed. The finding that was rendered outside time was without jurisdiction and therefore a nullity, bereft of any force of law.”

71. These cases reinforce the principle that statutory timelines are mandatory and jurisdictional. Non-compliance with such timelines deprives the relevant tribunal or court of jurisdiction to hear and determine the matter.

72. Interestingly there is no mention of the Appeal having been filed out of time in the 4th Respondent's judgment and neither is there any mention by the other parties before this cause.

73. A jurisdictional issue can be taken up by the court on its own motion as the court is deemed to know the law and cannot gloss over matters of jurisdiction. In *In Pancras T Swai v Kenya Breweries Limited* [2014] eKLR the Court of Appeal stated:

“The High Court is presumed to know the law. That is why *the Constitution* has conferred on the High Court in Article 165(3)(a) unlimited original jurisdiction in Civil and Criminal matters and in Article 20 (3)(a) jurisdiction to develop the law and in Article 20 (3) (b) the mandate to interpret the Bill of Rights. It was expected that counsel, in getting up on the brief would come up with the law and authorities including the Treaty and the case-law. But he failed to do so. It was the duty of the Court to have before it the relevant law and to apply it correctly...”

74. In *Hafswa Omar Abdalla Taib & 2 others v Swaleh Abdalla Taib* [2015] eKLR the Court of Appeal held that the court has authority to act on its own motion on such a crucial question such as the jurisdiction of the court even where it has not been raised by the parties. It stated as follows:

“...the determination of the appeal turns on the issue of jurisdiction.; that is, whether this court has jurisdiction to entertain this appeal in the first place. We appreciate that it was an issue that was not raised by any of the parties. However, it is an issue of law that has long



been settled and the parties and indeed their legal teams are deemed to know. Accordingly, this court can suo moto raise and determine the same.”

75. The same Court of Appeal quite recently in *Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 others (Civil Appeal E012 of 2024)* [2024] KECA 184 (KLR) (23 February 2024) (Judgment), had the following to say on the issue:

“The question whether an appellate Court can suo moto raise and address a point of law that was not addressed in the lower courts has been addressed by this Court in several decisions. In *Harun Meitamei Lempaka v Lemanken Aramat & 2 others* [2014] eKLR the Supreme Court cited with approval decided cases affirming that it is firmly settled law that issues of jurisdiction or competence of a court to entertain or deal with a matter before it is very fundamental. It is a point of law and therefore, a rule of court cannot dictate when, and how, such point of law can be raised. Being fundamental and threshold issue of jurisdiction, it can be raised at any stage of the proceedings in any court including this Court. The apex court proceeded to state as follows:(176) Consequently,a court of law can rightly raise a legal question of jurisdiction even where no party raises such a question.”

76. Clearly, the 4th Respondent in determining the 3rd Respondent’s appeal acted outside its statutory mandate when it determined an appeal filed beyond the prescribed period, and as such, its decision was void. As observed by Lord Denning in the case of *Benjamin Leonard Mcfoy United African Company Limited (UK)* [1962] AC 152:

“...If an act is void it is in law a nullity...And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

77. Judicial review is a critical mechanism that ensures that public bodies act within their legal mandate. In judicial review, courts examine whether a decision-maker has acted within their mandate and jurisdiction, beyond their powers, whether they have adhered to the principles of natural justice, and whether the decision is reasonable and within the boundaries set by law.

78. In the case of *Republic v Director of Pensions, the Pensions Department, the National Treasury of the Republic of Kenya; Gewa & another (Exparte); Ouma (Interested Party)* [2024] KEHC 7652 (KLR) it was held as follows:

“When the challenge is over an infringement arising from an administrative action, such a claim falls under the purview of judicial review as a right recognized under Article 47(1) of *the Constitution* and given effect by the *Fair Administrative Action Act*. This jurisdiction is also to be invoked under the Supervisory powers of this court under Article 165(6) and (7) of *the Constitution*.

“It is important to restate the scope of judicial review and this can be found in the words of the Judges of the Court of appeal in *Kapa Oil Refineries v Kenya Revenue Authority* [2019] eKLR where the court stated that:

“Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the *Commissioner of Lands –versus Hotel Kunste* [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David



Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See Zakayo Michubu Kibwange case (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature. See Prabhulal Gulabuland Shah –versus Attorney General & Erastus Gathoni Mlano, Civil Appeal No. 24 of (1985) (UR). Following the promulgation of the Kenya Constitution, 2010, judicial review is available as a relief to a claim of violation of the rights and fundamental freedoms guaranteed in *the Constitution* of Kenya 2010. See Child Welfare Society of Kenya –versus- Republic and 2 others, *Exparte Child in Family Forces Kenya* [2017] eKLR.”

