REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 535 OF 2016

IN THE MATTER OF AN APPLICATION BY THE HERITAGE A.I.I INSURANCE COMPANY LIMITED RETIREMENT BENEFITS SCHEME FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND DECLARATION

AND

IN THE MATTER OF RETIREMENT BENEFITS ACT, CAP 197 LAWS OF KENYA

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010 ORDER 53

BETWEEN

REPUBLIC…….…….…….….APPLICANT

-VERSUS-

RETIREMENT BENEFITS APPEALS TRIBUNAL .....RESPONDENT

JAMES OMWOYO NYANGAU…….....……INTERESTED PARTY

THE HERITAGE A. I. I. INSURANCE COMPANY LIMITED

RETIREMENT BENEFITS SCHEME….....EX-PARTE APPLICANT

RULING

Introduction

1. By a Notice of Motion dated 22nd November, 2016, the *ex parte* applicant herein, **The Heritage A.I.I. Insurance Company Limited Retirement Benefits Scheme** (hereinafter referred to as "the Scheme)**,** seeks the following orders:

> **1. CERTIORARI removing to this Honourable Court for the purposes of quashing the judgment against the Applicant dated 15th July 2016 and the consequential decree.**
>
> **2. DECLARATION that the judgment dated 15th July 2016 is a violation of the Applicant's**

right to fair administrative action and contrary to Article 47 of the Constitution of Kenya, 2010 as read with Section 4 of the Fair Administrative Action Act, 2015 as the same is an abuse of process, arbitrary, capricious and brought mala fides by the Respondent in abuse of due process of the court, and has occasioned the subject great prejudice.

3. DECLARATION that the judgement dated 15th July 2016 amounts to deprivation of the Applicant's rights to property guaranteed under Article 40 of the Constitution as payments were lawfully expended to offset the Interested Party's mortgage liabilities.

4. DECLARATION that the judgment dated 15th July 2016 was null and void as it affects the contractual rights of the parties to wit, the Interested Party and the Sponsor regarding he mortgage and further condemned the sponsor un-heard.

5. DECLARATION that the Respondent is bound by *sub-judice* rule.

6. Costs be provided for.

***Ex Parte* Applicant's Case**

2. According to the Scheme, two letters dated 22nd November 2007 the Interested Party informed the Fund Manager, the Human Resources Manager and the Managing Director of the Heritage Insurance Company Limited (hereinafter referred to as "the Sponsor") that authorized the Fund Manager to immediately transfer all his personal pension contributions to the Human Resource Manager to clear part of the outstanding on his mortgage It was further averred that by a letter dated 23rd November 2007 his employer, the Sponsor, informed the Interested Party that he had been retired with effect from 26th November 2007.

3. However, by a letter dated 24th February 2012 the Interested Party lodged a complaint with the Chief Executive Officer of the Retirement Benefits Authority (hereinafter referred to as "the Authority") about his failure to access 50% of his employer's pension contribution. By a further letter dated 8th May 2012 the Interested Party complained that in spite of his written authority that his personal pension contribution be utilized to offset his mortgage, the same had not been done and he demanded a refund. Follow up letters dated 12th and 21st May 2012 were made by the Interested Party where he set out his mortgage loan repayment and complained about non-receipt of his pension payments.

4. According to the Scheme, on 9th July 2012 the Applicant forwarded a payment of his early retirement package totalling Khss.556,810.00 and gave a breakdown of the payment and by an acknowledgement dated 13th July 2012 the Interested Party acknowledged receipt of the sum of Kshs.556,810.00 and stated that he had no further claim with the company and in his own handwriting he confirmed the outstanding deductions and that documents were within his records.

5. It was disclosed that the Senior Supervision Officer of the Authority by the letter dated 25th July 2012 dismissed the complaint by the Interested Party and found, *inter alia,* that:

(a) The Interested Party had by his letter dated 22nd November 2007 authorised the Fund Manager of Heritage Insurance Company Limited to transfer his personal pension contributions to clear his outstanding mortgage which contributions were used to off-set his outstanding mortgage.

(b) Issues relating to his retirement benefits had been dealt with satisfactorily and that only reference to payment of retirement benefits would be entertained.

6. However, the Interested Party lodged a complaint on 4th August 2014 challenging the decision of aforesaid dated 25th July 2015 and by a letter dated 27th November 2014 the Scheme sent documents to the Authority confirming that the Company was not indebted to the Interested Party.

