



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 40 OF 2015

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF ORDER 53 RULES 1 OF THE CIVIL PROCEDURE RULES

AND

**IN THE MATTER OF THE RETIREMENT BENEFITS ACT CAP 127 OF THE LAWS OF
KENYA**

AND

**IN THE MATTER OF A DECISION BY THE RETIREMENT BENEFITS APPEALS
TRIBUNAL DATED 8TH AUGUST, 2014 CONFIRMING/UPHOLDING A DECISION OF
THE RETIREMENT BENEFITS AUTHORITY DATED 12TH JULY, 2013.**

SMEP RETIREMENT BENEFITS TRUSTEESAPPLICANT

VERSUS

THE RETIREMENT BENEFITS AUTHORITY.....1ST RESPONDENT

THE RETIREMENT BENEFITS APPEALS TRIBUNAL...2ND RESPONDENT

JUDGMENT

1. On 11th March 2015 Honourable Korir J granted to the exparte applicant herein SMEP Retirement Benefits Trustees leave to apply for Judicial Review orders and directed that the substantive motion be filed and served within 21 days thereof.

2. On 1st April 2015 which was the 21st day from the date of leave, the exparte applicant filed notice of motion dated 30th March 2015 seeking the following judicial review orders:

a. An order of **certiorari** to remove to the High Court for purposes of being quashed the **decision** of the retirement Benefits appeals Tribunal (the 2nd respondent) dated 8th August 2014

dismissing the exparte applicant's appeal and upholding the decision of the Retirement Benefits Authority dated 8th July 2013 requiring the exparte applicant to compute and pay the interested party and other members of the SMEP Retirements Benefits Scheme dues on the erroneous Trust Deed dated 30th November 2005.

b. An order of **mandamus** directed at the Retirement Benefits Authority the 1st respondent to **rectify clause 2:11** dealing with Founders' contributions in the Trust Deed dated 30th November 2005 to capture the capping of the Founders contributions of kshs 3,750 to reflect the intention of the parties.

c. An order of **prohibition** prohibiting the 1st respondent from requiring the first applicant to **reconcile** the contributions for all affected members including the interested party in accordance with the approved but erroneous Trust Deed and Rules dated 30th November 2005 and to pay the affected members pension based on the 10% contribution element without capping the contribution element to kshs 3,750 as intended by the parties.

d. That costs be provided for.

3. The notice of motion is supported by the statutory statement filed on 6th February 2015, the verifying affidavit and supporting affidavit of Dr. Joseph Muriu sworn on 6th February 2015, the annexures thereto and other grounds as were canvassed and as deposed in the further affidavit filed on 7th March 2016 in response to the affidavits filed by the interested party and the 1st respondent.

4. The exparte applicant's case as contained in the statutory statement and as deposed in the supporting and verifying affidavit of Dr. Joseph Muriu the chairman Board of Trustees of the exparte applicant is that in the year 2006, the exparte applicant the precursor of SMEP DTM Ltd voluntarily founded for SMEP Retirements Benefits Scheme for the benefit of the employees of SMEP after it became autonomous from the National Council of Churches of Kenya in which it had been a department.

5. That at the time of founding the scheme and before the Trustee Deed was registered, the trustees and the sponsor discussed a series of a draft Trust Deed Rules which are dated 14th September 2005 and 16th November 2005 respectively.

6. That during the preparation of the Trust Deed and Rules, SMEP as employer and founder agreed to contribute 10% of the members' basic salary subject to a maximum of kshs 3750 while the members contribution was pegged at 10% of the basic salary subject to a maximum of kshs 3750.

7. That at the time of executing and registering the Trust Deed and Rules dated 30th November 2006, the Trustees, the founder and the members knew that the intention was to cap both the employer's contribution at 10% of the monthly salary subject to a maximum of kshs 3750.

8. That after the registration of the Trust Deed and Rules, the sponsor/employer deducted and remitted the employer's and employee's contributions at the rate of 10% of the employee's salary subject to a maximum of kshs 3750.

9. That the deductions continued until 9th November 2011 when the Trust Deed and Rules were amended and the maximum monthly contribution capped at kshs 4875.

10. That the interested party herein Rose Wanyama was not only a member of the scheme but also a trustee before she left employment with the sponsor in 2010.

11. That it was after the interested party had left her employment that she was paid her pension dues based on the monthly contributions remitted by the employer that she lodged a complaint with the Retirement Benefits Authority, the 1st respondent herein claiming that she was entitled to

payment of pension based on 10% of the employee's salary without capping, which claim was disputed by the ex parte applicant on the basis that:

- The Trust Deed and Rules dated 30th November 2006 did not reflect the intention of the parties in the draft Trust Deed and Rules and the conduct of the parties subsequent to the registration of the Trust Deed.
- That the interested party was not only a member of the scheme but also a trustee and it was inequitable for her to seek to benefit from an error in the Trust Deed and Rules which she was aware of as a former trustee of the scheme.
- That paying the interested parties and the other scheme members as directed by the 2nd respondent would cripple and destroy the entire scheme as the trustees do not have any other funds other than the funds actually deducted by the sponsor and remitted to the scheme managers for investment.
- That following the complaint which was considered by the 2nd respondent Retirement Benefits Appeals Tribunal, the latter ordered that the ex parte applicants do re-compute the members' dues based on the erroneous provision of the registered Trust Deed and Rules.
- That an appeal to the 1st respondent saw a decision/judgment dated 8th August 2014 dismissing the applicant's appeal, while upholding the 2nd respondent decision and requiring both the applicants and the 2nd respondent to abide by the provisions of the erroneous Trust Deed and Rules.

12. According to the ex parte applicant, it was not accorded a hearing and that the decision reached was contrary to the Rules of Natural Justice in that the 1st respondent directed the parties to proceed by way of submissions only to turn around and blame the applicants for not calling evidence in the judgment.

