REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 409 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL

REVIEW ORDERS OF CERTIORARI

REPUBLIC ……..……..……..……..APPLICANT

VERSUS

RETIREMENT BENEFITS AUTHORITY ……RESPONDENT

EX PARTE:

1. NETWORK FOR WATER AND SANITATION INTERNATIONAL

2. NETWORK FOR WATER AND SANITATION

INTERNATIONAL STAFF RETIREMENT BENEFIT SCHEME

JUDGEMENT

Introduction

1. By a Notice of Motion dated 24th July,2017, the *ex parte* applicants herein, **Network for Water and Sanitation International** and **Network for Water and Sanitation International Staff Retirement Benefit Scheme**, seek an order of An order of Certiorari be and is hereby issued quashing the decision by the Retirement Benefits Authority issued vide letter dated 29th May 2017 appointing M/S Roberts Insurance Brokers Limited as Interim Administrator of M/S Network for Water and Sanitation International Staff Retirement Benefits Scheme.

2. According to the applicant, on 29th May 2017 the Retirement Benefits Authority appointed M/S Roberts Insurance Brokers as interim administrators of the scheme yet there was no basis for the said appointment as the applicants had complied with the issues raised therein.

3. It was averred that on 21st June 2017 the Scheme filed an Appeal No. 1 of 2017 at the Retirements Benefits Appeal Tribunal which appeal was yet to be heard due to the fact that the tribunal sits on an *ad loc* basis and currently is not constituted.

4. According to the applicant, on 14th June 2017 M/S Roberts Insurance Brokers wrote to the 1st applicant

demanding payment of shillings Seven Million within 14 days.

5. To the applicants, the appointment of an interim administrator was unprocedural as the scheme had its own administrator in the name of M/S Enwealth Financial Services Limited.

Respondent's Case

6. The application was however opposed by the Respondent.

7. According to the Respondent, it is a state corporation established under the ***Retirement Benefits Act***, Act No. 3 of 1997 (hereinafter referred to as "the Act") and its functions as the Regulatory Authority of retirement benefits are enumerated in the said Act of Parliament.

8. It was averred that the Respondent herein appointed Ms. Roberts Insurance Brokers Limited as the Interim Administrator of Network for Water and Sanitation International Staff Retirement Benefits Scheme from 29th May 2017 for a limited period of 3 months which appointment was anchored on section 45(2) of the Act and was to ensure that Network for Water and Sanitation International Staff Retirement Benefits Scheme adheres to and operates in conformity with the ***Retirement Benefits Act*** and its Regulations.

9. It was revealed that prior to the said Appointment of the Interim Administrator, the Respondent on 6th June 2013 during a Scheme on site visit at **Network for Water and Sanitation International Staff Retirement Benefits Scheme** noted several non-compliance issues, raised and discussed the same with the then Trustees of the 2nd Ex-parte Applicant and that the key non-compliance issues noted *inter alia* included:

a. Then then Board of Trustee only had 3 members only representing employees and no representation of the Employer, which was below the statutory requirement and the Trust Deed and Rules of the Ex-parte Applicants were not updated, hence not in conformity with the ***Retirement Benefits Act***.

b. There was deducted but unremitted statutory contributions (pension arrears) amounting to Kshs. 6.1 Million excluding interest as from April 2013 contrary to section 33 as read with Section 53 (A) (1) of the ***Retirement Benefits Act***.

c. Then **Network for Water and Sanitation International Staff Retirement Benefits Scheme** had failed to submit Audited accounts for the financial period 2013 to 2016 contrary to Section to Section 34 of the Act.

10. It was disclosed that at the conclusion of the onsite scheme inspection meeting the ex-parte applicants agreed to put in place a Remedial Plan by end of June 2013 as per the actions plans to ensure the Scheme was compliant with the law but this was not the case and the respondent issued various correspondences in September 2012 reminding the ex parte applicants of their statutory obligations. Further, vide a letter dated 21st September 2012 the ex parte applicants pledged their commitment to comply with the statutory requirements as identified by the retirements Benefits Authority but there was and has been no compliance with the same.