“24. What Judicial Review Orders entail was elaborated in the case of *Kenya National Examination Council v Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996*, where the Court held that: -“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules or natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury’s Law of England, 4th Edition vol.1 at Pg.37 paragraph 128.”

79. In the present case, the 4th Respondent acted beyond its jurisdiction by entertaining an appeal filed out of time. As a result, the decision is subject to judicial review for being unlawful and ultra vires. Judicial review in this instance is necessary to preserve the sanctity of statutory timelines, which are fundamental to ensuring that legal processes are orderly and timely. Furthermore, there was no leave sought and obtained to enlarge the time for filing of that appeal.
80. Section 48(1) of the *Retirement Benefits Act* sets the statutory time limit for filing of an appeal. The time limit is imperative and must be adhered to unless there are exceptional circumstances that justify an extension, and a party must apply for such extension. The 4th Respondent’s failure to follow this time frame renders the decision invalid.
81. Article 47 of *the Constitution* of Kenya, 2010 guarantees the right to administrative action that is lawful, reasonable, and procedurally fair. By allowing an appeal outside the statutory time frame, the 4th Respondent violated this constitutional guarantee, as the action was not lawful.
82. The *Fair Administrative Action Act*, 2015 provides the framework for reviewing administrative actions. It mandates that all administrative decisions be made within the confines of the law. By acting outside



- the prescribed statutory period, the 4th Respondent acted in contravention of the requirements under the Act granting it jurisdiction.
83. Having established as herein above, I must briefly examine whether or not the orders of Mandamus and Prohibition can issue against the 1st and 2nd Respondents.
84. In their defence, the two respondents contend that the orders cannot issue against them as they are not the custodians of the deceased's retirement benefits as all retirement benefits are remitted to registered retirement benefits schemes, in this case the Kenya Forestry Research Institute Defined Contribution Retirement Benefits Scheme.
85. I am in agreement with the 1st and 2nd Respondent's argument that the 2nd Respondent is distinct from Kenya Forestry Research Institute Defined Contribution Retirement Benefits Scheme. A quick search on the internet clearly shows that the latter is a separate defined contributory pension scheme established under a Trust Deed and Rules. The contributions under this scheme are made by both the employee and employer, and the retirement benefit is based on the accumulated value of these contributions.
86. The 1st Respondent is the regulatory body responsible for overseeing and regulating retirement benefits schemes in Kenya, including defined contribution schemes like Kenya Forestry Research Institute Defined Contribution Retirement Benefits Scheme and as such it is regulated under the [Retirement Benefits Act](#), and therefore the Scheme is subject to the Act including the possibility of being sued as a separate legal entity.
87. I note that the ex parte Applicant has not enjoined the Scheme as a party to these proceedings. Order 53 Rule 3(2) of the Civil Procedure Rules clearly provides that the notice of motion shall be served on all persons directly affected. Failing to do so would contravene the principles of Articles 47 and 50(1) of [the Constitution](#), as it would amount to condemning a party unheard.
88. Accordingly, I find that mandamus cannot issue to compel a party with no public duty or any duty at all to do the thing which that body is not authorized to do under the law and neither can prohibition issue to prohibit a party that has no mandate to do anything which it is accused of doing. The benefits are with the Scheme and not any of the parties against whom mandamus and prohibition is sought. Those prayers are therefore not available to the ex parte applicant in addition, once a decision is quashed and there is nothing else remaining to be done by the body that made that decision or by any of the parties sued, there is nothing else remaining to prohibit or to compel performance.
89. In the end, I make the following orders:
1. An order of certiorari is hereby issued removing into this court for purposes of quashing and I hereby quash the decision by the Retirement Benefits Appeals Tribunal, the 4th Respondent, in Civil Appeal No. 1 of 2024 issued on 19th September 2024 apportioning the distribution of retirement benefits of the Late Tom Omani Nyakwara.
 2. I decline to grant prayers 2 and 3 for the reasons given above.
 3. Each party to bear their own costs of the application as the applicant is only partially successful and considering the nature of this dispute which also involves children.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF APRIL 2025

R.E. ABURILI

JUDGE