13. Further, that the decisions reached by the respondents are contrary to the principle of voluntary pension Scheme in that it seeks to compel trustees to compute pension dues based on contributions which the employer did not agree to or promise its employees (members of the scheme).

14. It is also averred by the ex parte applicant that the decisions of the respondents are unreasonable and incapable of performance in that the applicants are required to compute pension dues on the basis of contributions which were neither deducted nor remitted and invested.

15. Further, that the decisions of the respondents are tainted with bias and go against statutory provisions which obligated the respondents to be objective and safeguard the interests of not only the members of the scheme but those of the sponsors as well.

16. It was therefore claimed that it was unfair for the respondents to require the ex parte applicants to pay to the interested party the sponsors contributions on the basis of 10% of basic salary when the amount actually remitted were to the complainants knowledge capped at the same level.

17. The interested party in this case was employed by NCKK vide letter of appointment dated 6th January 1997 as an Assistant Accountant.

18. The impugned decision is annexed as JM 3 on page 381 of the bundle for chamber summons for leave filed on 5th February 2015; The Trust Deed, deed of appointment of the interested party as trustee, interested party's pays slip, computation and payment of retirement benefits due to the interested party on 29th December 2010; cheque payment dated 16th December 2010 at pages 192 and 193 of the chamber summons bundle among other documents.

19. The 1st respondent filed a replying affidavit sworn by Dr. Edward Odundo the Chief Executive Officer of Retirement Benefits Authority (RBA) on 8th June 2015 deposing that Section 5 of the Retirement Benefits Authority Act mandates the Authority to protect the interests of members and

sponsors of retirement benefit sector; promote the development of the retirement benefits sector; advise the Minister on the national policy to be followed with regard to retirement benefits schemes and to implement all Government policies relating thereto and to perform such other functions as are conferred on it by the Act or by any other written law.

20. That the applicant is a Retirement Benefits Scheme duly registered as such pursuant to Section 23(1) of the Retirement Benefits Authority Act and Regulation 4(1) of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000.

21. That following such registration, on 30th November 2005 the applicant lodged with the Authority its Trust Deed and Rules pursuant to Section 23 of the Retirement Benefits Authority Act and Regulation 7 of the Regulations 2000.

22. That on 2nd February 2013 the 1st respondent received a complaint letter from the interested party dated 1st February 2013 to the effect that she complained of nonpayment and non-remittance by the applicant of her retirement benefits following her contributions in line with the Trust Deed.

23. That the interested party was at all material times an employee of the applicant and contributed to the scheme as required by the Trust Deed and Rules up to 22nd October 2010 when she resigned from the applicant's employment and sought her retirement dues.

24. That the applicant refused to compute and pay the interested party her retirements benefits as set out in the Schemes Trust Deed and Rules filed with the authority on 30th November 2005.

25. That Clause 2:8 of the registered Trust Deed was clear that every member shall (sic) as a minimum basic contribution at the rate of 10% of his basic pay; clause 2:11(a) provided that the founder shall contribute towards the scheme a minimum of 10% of the members basic salary.

26. That the Authority did on 12th July 2013 order the applicant to reconcile contributions for all affected members including the interested party in accordance with the approved Trust Deed Rules dated 30th November 2005 and to send to Retirement Benefits Authority a schedule containing the correct computations for all affected members, the correct pension based on 10% contribution as provided for in the 2005 Trust Deed.

27. That a review application was dismissed on 12th July 2012 as the Retirement Benefits Authority could not act contrary to the express provisions of the applicant's Trust Deed and Rules.

28. That the decision of Retirement Benefits Authority of 12th July 2012 was appealed against before the 2nd respondent Retirement Benefits Authority Tribunal, which latter upheld the 1st respondent's decision on 8th August 2014 and that it was indeed the obligation of the Trustees, pursuant to Regulations 8(2) (g) and (1) of the Retirement Benefits Authority Regulations 2000 to ensure that contributions were made based on correct pensionable emoluments and that the same remitted to the custodian of the scheme and duly paid out when due.

29. That besides the Trust Deed and Rules of 30th November 2005, there are no other Trust Deed or Rules hence it was upon the applicants to ensure that proper documents were filed with the Retirement Benefits Authority and not to blame the interested party who was one of its staff and who was an innocent scheme beneficiary. It was also contended that the parties were bound by a registered Trust Deed and not any other unregistered instrument and that the interested party had a legitimate benefit to her dues lawfully owed to her.

30. According to the 1st respondent party, the applicant has not demonstrated how their decision was *ultra vires* or unreasonable and that the applicant is rather challenging the decision of the respondents on misconception on a point of law that the decision was wrong on facts hence there are no sufficient

reasons to warrant grant of the Judicial Review orders sought, considering that Regulations are applicable to all schemes throughout the country and do not discriminate against anyone.

31. The 1st respondent urged the court to dismiss the notice of motion.

32. In rejoinder affidavit sworn by Violet Awori one of the applicant's trustees on 7th March 2016, the ex parte applicant annexed copy of deed of appointment of the interested party and her pay slip showing the deductions made and remitted to the scheme while maintaining that the interested party knew all through that the contribution of a maximum of kshs 3750 was a practice inherited from her previous employer, the NCKK.

33. Further, that as a trustee, the interested party participated in meetings of the Board of Trustees in which the capping of the employer's contribution at kshs 3750 was highlighted and that one such meeting was on 7th August 2009 vide Minute No. 11/2009.

34. In addition, that the interested party's pension dues were computed and paid to the interested party in accordance with the actual contributions invested in the scheme long before the interested party made her complaint to the 1st respondent.

