



**Republic v Retirement Benefits Appeals Tribunal & 2 others;
Mumo & 168 others (Exparte) (Judicial Review E157 of 2021)
[2023] KEHC 766 (KLR) (Judicial Review) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 766 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E157 OF 2021
AK NDUNG’U, J
FEBRUARY 9, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

RETIREMENT BENEFITS APPEALS TRIBUNAL 1ST RESPONDENT

**CO-OPERATIVE BANK OF KENYA STAFF RETIREMENT BENEFITS
SCHEME 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

AND

ALICE ANYONA MUMO & 168 OTHERS EXPARTE

RULING

1. Before Court is the Applicants’ Chamber Summons application dated 12th November, 2021. The application seeks two primary orders as follows;
 - 1) Leave be granted to the Applicants herein to apply for Judicial Review orders of Certiorari removing to the High Court for purposes of quashing the judgment and orders of the 1st Respondent dated 12th October, 2021 in RBAT No. 8 of 2011; Alice Anyona Mumo & Others v Retirement Benefits Authority & Anor.
 - 2) Leave to apply for Judicial Review order of Mandamus compelling the 1st Respondent to adopt the Ex parte Applicants Actuarial Report prepared by Independent Actuarial Consultants (PTY) Limited and direct payments to be made in accordance with the said Report.”



2. The application also seeks costs. It is supported by the grounds on its face, a Statutory Statement dated 12th November, 2021 and verified by the Verifying affidavit of Joseph Kililo Mwaghazi the 65th Applicant herein sworn on even date.
3. The Applicants' case is that they are former employees of the Co-operative Bank of Kenya Limited and Members of the Co-operative Bank Staff Retirement Benefits Scheme which was and is an irrevocable trust established by the 2nd Respondent under the Trust Deed dated 1st July 1972. The Scheme is said to have initially acted as a Provident Fund to provide retirement and other benefits to the employees upon their retirement or cessation of employment at a specified age and relief for the dependants of deceased employees.
4. It is the Applicants' case that they were entitled to be paid their pensions and benefits under the provisions of the Rules of the scheme set out in the schedule to the Trust Deed as lawfully amended from time to time and/or in accordance with the law. The 1972 Provident Fund is said to have at the material time been a defined contributory scheme whereby the 2nd Respondent deducted from the Applicants' monthly salary a percentage of their salaries towards the Provident Fund.
5. It is urged that the Scheme continued to be a Contributory Scheme for the Applicants who left before its conversion. However, the Provident Fund to which the Applicants made monthly contributions was unilaterally wound up by the Respondents on or around 31st May 1999 and the benefits accruing therein were not refunded to the Applicants as was required and instead the Respondents applied the same for purposes the provident fund was not established for. The Respondents it is argued have to date declined to inform the Applicants how much had accrued to them in the Provident Fund prior to its being wound up.
6. The 2nd Respondent is said to have continued to, unlawfully and without any lawful authority, deduct monies from the Applicants long after the fund was wound up. Further that the 2nd Respondent instead of computing the benefits that were due to the Applicants under the Provident Fund and refunding them to the Applicants failed to do so and to date they are not aware of the whereabouts of their benefits that accrued to them under the Provident Fund.
7. It is the Applicants' case that on or about the year 2010 they caused Actuarial calculations to be done on their Net Accrued Pensions payable upon leaving the Bank service and found that the Pension Scheme had not computed and paid them their amounts thereby resulting in them being unpaid and/or paid reduced amounts, contrary to the provision of the Trust Deed and Rules and the Law, which action was illegal, null and void.
8. That as a consequence of their dissatisfaction with the decision of the Retirement Benefits Authority, they filed an Appeal before the 1st Respondent on 16th June, 2011 being RBAT No. 8 of 2011; *Alice Anyona Mumo & Others v Retirement Benefits Authority & Another*. However, on 12th October, 2021 the Tribunal dismissed the Appeal and went ahead to adopt an actuarial report prepared by NBC Holdings and it is this decision that they seek to challenge before this Court.
9. The 2nd Respondent in response to the instant application filed a Replying Affidavit sworn by Lawrence Karanja who swears to be the Secretary of the Co-operative Bank of Kenya Staff Retirement Benefits Scheme.
10. The 2nd Respondent's case is that pursuant to the Ex parte applicants having lodged a complaint with the Retirement Benefit Authority under section 46 of the [Retirement Benefits Act](#), the Ex parte Applicants in compliance with the Authority's directions submitted an actuarial report from the