7. It was contended that sometimes in 2009, the Interested Party lodged in a suit in Machakos High Court *vide* **Machakos HCCC No. 265 of 2006 - James Omwoyo Nyangau vs. The Heritage Insurance Company Limited & Others** in which the Interested Party admitted under oath that he had authorized the payment of **Kshs.479,162.00** to reduce his mortgage debt. However, on 23rd January 2015 the Chief Manager Legal Services made a decision on the complaint made in May 2012 and directed the Scheme to pay the Interested Party the sum of Kshs.479,162.00.

8. In the Scheme's view, the said decision was null and void *ab initio* because:

(a) The matter had already been determined on 25th July 2012.

(b) The Chief Legal manager had no power and jurisdiction to sit on appeal of the decision of a fellow officer.

(c) The Chief Legal manager fatally ignored the pending appeal from the decision of 25th July 2012 and he had no power to make any directions as the appeal was pending and the matter was res judicata.

9. It was averred that on 27th July 2015 the Chief Executive Officer of the Authority issued a direction under section 39 of the ***Retirement Benefits Act*** and upheld what the Scheme believed was an illegal decision dated 23rd January 2015 in which he found, *inter alia*, that the basis for offsetting the loan was not clear and directed that the Interested Party be paid the sum of Kshs.479,162.00 together with interest. The Scheme by its letter dated 12th August 2015 informed the Chief Executive Officer of the Authority that the Interested Party had voluntarily authorized the transfer of his personal pension on 22nd November 2007 and informed the Authority of its intention to appeal against its decision. However, on 25th August 2015 the Chief Executive Officer of the Authority stood by the decision of 27th July 2015.

10. The Scheme averred that on 2nd September 2015, the Applicant filed the memorandum of Appeal to the Respondent and stated inter-alia that:

(a) The Matter was *res judicata* having been determined on 25th July 2012.

(b) The decision of 23rd January 2015 was illegal, null and void *ab initio* as there was no power and jurisdiction for the RBA officer to render a conflicting decision in the same complaint lodged in May 2012 when a decision had been issued by another RBA official.

(c) The decision of the Chief Executive Officer of the Authority was null and void *ab initio* as there is a pending appeal lodged on 4th August 2014 that challenges the decision of 25th July 2012.

(d) The decision by the Chief Executive office of the Authority would amount to unjust enrichment by the Interested Party as he had authorized the use of his personal contribution to offset his mortgage debt. To now order a refund would be unlawful and unconscionable when this fact is admitted in the pending suit in the High Court.

(e) The Chief Executive officer of the Authority has no jurisdiction to deal with a matter pending in the High Court when an admission had been made by the Interested Party that he had authorized the payment of his personal contribution to reduce his mortgage debt.

11. After the close of the pleadings and the filing of submissions, the hearing took place but after the hearing, the Scheme came across two decisions which it brought to the attention of the Respondent vide a letter dated 29th April 2016 which letter was send to the Interested Party and the Authority for them to make comments. However, on 15th July 2016, the Respondent delivered the impugned judgment wherein it dismissed the appeal by the Applicant and ordered it to pay the Authority and the Interested Party costs on the higher scale.

12. The Scheme averred based on legal advice that that the Applicant had an excellent case for the following reasons:

(a) The Respondent in dismissing the appeal by the Applicant, ignored clear evidence in its possession contrary to the provisions of Article 47 of the Constitution as read with Section 4(1) of the ***Fair Administrative Action Act*** which provide a right to lawful, reasonable and procedurally fair administrative action to wit:

(i) The Respondent failed to analyse the evidence before it which showed that by the time the Chief Executive officer of the Authority rendered the decision, the matter was *res judicata* having been determined on 25th July 2012.

(ii) There was unequivocal evidence which was not controverted by the Interested Party that he wrote to the Applicant directing the Applicant to use his pension to offset his mortgage liability; and he had admitted under oath in the Machakos High Court matter HCCC No. 265 of 2006 - **James Omwoyo Nyangau vs. The Heritage Insurance Company Limited & Others** that his pension be used to reduce his mortgage debt.

(iii) The decision of 23rd January 2015 was illegal, null and void *ab initio* as there was no power and jurisdiction for the RBA officer to render a conflicting decision on the same complaint lodged in May 2012 when a decision had been issued by another RBA official.