35. It was further deposed that the first respondent has a statutory duty to protect both the sponsors and members of the scheme and the 1st respondent's decision to require the applicant to compute the member's dues on a basis that was not on contemplation by the parties is not only patently unfair but clearly unreasonable.

36. The ex parte applicant maintained that it is not the duty of the 1st respondent to confer a benefit to the interested party or any other members of the scheme on the basis of a mistake in a Trust Deed but to implement the manifest intention of both the sponsor and the scheme members. That therefore the decision of the 1st respondent is *ultra vires* its mandate and statutory duty to safeguard the interest of both the sponsors and members of a Voluntary Retirement and Benefit Scheme.

37. The 2nd respondent did not file any response to the ex parte applicant's application. Parties agreed and filed written submissions which they also highlighted orally.

38. In the ex parte applicant's submissions filed on 28th May 2015 dated 20th April 2015, the ex parte applicant's counsel Mr Kairaria submitted that there is an error in the Trust Deed dated 30th November 2005 which error relates to the contribution aspect as far as the founder's contributions were concerned. That although clause 2: 11 of the Trust Deed on the Founder's contributions states that the Founder shall contribute towards the scheme a minimum of ten percent (10%) of the member's salary and that despite clause 2:8 of the Trustee Deed stipulating that every member shall, subject to the provisions of rules 2:9 and 2:10 make, as from the date of becoming a member, a minimum basic contribution at the rate of 10% of his basic salary, the intention of the parties is contained in the Rules which were yet to be registered. Further, that it was the practice from 2005-2011 when the figure for contributions was adjusted and remitted to the investment Fund.

39. That all this information on the amount of contributions was within the knowledge of all employees as per the member's information hand book and that the interested party having been a trustee employee, she knew from 2009 until she resigned in 2010 that 10% of her salary had never been deducted and or remitted to the scheme for investment.

40. That the error in the Trust Fund was discovered in 2009 and that the same was discussed with a view to rectifying it but it had not been rectified as at 2010 when the interested party resigned and her final dues computed and paid to her on the basis of the actual contributions made and remitted and not the 100% envisaged in the Trust Deed and her letter of appointment. That even her pay slip shows clearly that only shs 3750.00 monthly was deducted and not 10% of her basic salary.

41. According to the *ex parte* applicant, the 1st respondent's finding that the contributions for members be pegged at 10% as per the Trust Deed as registered and reconciliation of all affected members' dues including the interested party herein was erroneous.
42. Counsel for the applicant maintained that effecting what was in the registered Trust Deed would negatively affect the scheme since those funds being claimed were not collected from the employees and remitted for investment. Mr Kairaria urged the court to quash the decision of the tribunal (2nd respondent) since under Section 5 of the Retirement Benefits Authority Act, the Authority is mandated to protect interests of both members and the scheme which means that the Authority should effect actual intentions of parties since the scheme is a voluntary one based on what is **agreed by the parties** and not set by the law.
43. Mr Kairaria submitted that it is not proper to insist that parties are bound by an error regardless of their intentions and actions. Further, that where an error occurred at the point of registration the appropriate remedy is to rectify that error on the document. That the amendments contemplated in the Regulations reflect a change of mind. It was submitted that the authority failed to act in accordance with the law relating to rectification of documents and that the impugned decision does not consider the negative effect that the implementation of the decision does not consider the negative effect that the implementation of the decision will have on the scheme. That the funds are not kept by the applicant but invested with the Fund Manager based on contributions hence the whole scheme will be bankrupt if the decision is implemented.
44. In addition, it was submitted by Mr Kairaria that the impugned decision confers a benefit to the 1st interested party and to all other members who had not complained, which benefit had not been agreed upon between the sponsor and members; and which, therefore, goes against the spirit of a voluntary scheme, by seeking to impose an amount to be contributed by the employer when they have no authority to impose.
45. Mr Kairaria further submitted that the interested party having been a trustee and having failed to raise the issue until 2 years after her retirement and after being paid 50% of retirement benefits is when she raised the issue, it was mischievous of her to seek a benefit which she knew that benefit was never contemplated by the employer and members of the scheme.
46. Mr Kairaria urged the court to find that the respondent's decision was unfair and unreasonable and not in the interest of both the sponsor and members of the scheme as the decision if implemented will kill the whole scheme.
47. It was submitted that the decision of the respondents was unreasonable, irrational, and unfair, in view of the foregoing.
48. Further, that the applicant was not accorded a fair hearing in that the 2nd respondent directed the parties to proceed by way of written submissions only to turn around in the judgment and blame the applicant for not calling evidence which then meant that the applicant was locked out of raising the substantive issues it intended to raise at the hearing.
49. Reliance was placed on **Ridge Vs Baldwin [1994] A.C. 40** where it was held that the body with the power cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case. That in failing to afford the *ex parte* applicant a fair hearing, this was an apparent sign of bias. Further reliance was placed on **COTU (K) VS Benjamin K Nzioka & 5 Others CA Nairobi 249/1993**.
50. Counsel also submitted that lack of fair hearing was coupled with procedural impropriety contrary to Rule 10 of the Retirement Benefits Authority (Tribunal) Rules 2000 which envisages a fair hearing.
51. That failure to accord the applicant a fair hearing in arriving at the decision was against the rules of

natural justice. Reliance was placed on **Halsbury's Laws of England (Administrative Law) 4th Edition, 201 Reissue Page 218 paragraph 95** which defines natural justice.

52. It was submitted that the decision by the respondent was against the principle of proportionality and the spirit of voluntary contributions. Reliance was placed on **Republic vs Commissioner of Lands Exparte Lake Flowers Ltd Nairobi HC Miscellaneous Application 1235 of 1998**.