11. According to the Respondent, since the meeting of June 2013 and subsequent meetings and despite several reminders the Ex-parte Applicants failed, refused and/or ignored to remedy the non-compliance issues raised in the letters dated 24th March 2016 and 6th June 2016. Accordingly, the ex parte applicants were duly informed and notified on 24th March 2016 of the non-compliance issues and given 14 days to comply and were further informed that incase of non-compliance then RBA would appoint an interim administrator. To this, the ex parte applicants responded promising once against to take measures.

12. It was the Respondent's case that NETWAS Retirement Benefits Scheme at all material times hereto

before the appointment of the Interim Administrator on 29th May 2017 was in contravention of various statutory provisions governing retirement benefits including;

i. Section 26 of the Act.

ii. Section 33 and 53 (A)(1) of for deducting and failing to remit the statutory contributions.

iii. Sections 34 of the Act for failing to submit Audited Accounts within three (3) months after the end of the financial year.

iv. Sections 40 (c) and (d) for failing to notify the CEO of the contributions to the scheme fund that have been due for over 30 days and that the non-remittance would jeopardize the rights of the members.

13. The Respondent reiterated that this far the Submitted Remedial Plan has not been adhered to by the Ex-parte Applicants. It was disclosed that though the Compliance Remedial Plan and Copies of Audited Accounts form 2013 – 2016 have been due since end of June 2013, the Compliance Remedial Plan though dated 24th May 2017 was only received by the Respondent on 12th June 2017 s after appointment of the Interim Administrator. Further, the compliance remedial plan as so named is unacceptable as it purports to have existing scheme members' relinquish their rights to their accrued benefits. With respect to Copies of Audited Accounts form 2013 – 2016, the same were filed on 7th June 2017 after the appointment of the Interim Administrator they do not indicate the unremitted statutory contribution deducted from the members which confirmed by Enwealth Financial Services Limited appointed by the *ex parte* Applicants. It was contended that there has been no payment in the scheme since the sponsor ceased remitting the required contributions in April 2011 and the scheme continues to incur serious liabilities.

14. It was further contended that though NETWAS Retirement Benefits Scheme is obligated to file Quarterly records of Contributions, the same have not filed since June 2013 save for June 2016 to 31st March 2017, which only in December 2016 and March 2017 showing and confirming non-remittance of statutory contributions.

15. The Respondent reiterated that the compliance remedial plan submitted by the ex-parte applicants, was not a remedial plan within the meaning of Regulation 4(2) of the ***Retirement Benefits (Minimum Funding and Winding Up of Schemes) Regulations, 2000*** as it does not provide arrangements to eliminate the deficit in the scheme.

16. According to the Respondent, it is within the mandate of the Interim Administrator stated in section 45 (5)(b) of the ***Retirement Benefits Act*** i.e "recovering all debts and other sums of money due to and owing to the scheme" and as such the demand by the Interim Administrator is in conformity with the law cited above. It was averred that before the Interim Administrator issued a demand letter for the unremitted statutory contribution, the Sponsor and the scheme were in communication with the duly appointed interim administrator over this issue.

17. The Respondent's position in view of the foregoing was that the ex-parte Applicants have been running the NETWAS Staff Retirement Benefits Scheme contrary to the Act and its Regulations as specifically proved in paragraphs 10 and 11 herein and the Respondent as the Regulator was duty bound by statute and acted procedurally inconformity with Section 45(2) of the Act by appointing an Interim Administrator. It was confirmed that the appointment of the Interim Administrator was only for three (3) months and was to assist the ex-parte applicants to take measures to comply with the law and it is evident from the facts herein that the said appointment has resulted to partial compliance.

18. The Respondent averred that the ex-parte applicant had not tabled any iota of evidence to show that the outstanding contribution due from the Sponsor has been remitted and there is outstanding sum in excess of Kshs. 6,601,722.75. Also, there is no evidence attached to show that the monthly installment

from June, July and August have been paid into the scheme as stated in the unacceptable Remedial Plan. In light of the foregoing the ex-parte applicants failed to show any *mala fides* or failure to follow procedure by the Respondent in appointing the Interim Administrator.