- Independent Actuarial Consultants (PTY) Limited regarding the cash equivalent of deferred pension rights.
11. The 2nd Respondent is also said to have been directed by the Authority to calculate the benefits owed indicating the Scheme Rules and Trust Deed applicable, formula used to make the calculations, the date the complainants had joined and left service and to also calculate the conversion benefits when the scheme was converted to a defined contribution scheme.
 12. The authority is said to have considered both actuarial reports and thereafter rendered its decision stating that it was satisfied that the Ex parte Applicants herein had been duly paid in line with the provisions of the applicable 2nd Respondent's Trust Deed and Rules. It is this decision that led to the filing of RBAT No. 8 of 2011, Alice Anyona Mumo & Others vs Retirement Benefits Authority & Another. Upon review of the documentation filed in the Appeal and Responses, the 1st Respondent is said to have directed that the matter be referred back to the Authority for further consideration and determination of the Ex parte Applicants' complaint.
 13. The Authority is said to have thereafter re-evaluated the complaint and appointed an independent Actuary being NBC Holdings (Pty) Limited and subsequently made a decision on 8th May, 2013 stating that it had evaluated the information and findings supplied by the independent actuary appointed by the Authority pursuant to the 1st Respondent's orders, and was satisfied that the computations done earlier by the 2nd Respondent and upon which the benefits payable to the Ex Applicants had been determined and paid was proper, save for those Ex parte Applicants whose data was missing.
 14. It is the 2nd Respondent's case that being dissatisfied with the said decision, the Ex parte Applicants filed an Amended Memorandum of Appeal dated 11th September, 2017 before the 1st Respondent where Parties filed their respective responses and submissions and the Appeal was subsequently heard before the 1st Respondent on 5th November, 2020. The Appeal is said to have been dismissed with no orders as to costs for want of merit.
 15. The 2nd Respondent argues that the grounds of the instant Application as appears on the body of the Application are general and lack specificity and therefore, this Honourable Court ought not to entertain such general grounds. Further that, the 2nd Respondent has incurred enormous costs in defending the various claims against it by the Applicants and as such should leave to commence judicial review proceedings be granted, the Applicants should give security for costs commensurate to the amount claimed.
 16. I have considered the Chamber Summons, Verifying Affidavit and Statutory Statement. I have had due regard to the response on record and the learned submissions by counsel. The issue for determination is whether the Application for leave to commence judicial review proceedings is merited.
 17. The Ex parte Applicants in their submissions contend that the impugned Judgement was made unreasonably as the 1st Respondent failed to perform its duty to determine the issue on merit as it only relied on the report by NBC Holdings (PTY) Report. The Tribunal is also faulted for failing to take into account relevant factors such as making a comparison of benefits due under the Scheme Rules and those paid based purely on equity.
 18. The Ex parte Applicants also argue that it was also procedurally improper for the Tribunal to adopt the report by NBC Holdings during the appeal as this generalized the appeal without considering and submitting on each Applicants' case individually.



19. It is submitted that the Tribunal, in making the orders dismissing the Appeal on 12th October, 2021, was in gross violation of the Applicants' fundamental right to equal protection and benefit of law and also in breach of the provisions of Article 41(1) of the Constitution on fair labour practices. It is also their submission that the Respondent is mandated to perform the task of determining the Complaint pursuant to section 47 of the Retirement Benefits Act hence it is only proper for this honorable court to intervene by compelling the Respondent to perform its duty without delay pursuant to Article 159 of the Constitution of Kenya.
20. The Ex parte Applicants also submit that there is no decision by the Chief Executive Officer of the Retirement benefits Authority as provided in the Retirement Benefits Act. It is therefore unfounded in Law for the Respondent to urge that the Applicant ought to have approached the Retirements Benefits Appeals Tribunal as the first port of call for determination and resolution of the matter.
21. The 2nd Respondent in its written submissions submits that the Ex parte Applicants are yet to be granted leave to file a substantive Motion before this Honourable Court. As such, they ought to do no more than advance a case for grant of such leave.
22. Further, that it cannot be said that the 1st Respondent's decision was unprocedural as the Ex parte Applicants were given an opportunity to ventilate their case and adduce evidence in support thereof. It is urged that, at paragraph 79 of the 1st Respondent's decision, it clearly noted that the Ex Parte Applicants herein had been heard every step of the way and that there was no iota of evidence that suggested that they were not afforded an opportunity to be heard.
23. Further, that upon receiving the Report by NBC Holdings Limited the Authority inquired from the Ex parte Applicants whether they wanted to rebut the allegations contained in the said report through additional evidence vide a letter dated 26th May, 2011. The Ex parte Applicants, it is urged, did not respond to the said letter or take up the invitation.
24. It is the 2nd Respondent's argument that the Ex parte applicants are inviting this Honourable Court to interfere with the merits of the decision of the 1st Respondent by asking the Court to issue an Order of Mandamus compelling the 1st Respondent to adopt the Ex parte applicants' Report prepared by the Independent Actuarial Consultants and direct that payments be made in accordance with the said report.
25. The requirement to seek leave is provided for under Order 53 Rule 1 of the Civil Procedure Rules 2010, which stipulates that an Applicant must seek leave to institute judicial review proceedings.
26. The purpose of this is so as to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the Applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review were actually pending even though misconceived.
27. These reasons for leave were discussed at length in the case of Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996.
28. Leave as was held by the Learned Judge in R v County Council of Kwale Ex Parte Kondo and 57 Others (supra) may only be granted if on the material available, the court is of the view that, without going into the matter in depth, the Applicant has an arguable case for the grant of the relief sought.