53. The applicant's counsel further submitted that the decision went against the legitimate expectation of the applicant that it would be granted a right to fair and administrative process. Reliance was placed on **Keroche Industries Ltd vs. Kenya Revenue Authority & 5 Others Nairobi HC CMA No. 743 of 2006**.

54. It was further submitted that the respondent failed to take into account relevant considerations which were relevant submissions, evidence and similar factors presented by the applicant and that the decisions were based on irrelevant considerations. Reliance was placed on **Weinberger vs Inglis & Another [1919] AC 606 at 608** as approved in **secretary offor Education v Tameside Metropolitan Borough Council [1977] AC 101U** and **Roberts v Hopwood & Others [1925] AC 578**.

55. It was submitted that in the present case, the respondents failed to give regard to the intention of the parties while forming the trust, and also the results of their orders on the financial position of the exparte applicant.

56. The exparte applicant's counsel further submitted that there was **an error of law on the face** of the record in that the respondents failed to take into account the exparte applicants grounds set out in its memorandum of appeal. Reliance was placed on **Republic v Northumberland Compensation Appeal Tribunal exparte Show [1952] 1 KB 338**.

57. On whether the orders sought are available to the exparte applicant, reliance was placed on **Halsbury's Laws of England 4th Edition Vol 1(1) paragraph 12 page 270**; **Kenya National Examination Council v Republic exparte Geoffrey Gathenji Njoroge CA 266/1996**; **Captain Geoffrey Kugoya Murungu v Attorney General Miscellaneous Application 293/93**; **Jotham Mulati Wealamondi v The Chair ECK Miscellaneous Application 81/2002**; **Chartbook Ltd V Persimmon Homes Ltd [2009] UKHL 38, 3 WLR 267**; **Thomas Bates & Son Ltd V Wyndhams [Lingerie] Ltd [1981] 1WLR 505**; **A.Roberts & Company Ltd v Leicestershire County Council [1961] Ch D.**; **Andrews & Others V Andrews & another [2014] EWHC 1725 Ch**; **Republic v The Commissioner of Lands exparte Lake Flowers Ltd (supra)**; **Regina v Dudshealth, exparte Meredith [1950] 2 ALL ER 741, at 743** cited in **Republic Permanent Secretary of the President Ministry of Internal Security & Another exparte Nassir Mwandishi Miscellaneous JR 132/2010**; **Peter Okedi Kadamas & Another v Municipality of Kisumu CA 109 of 1984**; and **Republic vs Attorney General & Another exparte Kipngeno arap Ngeny, Miscellaneous Civil Application 406 of 2001**.

58. The exparte applicant's counsel concluded that fair and expeditious Administrative Action espoused in Article 47(1) of the Constitution could not be guaranteed in this case when the process of arriving at the decision was shrouded in mystery, and without a proper hearing as prescribed. Counsel prayed for the orders as sought by his client.

59. The 1st respondent filed written submissions on 14th October 2015 setting out three issues for determination;

a) Whether the respondent's decision was lawful and proper;

b) Whether the applicant was afforded an opportunity to be heard pursuant to the rules of natural justice;

c) Whether the applicant has proved its case to warrant the orders sought.

60. On the first issue of whether the respondent's decision was lawful and proper, it was submitted that clauses 2:9 and 2:11 of the Trustee Deed registered on 30th November 2005 are clear as to the intentions of the parties and that the purported amended Trust Deed and Rules were never registered with the 1st respondent as required by Regulation 16 of the Retirement Benefits (Occupational Retirement Benefit Scheme Regulations, 2000 which mandates such registration and prohibits reduction of accrued rights.

61. Further, that the Trust Deed Clause 1:14 provides for the criteria to be followed in order to give effect to any amendments to the Trust and Rules. It was submitted that the draft amendments were never consented to by members seeking to reduce contributions and that there was no authority for approval of amendments by way of Trustees Resolutions as required under Clause 1: 16 (f) of the rules; that the resolution was not transmitted to the Retirement Benefit Authority for approval as required by Clause 1: 13 (d) & (m) of the Deed and Rules dated 30th November 2005.

62. It was submitted that the respondent was bound by the registered Trust Deed and to give effect to it, hence the decision of the respondents' decisions were lawful. Reliance was placed on **Republic vs. Attorney General & Others ex parte KAA Staff Retirement Benefits Scheme**.

63. Further, it was contended that the respondents could not in the circumstances of this case have arrived at any other decision except as prescribed under Section 46 of the Retirement Benefits Authority Act to protect the pensioners' interests in a pension scheme.

64. On the second issue of whether the applicant was afforded a fair opportunity to be heard pursuant to the rules of Natural justice, it was submitted that the applicant is misleading this court since it filed written submissions and made oral arguments during the hearing of the appeal in support of the grounds of appeal and that the procedure for hearing of appeals as stipulated in Rule 10 of the Tribunal Rules 2000 was adhered to. That in any event, no minutes of proceedings of the Tribunal were attached to enable the court determine the veracity of the allegations that the applicant was denied a chance to be heard.

65. On the third issue of whether the applicant has proved his case to warrant the orders sought, it was submitted that Judicial Review courts are not appellate courts as affirmed by the Court of Appeal in **Kenya Pipeline Company Ltd vs Hyosung Ebara Company Ltd & 2 Others** citing **Chief Constable V Evans [1982] 3 ALL ER 141**.

66. It was submitted that the authority had no discretion to depart from the scheme rules as registered in 2005 which rules bind all the parties. Further reliance was placed on the case of **Community Advocacy and Awareness Trust & 8 Others v Attorney General [2012] e KLR** citing **Pharmaceutical Manufacturers of SA in Re President of SA 2000(2) SA 674 (cc)** on threshold of rationality. Further reliance was placed on **Pastoli V Kabale District Local Government Council & Others[2008] 2 EA 300** where the court set out what must be proved to warrant grant of Judicial Review. It was further submitted that Rule 16 of the Regulations 2000 seeks to cure the mischief of ensuring members of the scheme are consulted before amendments to the Trust Deed are effected, which amendments must be registered with Retirement Benefits Authority Act in order to protect interests of members and sponsors of the Retirement Benefit Schemes.