19. The Respondent's position was therefore that the Motion dated 28th July 2017 is devoid of any legal justification and/or merit and offends various provisions of the ***Retirement Benefits Act*** including sections 33, 34, 40 (c) & (d) and 53A(1) and as such the motion should be dismissed with costs. To the Respondent, the ex parte applicants herein have not only come to court with unclean hands but have also been mean with the truth so as to mislead the Court hence this suit ought to be dismissed with costs to the Respondent.

Applicant' Rejoinder

20. In their rejoinder the applicants averred that at the time of the appointment of interim administrators most of the issues raised by the respondent had been addressed as follows:-

a. "Inadequate trustees". The trust deed appointing the requires number of trustees had been filed with the respondent.

b. "Non-submission of audited accounts". The same had been prepared before the said appointment. However the respondent had not authorized the scheme administrator M/s Enwealth Financial Services to file the same online until June 2017.

c. "Un-limited contributions". Compliance remedial plan was prepared and filed with the respondent but the latter did not respond to the same.

21. It was stated that had adequate notice of the said appointment been given based on the above issues the ex parte applicants would have addressed any contentious issues and have the same resolved with the assistance of the scheme administrator M/S Enwealth Financial Services.

22. The applicants insisted that they were not in contravention of the statutory provision cited in paragraph 13 of the replying affidavit in that:-

a. The applicants submitted the names of trustees on 1st July 2016 together with the requisite deed.

b. A compliance remedial plan was submitted. No deductions were made since the sponsor was facing serious cash flow problems. Staff members were provided with salary advances as and when funds were available to enable them meet their basic needs. Indeed the sponsor has commenced payment of arrears.

c. The audited accounts have been filed.

d. In compliance with section 40(c) and the scheme trustees were in constant communications with the respondent and held various meetings at which the status of the scheme was discussed.

23. The applicants contended that the respondent did not communicate its rejection of the plan before the said appointment and that the staff members who forfeited their rights did so voluntarily in accordance with section 33(i). In their view, the delay in filing audited returns was because Enwealth Financial services were not recognized by the respondent's online filing system but that they were able to file the same after they were authorized by the respondent in June 2017. They averred that quarterly reports were filed for June-September 2013 and October-December 2013. However, there were no more contributions and hence the issue of non-remittance from January 2014 did not arise. Their case was that the remedial plan submitted does not seek to deny members of accrued rights in the scheme but rather members voluntarily and in writing surrendered their rights.

24. The applicants contended that in appointing the interim administrator the respondent failed to

recognize that the scheme had a competent administrator duly appointed by the trustees who had guided in the preparation of the compliance remedial plan for the recovery of the outstanding contributions and that the respondent failed to seek the status of compliance of the scheme as at 29th May 2017.

Determination

25. I have considered the foregoing as well as the submissions filed herein.

26. In **Penina Nadako Kiliswa vs. Independent Electoral & Boundaries Commission (IEBC) & 2 Others (2015) eKLR,** Supreme Court of Kenya held at paragraph 28:

> **"The well-recognized principle in such cases is that the court's target in judicial review is always no more than the process which conveyed the ultimate decision arrived at. It is not the merits of the decision, but the compliance of the decision-making process with certain established criteria of fairness. Hence, an applicant making a case for judicial review has to show that the decision in question was illegal irrational or procedurally defective."**

27. Section 45 of the ***Retirement Benefits Act*** provides as follows:

> ***(1) This section applies and the powers conferred by subsection***
>
> ***(2) may be exercised in the following circumstances—***
>
> > ***(a) if the trustees of a scheme fail to submit to the Chief Executive Officer the annual accounts required under section 34 for over six months after the end of the financial year to which they relate;***
> >
> > ***(b) if the trustees are found to have submitted or provided any accounts, returns, statements, books, records, correspondence, documents or other information relating to the scheme fund which are false or misleading; or***
> >
> > ***(c) if the Chief Executive Officer, whether on inspection or otherwise, becomes aware of any fact or circumstance which, in his opinion, warrants the exercise of the relevant power in the interests of the sponsors and members of the scheme or in the public interest.***
>
> ***(2) The Chief Executive Officer may, with the approval of the***