29. In the instant matter, the gist of the Application before this court is that the Applicants are seeking to have the 1st Respondent's decision in RBAT No.8 of 2011; *Alice Anyona Mumo & Others v Retirement Benefits Authority & Other* quashed on grounds that it was made unreasonably, irrationally and with procedural impropriety. The Applicants also seek leave to have an order of mandamus issued against the 1st Respondent to have it adopt the Ex parte Applicants' Actuarial Report prepared by the Independent Actuarial Consultants (PTY) Limited and to further direct payments to be made accordance with the said report.
30. The Retirement Benefits Appeals Tribunal is established under Section 47 of the [Retirement Benefits Act](#). The Tribunal is expressly vested with jurisdiction to hear appeals by any person aggrieved by a decision of the Authority or the Chief Executive Officer within thirty days of receipt of the decision.
31. In the instant case before this Court, the Ex parte Applicants aggrieved by the decision of the Authority, lodged an Appeal before the 1st Respondent seeking to have the entire decision set aside. Upon considering the Amended Memorandum of Appeal filed by the Applicants and the Respondents' response and hearing submissions by respective counsel, the Tribunal identified three issues for determination and these were whether Co-operative Bank of Kenya Staff Retirement Benefits Scheme provided the actuarial factors and methods for computation of the Appellants' benefits, whether the Retirement Benefits Authority discharged its statutory duties and obligations to the Appellants upon the lodging of the Appellants' complaint with the Authority and finally who is to bear cost of the Appeal. Upon substantially examining the three issues the Tribunal dismissed the Applicants' appeal with no orders as to costs.
32. I have applied my mind to the parties' respective positions as articulated in their grounds, affidavit evidence and submissions on record. The onus was on the Applicants to demonstrate that they have an arguable case that merits further inquiry at a substantive stage. The application lacks specificity on the breaches pointing to an arguable case that establishes grounds of illegality, irrationality or procedural impropriety. Instead, the Applicants have raised lengthy grounds of dissatisfaction with the 1st Respondents decision, grounds which, on the face of it, are couched as grounds of appeal. Suffice it to note that this court's jurisdiction in judicial review does not extend to merit review of impugned decisions. This court supervises processes to establish that they are legal, rational/reasonable and within procedural propriety. As drawn, the chamber summons is an invite to this court to grant leave for the filing of a motion that seeks merit review. This is not within the province of this court.
33. The scope of judicial review is now well settled. In [Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd](#) Civil Appeal No. 185 of 2001 the Court of Appeal expressed itself as follows:
- “Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision... It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”



34. In the Uganda case of *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300. It was held while citing *Council of Civil Unions v Minister for the Civil Service* [1985] AC 2 and an Application by Bukoba Gymkhana Club [1963] EA 478 at 479 that:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

35. The power of the court to grant leave is discretionary. Like all discretionary powers, it must be exercised judiciously. Once an arguable case is established through a cursory perusal of the material before court, leave shall be granted. In in *Vivo Energy Limited v National Land Commission* [2020] eKLR the Court held;

“In an application for leave such as the present one, the Court ought not to delve into the arguments of the parties, but should make cursory perusal deeply of the evidence before it and make the decision as to whether an applicant’s case is sufficiently meritorious to justify leave.”

36. In the instant matter, Section 49 of the *Retirement Benefits Act* provides that in determining any matter, the Tribunal may take into consideration any evidence which it considers relevant to the subject of an appeal before it notwithstanding that the evidence would not otherwise be admissible under the law relating to admissibility of evidence. I have perused the decision by the tribunal. It is obvious from the record that the Tribunal considered all material and reports filed before it and heard all parties in arriving at its decision. The decision reached was on the merits as determined by the Tribunal which had the necessary jurisdiction to hear the matter. Indeed, there is evidence vide a letter dated 26th May 2021 which gave opportunity to the Applicants to challenge the NBS Holdings report that is now impugned. Natural justice, and specifically the right to be heard, was at play.

37. Flowing from the above, it is manifestly clear that what the Applicants seek to challenge is the merit of the 1st Respondents decision and not the procedure followed to reach that decision. The Applicants purport to direct how the 1st Respondent ought to have reached its decision and what evidence the Tribunal ought to have considered in order to reach a decision that is favorable to them. This, as alluded to above, is not within the province of this court in exercise of its judicial review jurisdiction.



The court in High Court Misc Civil Application no. 1025 of 2003, *R v Judicial Service Commission* popularly known as Pareno Case, stated as follows:-

“The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question.”

(See also *Halsbury’s Laws of England* 4th Edition Vol(1)(1) Para 60).

38. In the premises, and for the reasons above stated, the Applicants have on the whole, fallen way short of establishing the threshold for the grant of leave. I find no merit in the application. The same is dismissed with no orders as to costs. It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023

.....

A.K. NDUNGU

JUDGE