67. The applicant's counsel in a rejoinder submission maintained that there was no representation made by the sponsor or the applicant to the 1st interested party or other members that the members would be paid 10% of their benefits when they retire. That the 1st interested party cannot claim to have discovered the error in computation of her benefits after her retirement since she was a Trustee and she attended meetings of the applicant. Mr Kairaria submitted that the Authority was bound to interpret the Trust Deed on what was legitimately due to the 1st interested party but that it failed to do so.

Determination

68. I have carefully considered the *ex parte* applicant's application for Judicial Review orders, dated 30th March 2015 and filed in court on 1st April 2015, supported by statutory statement, supporting and further affidavits and the elaborate exhibits. I have as well considered the 1st respondent's replying affidavit, and exhibits. I have also considered the parties' advocates detailed written and oral submissions supported by statutory and case law.

69. In my humble view, the issues that flow from the case are:

- 1) *Whether the respondent's decision was lawful, rational and or arrived at with procedural propriety.*
- 2) *Whether the *ex parte* applicant was accorded a fair hearing.*
- 3) *Whether the reliefs sought are available to the *ex parte* applicant.*
- 4) *What orders should this court make?*
- 5) *Who should bear costs of the Judicial Review proceedings?*

70. This court will commence with the second issue of whether the *ex parte* applicant was accorded a fair hearing under the Rules of natural justice. According to the *ex parte* applicant, it was denied a fair hearing because the 1st respondent allowed parties to file written submission but in the judgment, it attacked the applicant for failure to make oral submissions yet there was no requirement for oral submissions. Further, that the respondent failed to consider all the issues in the memorandum of appeal.

71. The 1st respondent thinks otherwise. I have carefully read the judgment of 8th August 2014 by the Retirement Benefits Tribunal. Albeit proceedings before the Tribunal were never annexed to these Judicial Review proceedings, the Tribunal exhaustively analyzed the applicant's case, the 1st respondent's case as presented, including all exhibits produced and the issues for determination framed after carefully considering the pleadings, submissions and authorities, filed by both parties to the dispute. The Tribunal equally carefully and anxiously considered all the documents and the oral submissions ably made by advocates for the appellants and the respondent (see page 395 of the *ex parte* applicant's bundle (last paragraph) and page 392, 2nd paragraph thereof). The 2nd respondent also framed three clear issues on page 396 (7) of the judgment of 8th August 2014 as before delving into the details of the case in determining those issues:

- 1) *Whether the appellants and the respondent were bound by the Trust Deed and Rules dated 30th November 2005 when considering the calculation of benefits due to members of the scheme;*
- 2) *Whether the appellants and/or the respondent may without amendment effect changes to the Trust Deed and Rules dated 30th November 2005 when considering calculation of benefits due to the members of the scheme.*
- 3) *Who should bear the costs of the appeal?*

72. The Tribunal ventured into and explored the statutory provisions of the Act and Regulations made there under and the Trust Deed and arrived at the decision that the appellant's apparent departure from the clear statutory obligations constituted breach of statutory provisions which could not reasonably be explained away in the casual manner by laying blame on Mrs Mokaya, and lauding it as innocent the conduct of their advocate (see page 401 of the applicants bundle).

73. In my humble view, the *ex parte* applicant has failed to demonstrate to this court that the rules of natural justice were breached by the 2nd respondent whose decision is under challenge before this court. I find that there is no demonstration of denial of fair hearing; bias or breach of rules of natural

justice as alleged by the ex parte applicant.

74. I further find that the 2nd respondent's decision covered all the issues raised in the grounds of appeal and in arriving at the decision that it did, the 2nd respondent explored all the facts of the case that had been before the 1st respondent, the memorandum of appeal, the provisions of the Trust Deed and the statutory requirements on obligations placed on the 1st respondent.

75. I am therefore unable to find that the ex parte applicant was denied a fair hearing by the 2nd respondent as it was given an opportunity to present its arguments both in writing and orally which it did through its counsel and a decision arrived at upon examination of all the material placed before the Tribunal, backed by statutory provisions.

76. On the first issue of whether the decision of the 2nd respondent was lawful, the applicant claimed that the decision affected all other members of the scheme who were not complainants or parties to the dispute hence the decision failed to take into account the fact that implementation thereof would ground the operations of the applicant to bankruptcy contrary to the statutory duty of the 1st respondent under Section 5 of Retirement Benefits Authority Act to protect the interests of both sponsor and members of the scheme.

77. With utmost respect to the ex parte applicant, the issue of whether or not the 1st respondent was entitled to find that there should be recalculation of the benefits of all other members and on whether implementation of such decision would have a devastating financial effect on the scheme is an issue of fact and merit issue, not a procedural legal issue. I say so because calculation of retirement benefits and whatever detrimental effect that recalculation would have on the ex parte applicant is a matter for an *actuarist* and not for the parties or even a court of law.

78. There was no actuarial report demonstrating what great risk and or devastating financial effect that the recalculation would have on the ex parte applicant. Furthermore, no provision of the law was cited to show that the 1st respondent having found that the applicant had breached the law by paying into the fund an amount less than what the Trust Deed instrument provided, the 1st respondent had no statutory mandate to direct the applicant to correct that position. Furthermore, a pension scheme does not involve one beneficiary but several beneficiaries who rely on the consistent and certain application of the Scheme Trust Deed and Rules to ensure that benefits are evenly and fairly distributed. The role of the 1st respondent is to regulate the schemes and ensure they comply with the law as stipulated under the RBA Act.