Authority—

> > ***(a) appoint any person (in this Act referred to as "an interim administrator") to assume the management, control and conduct of the affairs and business of the trustees, the manager, the custodian or the administrator, as the case may be, to exercise all the powers of the trustees, the manager, the custodian or the administrator to the exclusion of such trustees, manager, custodian or administrator;***
> >
> > ***(b) remove any officer or employee of the trustees, the manager, the custodian or the administrator who, in the opinion of the Chief Executive Officer, has caused or contributed to any contravention of the provisions of this Act or any regulations made thereunder or to any deterioration in the financial stability of the scheme or has been guilty of conduct detrimental to the interests of the members or sponsors of (c) by notice in the Gazette, revoke or cancel any existing power of attorney, mandate, appointment or other authority by the trustees, the manager, the custodian or the administrator in favour of any officer, employee or any other person.***
>
> ***(3) The appointment of an interim administrator shall be for such period, not exceeding twelve months, as the Chief Executive Officer may specify in the instrument of appointment but may be***

extended by the High Court, upon application by the Chief Executive Officer, if such extension appears justified.

(4) An interim administrator shall, upon assuming the management, control and conduct of the affairs and business of the trustees, the manager, the custodian or the administrator, discharge his duties with diligence and in accordance with sound actuarial and financial principles and in particular, with due regard to the interests of the trustees, the manager, the custodian, the administrator, the members and sponsors of the scheme.

(5) The responsibilities of the interim administrator shall be—

(a) tracing, preserving and securing all the assets and property of the scheme;

(b) recovering all debts and other sums of money due to and owing to the scheme;

(c) evaluating the solvency and the liquidity of the scheme;

(d) assessing the schemes, the manager 's, the custodian's and the administrator 's compliance with the provisions of this Act and any regulation made thereunder; (e) determining the adequacy of the capital and reserves and the management of the scheme and recommending to the Chief Executive Officer any restructuring or reorganisation which he considers necessary and which, subject to the provisions of any other law, may be implemented by him on behalf of the trustees, the manager, the custodian or the administrator; and

(f) obtain from any former trustee, manager or administrator of the scheme or any officer, employee or agent thereof, any documents, records accounts, statements, correspondence or information relating to the scheme.

(6) The interim administrator shall, within a period of twelve months from the date of his appointment, prepare and submit to the Chief Executive Officer, a report on the financial position and the management of the scheme with recommendations as to whether—

(a) the scheme is capable of being revived; or

(b) the scheme should be deregistered.

(7) The Chief Executive Officer shall, after taking into account the report of the interim administrator, make appropriate recommendations to the Board which shall take a decision on the matter.

(8) Neither the Chief Executive Officer nor any officer, employee or agent of the Authority nor the interim administrator nor any other person appointed, designated or approved by the Chief Executive Officer under the provisions of this Part shall be liable in respect of any act or omission done in good faith in the execution of the duties undertaken by him.

28. It is therefore clear that the Respondent is empowered by the Act, to appoint an interim administrator where conditions in section 45(1) of the Act are satisfied. The Respondent has enumerated the circumstances which informed its decision to take the said action. Those circumstances if true may well justify the appointment of the said interim administrator.

29. It is however not for this Court to make a determination as to the merits of the said decision since as stated in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

"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."

30. Similarly, in **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision 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. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

31.The House of Lords in the case of **Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 All ER 935**, rationalized the grounds of judicial review and held that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc. Irrationality as fashioned by **Lord Diplock** in the **Council of Civil Service Unions Case** takes the form of Wednesbury unreasonableness explicated by Lord Green and applies to a decision which is so outrageous in its defiance to logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

32. Therefore, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

33. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in

order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

34. I also associate myself with the expressions in **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR,** that:

> "**...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision**…**I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter...**"

35. In this case it is clear that the issues which the applicants raise are merit oriented. Section 48 of the Act provides that:

> ***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.***

36. In my view the issues raised herein ought to have been dealt with by the Tribunal which is properly seized of the jurisdiction to deal with matters of merit.

37. In the premises I find no merit in this application which I hereby dismiss with costs to the Respondent.

38. It is so ordered.

Dated at Nairobi this 8th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Ooko