79. Judicial review looks at the process and not the merits of the decision. From the applicant's submissions, clearly, it seeks to convert this court into an appellate court to reexamine and reevaluate the evidence tendered before the respondents and arrive at its own independent decision. That is not permissible and the authorities on this aspect are too many to be cited here. The scope of Judicial Review was also considered in **R v Vice Chancellor JKUAT Ex parte Cecilia Mwathi & Another** in which the following excerpt from **Supreme Court practice 1997 VOL 53/1-416** was quoted:

“ 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 is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of authority constituted by law to decide the matters in question.”

80. In **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd (2002) e KLR** it was stated that:

“In Judicial Review, the court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of Judicial Review is concerned with, and such court is not entitled to act as a Court of Appeal over the decider; acting as an Appeal Court over the decider 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 and that, as we have said, is not the province of Judicial Review.”

81. Examining the Trust Deed as registered with the 1st respondent on was 30th November 2005, it is clear that under clause 2:8, every member shall subject to the provisions of Rules 2: 9 and 2: 10 make as from the date of becoming a member a minimum basic contribution at the rate of 10% of his basic salary; The founder shall contribute towards the scheme a minimum of 10% of the member’s basic salary.

82. The Trust Deed once registered with Retirement Benefits Authority becomes a statutory instrument and therefore a legal contract binding the founder and its members and therefore any other contrary intention can only be recognized if there is an appropriate amendment to the instrument in the manner set out in the same instrument or statute.

83. In this case, the applicant alleges that the draft amendments to the trust made in 2006 reflected the correct intentions of the parties which were to the effect that the interested party was only entitled to a maximum of shs 3750.

84. Regrettably, the purported amended Trust Deed and or Rules dated 14th September 2005 and 16th November 2005 are neither signed nor registered with the Retirement Benefits Authority as required by law. Secondly, there are no resolutions showing that the trustees resolved to amend the Trust Deed and Rules and if they did so, this court is left wondering why between 2005 and today, there has been no registration of the purported amendments to give effect to the parties’ intentions, in the absence of any court order injuncting the applicant from effecting the intended amendments to the Trust Deed.

85. Regulation 16 of the Retirement Benefits (occupational) Retirement Benefit Schemes) Regulations 2000 provides that:

16(1) A Scheme may amend its rules as specified in the Rules but no such amendments shall be valid:-

If it purports to invalidate or reduce accrued rights and interests of the sponsors and members of the scheme;

If it purports to effect any right of a creditor of the scheme, other than a member thereof;

1. Unless it has been approved by the Authority and registered as provided for in paragraph (3).

2. Within thirty days from the date of the passing of a resolution for the amendment of the scheme rules a copy of such amendment shall be transmitted by the trustees to the Authority for registration.

86. Contrary to the above provisions of the Regulations made under the Retirement Benefits Authority Act, there is no resolution for the amendment to the scheme Rules shown to exist and neither were there any evidence of transmission of such purported amendments by the trustees to the Retirement Benefits Authority for registration.

87. Further, there is no evidence that the applicant, in seeking to give effect to the intention of the parties ever forwarded any amendments to the Retirement Benefit Authority for approval before eventual registration.

88. In addition, the glaring evidence on record shows that the applicant's '*intention*' to amend the Regulations would reduce the accrued rights and interests of members since the primary instrument was clear that the sponsor's contribution would be 10% of the members basic salary and therefore by capping the maximum contribution to 3750 irrespective of what a member earned as basic salary, that would be tending to invalidate or reduce the accrued rights and interests of the members in favour of the sponsor, contrary to Regulation 16(1) (a) of the Retirement Benefits Authority Regulations.

89. Further, Clause 1: 14 of the registered Trust Deed is clear that Trustees may only amend by deed the provisions of the Trust Deed from time to time with the consent of the founder, the Authority (RBA) and the Commissioner.

90. Furthermore, it is suspect that the applicant would have a duly executed Trust Deed and Rules (under seal) dated 30th November 2005 registered with Retirement Benefits Authority (1st respondent) with a commencement date of 1st January 2006 containing Rule 2:8 on members contributions and Rule 2: on the founders contribution all stipulating that the minimum basic contribution would be at the rate of 10% of the member's basic salary, yet, with hindsight, have a separate unsigned, unsealed Trust Deed and Rules (NOT proposed amendments), dated 14th September 2005 and 16th September 2005 contemplating the founder's contributions pegged on a maximum figure of 3750!!

91. In my humble view, as the Trust Deed and Rules as registered are clearly dated 30th October 2005, it would be expected that if there was any intention to amend the two instruments, then the amendments would follow the procedures as stipulated in the instruments and Regulations under the Retirement Benefits Authority Act and such amendments if any would have come much later and not before the instruments were registered.

92. This court notes that the minutes of 25th January 2005 at Jumuia Place, Nairobi had minute 12/TRUST/2005 under matters arising, touching on amended Trust Deed and Rules but nothing was discussed concerning the contribution by the members or the founder. Therefore, albeit the applicant wants this court to believe that the Registered Trust and Rules had errors and that the draft Deed and Rules is the one which was correct, and indicative of the parties' intentions, this court is unable to accept that explanation for, there is no impediment that stood in the way of the applicant inserting that clause on minimum of sh 3750 into the registered instrument and neither is there any evidence of any attempt to cause the amendments to the instrument to date, yet, as at 9th December 2008, there was a Deed registered for removal of Trustees and appointment of new Trustees. There is therefore absolutely no indication that the applicant intended to amend the clause on minimum contributions.

93. Even assuming that the alleged '*error*' to the Trust Deed and Rules dated 30th October 2005 was inadvertent, as per the minutes of 7th August 2009 which were attended by the interested party, at minute 18/2008 on "***Deed Amendment of Trust Deed and Rules Document***" the court observes that what was discussed there under was "***the Deed amendments and removal of Trustees***" which had been finalized as discussed and submitted to Kenya Revenue Authority for embossment before being launched with the Retirement Benefits Authority.

94. However, at minute 5/2009 of the Administrator's presentation, it was reported that "the scheme investment was done as required and on the report on the budget for 2009/2010 highlights affecting the scheme, it was reported under (e) staff contributions, that there was an anomaly between the existing practice as in the Staff Regulations and the Trust Deed and policy document on staff contributions and that it was agreed that the Trust Deed and Rules document be harmonized to be in line with the terms of employment policy as this was the basis for the Trust Deed and Rules

document.”

95. Nevertheless, even after that minute, 5/2009 no attempt was made to amend the Trust Deed and Rules as required under the Trust Deed and Rules and the Regulations made under the Act.

96. The applicant’s exhibit at page 235 of its bundle annexes the Members Information Hard book dated October 2009 after the meeting of 7th August 2009 prepared by the Human Resources and Administration Department. Clause 4:0 is on contributions. Clause 4:1 (b) purports to inform the members that the employer contributes 10% of the basic salary subject to a maximum of shs 3750 on the member’s behalf while the members contribute 10% of the member’s basic salary or more on a voluntary basis.

97. My humble opinion is that the members information Hard book made on October 2009 prepared by Human Resources and Administration Department did not and could not amend the Trust Deed and Rules which had been registered in 2005 and to which no amendments had been made in the manner stipulated by the Trust Deed instrument itself and the Act and Regulations made thereunder.

98. The applicant’s counsel submitted that the parties’ intentions override the law. However, with the law (Regulation) under the Act clearly stipulating the procedure by which amendments to the Trust Deed and Rules would be amended, and in the absence of any resolution of amendments to the Trust Deed instrument by the Trustees or approval by members. Therefore, the applicant cannot be heard to seek to operate outside the statutory provisions at its own convenience for, there is no consent from the members for alteration to the clause on the founder’s contributions from 10% of basic salary to **“subject to a maximum of shs 3750.”**

99. In other words, I find that the applicant is attempting to go round the statute or seeking waiver of enforcement of a statutory instrument without the consent of the members, as required under the Regulations under the Retirement Benefits Authority Act which prohibit variation to the instrument except by amendment as provided for in the instrument and the Regulations.

100. Furthermore, this court finds that the question of whether or not The 2nd respondent Tribunal should have relied on *the “intended trust Deed”* or the registered Trust Deed which is said to have errors which errors have subsisted to date without any amendments are matters which would appropriately be investigated into by the court exercising appellate jurisdiction as stipulated in Section 78 of the Civil Procedure Act Cap 21 Laws of Kenya and not to be challenged by way of Judicial Review proceedings.

101. The same applies to determinations of whether or not the interested party should be permitted to benefit from contributions that were not made (in violation) of the Trust Deed Instrument), since no investments were allegedly made on her behalf.

102. In other words, there are a myriad of questions such as whether the applicant bears any liability for wrongfully deducting the sums lesser than the contributions mandated by the Trust Deed and Rules, which question cannot be determined conclusively by this court; and whether a trustee such as the interested party herein who was involved in policy making and execution of decisions of the applicant and who knew or ought to have known first hand as to what was being deducted as she was an insider, had any legitimate expectation to reap more than what she invested into scheme.

103. I would, however, hesitate to find that the applicant had any legitimate expectation that it would be allowed to waive statutory provisions in favour of the intentions of the parties which intentions were never reduced into a Deed amending the Trust Instrument and Rules with the consent of the members, and only with the approval of the Retirement Benefits Authority. It is important to note that Judicial Review involves an assessment of the manner in which the decision is made, it is not an appeal and the jurisdiction is exercised in a supervisory manner as stipulated in Article 165(6) of the Constitution to ensure that authority of power is exercised in accordance with the basic principles of legality, fairness, rationality and procedural propriety (see **Pastoli V Kabale District Local Government**

Council and Others(supra) in which the court cited with approval **Council of Civil Unions Vs Minister for the Civil Service [1985] AC 2** and in **Re an application by Bukoba Gymkhana Club [1963] EA 473 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 improprietyillegality 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, 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 standardsprocedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking the 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 legislature instrument by which such authority exercises jurisdiction to make decision. “see also Municipal Council of Mombasa V Republic and Umoja Consultants Ltd CA 185/2001(supra).

104. On the part of the Retirement Benefits Authority (Tribunal) in arriving at the decision that it did framed the following three issues of determination:

1. Whether the appellants and respondent were bound by the Trust Deed and Rules dated 30th November 2005 when considering the calculation of benefits due to members of the scheme;

2. Whether the appellants or the respondent may, without amendment effect changes to the Trust Deed and Rules dated 30th November 2005 when considering calculating benefits due to members of the scheme.

3. Who should bear the costs of the appeal.

105. It is worth noting that Section 46(1) of the Retirement Benefits Authority mandates the Chief Executive Officer of the scheme to ensure that in making a decision, such decision is made in accordance with the provisions of the relevant scheme Rules of Retirement Benefit Authority under which the scheme is established. On the other hand, the Retirement Benefits Authority Act mandates the Retirement Benefit Authority to regulate and supervise the establishment and management of Retirement Benefits Scheme.

106. It follows that the 1st respondent is expected to regulate and supervise the establishment and management of Retirement Benefits Schemes by registering the Trust Deed Instruments and Rules. The tribunal after reviewing the evidence and the law, in its exercise of appellate jurisdiction, found that the 1st respondent acted properly and within the law. It found that except for the rates of contribution at 10% of basis salary expressed in Rules 2:8 and 2:11 of the Rules of the applicant scheme, the Trust Deed and Rules dated 30th November 2005 was the correct document to be used in administration, regulation, supervision and management of the applicant scheme and that Clause 1:2 of the Trust Deed was clear that the scheme was established under irrevocable trusts as declared by the sponsor; and that the obligations of the scheme to its members flow from the registered Trust Deed and Rules as read with the applicable law.

107. In arriving at the above decision the 2nd respondent analyzed the various relevant provisions of

Retirement Benefits Authority Act and Rules made there under and the clauses in the applicant Schemes Trust Deed and Rules. More importantly, Section 40 of the Retirement Benefits Act Mandates the exparte applicant to:

- a) Ensure that the scheme fund is at all times managed in accordance with the Retirement Benefits Authority Act, any regulations made there under, the Scheme Rules and any directions given by the Chief Executive Officer;
- b) Take reasonable care to ensure that the management of the scheme is carried out in the best interests of the members and sponsors of the scheme;
- c) Report to the Chief Executive Officer as soon as reasonably practical, any unusual occurrence which in their view could jeopardize the rights of the members or sponsors of the scheme; and
- d) Report to the Chief Executive Officer, as soon as reasonably practical, if any contributions into the scheme fund remain due for a period of more than 30 days.

108. The court notes that the Tribunal found both the applicant herein and the 1st respondent in error. On the part of the appellant, it was found to have failed to ensure that contributions are made in accordance with the Rules of the Scheme. On the part of the 1st respondent, it was found to have failed to ensure full compliance with the Trust Deed and Rules of the Scheme.

109. The Tribunal also made serious factual findings on the evidence available including lack of evidence to show approval of amendment to the Trust Deed and Rules dated 9th November 2011 which provides at Rule 11(a) that the sponsor to contribute a minimum of 10% of a member's basis salary subject to a maximum of kshs 4875.00.

110. This court also notes that vide a **Revised Trust Deed of 9th November 2011** that Revised Deed was neither sealed nor registered with the 1st respondent as required by law. The exparte applicant was bound to comply with the Trust Deed and Rules and the Retirement Benefits Authority Act and the Rules made there under. And if there was any error in the Deed and Rules the applicants were obliged to cause amendments using the procedure stipulated in the Deed and Rules and the Retirement Benefits Authority Regulations.

111. Any directive or order to the applicant requiring it to make payments of the retirement benefit otherwise than in accordance with the Trust Deed and Rules as registered would be irrational and unreasonable and illegal.

112. Although the applicant cited several authorities to show that the respondents should have considered that intentions of a contract overrides the statutory provisions, and that a party is in principle entitled to rectification of a contract upon proof that he believed a particular term to be included in the contract, and that the other party concluded the contract with the omission or a variation of that term, in the knowledge that the first party believed the term to be included, which principle as set out in **Thomas Bates & son Ltd (supra)** case adopted from **Snell on Equity 25th Edition 1960 page 569** that:

“ By what appears to be a species of equitable estoppels, if one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he and those claiming under him will be precluded from resisting rectification in the group that the mistake is unilateral and not common,” this court observes that the interested party or respondents have not resisted any amendments to the Deed and Rules. Simply put, there is no such proposed amendment placed before the 1st respondent for approval and registration. There is s only street talk.

113. Furthermore, if the Deed was a contract between the parties with clauses requiring

rectification, there is nothing to show that the applicant sought for rectification of the erroneous clauses.

114. This court would therefore be usurping the powers of the 1st respondent and of the sponsor and trustees if it attempted to purport to amend the Trust Deed Instrument through Judicial Review proceedings, by purporting to substitute the respondents' decisions with its own.

115. In my humble view every reasonable authority would only act within the confines of the law and not act ultra vires or without jurisdiction. I do not find any jurisdiction which the respondents declined to exercise, in accordance with statute, the Retirement Benefits Authority. Moreso, even the Deed and Rules do not confer any jurisdiction on the respondents to amend the Deed and Rules but to approve the amendments and register them for as long as the amendments are done in accordance with the Deed Instrument and Regulations made under the Act.

116. Furthermore, rectification of Clause 2:11 would only be done through amendment as stipulated in the Deed and Rules and Regulations made under the Act. This court cannot direct the 1st respondent to rectify an instrument that does not belong to it. The Deed belongs to the applicant and its members who have the power to amend and this court cannot usurp that power and if did so, it would be abusing its powers.

117. In the end, I am unable to find that the respondents acted outside the law in arriving at the decision that they did. I find that they acted within the law in arriving at the decision that they did. Certiorari would therefore not issue and neither mandamus as the court cannot compel a rewriting of a contract between the parties.

118. The prayer for prohibition cannot issue as the 1st respondents requiring that the applicant conducts reconciliation for all affected members is a statutory role to ensure the applicant acts within the Deed and Law stipulated particularly where the applicant has not amended the Deed dated 30th November 2005. Furthermore, the purported amendments reflecting intentions of parties as per the 2011 draft instrument which has never been registered gives different figures from those contained in the drafts of 14th September and 16th September 2005. Therefore the court would not even know which is the actual maximum capping contributions by members.

119. I am equally unable to find that the applicant has made out a case for the grant of the Judicial Review orders of certiorari, mandamus and prohibition sought in the Notice of Motion.

120. The upshot of all the above is that this court finds the ex parte applicant's application dated 30th March 2015 not merited and the same is hereby dismissed.

121. I order that each party bear their own costs of the Judicial Review proceedings, in view of the existing relationship between and among the parties to these proceedings.

Dated, signed and delivered in open court at Nairobi this 24th day of January 2017.

R. E. ABURILI

JUDGE

In the presence of:

Mr Kimathi h/b for Kairaria for the ex parte applicant

Mr Ochieng for the Respondents

CA: George