(iv) The decision of the Chief Executive of the Authority was null and void *ab initio* as there is a pending appeal lodged on 4th August 2014 that challenges the decision of 25th July 2012 which is yet to be determined.

(v) The decision by the Chief Executive Office of the authority would amount to unjust enrichment by the Interested Party as he had authorized the use of his personal contribution to offset his mortgage debt. To now order a refund would be unlawful and unconscionable when this fact is admitted in the pending suit in the High Court.

(vi) The Chief Executive Officer of the Authority has no jurisdiction to deal with a matter pending in the High court when an admission had been made by the Interested Party that he had authorized the payment of his personal contribution to reduce his mortgage debt.

(vii) The Respondent failed to analyse the evidence before it in totally and the submission made by the Applicant.

(b) Contrary to the provisions of sections 7(2)(a)(iv), (c), 9d), (e), (f), (h), (i) (iii) & (iv), (j), (k) and (n) of the ***Fair Administrative Action Act*** the decision by the Respondent is:

(i) Unreasonable as it flies in the face of clear evidence that the Interested Party had consented to his pension being used to offset his mortgage liability. The Interested Party further admitted to the same under oath in the High Court matter.

(ii) Indicative bias by the Respondent for the reasons that the Respondent failed to evaluate the evidence before it wholesomely and the submission and authorities submitted by the Applicant which were dismissed casually by the Respondent; and it misinterpreted the doctrine of estoppel and acquiescence and failed to consider the submission and authorities by the Applicant.

(iii) Materially influenced by an error of law as if a party acquiescence to a position, he cannot be heard to complain later if prejudice may be caused by the other party; if a party has so acted where fair inference can be drawn from his conduct that he consents to a transaction to which he might quite properly have objected he cannot be heard to question the legality of the transaction against the person who on the face of his conduct has acted on the view that

the transaction was legal which the principle applies even if the party whose conduct is in question was himself acting without full knowledge or error; a party is in law estopped from reneging on his promise which the other party reasonably relied on; and the doctrine of estoppel and sub-judice applies to administrative body like the Authority herein.

(iv) Procedurally unfair as the Applicant was not accorded a fair hearing by the Respondent who either ignored its evidence and/or relied on the evidence produced selectively. The Respondent further failed to evaluate the evidence and submissions by the Applicant.

(v) Indicative ulterior motives or calculated to prejudice the rights of the Applicant as the decision by the Respondent flies in the face of logic and evidence.

(vi) Failed to take into account relevant consideration being that the Interested Party had not denied that it authorized the Applicant to use pension to reduce his mortgage debt; the Interested Party had admitted the same in the high court i.e., it has authorized the Applicant to use his pension to reduce his mortgage debt; and the Respondent further failed to take into account the fact that the there was a pending appeal before the Authority challenging the decision of the officer of the Authority that had found that the Interested Party had authorized his pension to be used to reduce his mortgage debt.

(vii) The decision was made in bad faith.

(viii) It was not rationally connected to the information before it.

(ix) It is unreasonable as it effectively condemns the Applicant to pay the Interested Party Kshs.497,251.00 as at 6th August 2009 with interest from that date till payment in full in addition to the costs on the upper scale to the Authority and the Interested Party yet after the Interested Party's authorized his pension to be used to offset his mortgage liabilities, the same was depleted.

(x) It's an abuse of the Respondent's discretion.

(xi) It's unfair and an abuse of the Respondent's power.

13. It was submitted by the applicant that since the Interested Party did not succinctly denied the facts set forth in the verifying affidavit, they are deemed admitted. In this respect the Scheme relied on **Mohammed & Another vs. Haidara [1972] E.A 166 at page 167.**

14. Based on the evidence on record the Scheme relied on section 120 of the ***Evidence Act,*** **Cap 80** which creates a statutory estoppel barring the attempt by a party to renege on a position it had led another party to rely on. And submitted that it would be unconscionable for a person to deny a representation of fact that is implicit in his conduct which estoppel may arise from agreement or from an express or implied representation, promise or from negligence. It was therefore submitted that in principle, if two parties agree expressly or impliedly that their legal relations shall be based on the assumption that a certain state of affairs exists, and when this has been done, the original parties to the agreements as we all as those claiming them are stopped from denying the existence of the assumed state of affairs. The Scheme relied on ***Odunga's Digest on Civil Case Law and Procedure*** and **Ogola, J's** decision in **Ayman Hijjawi vs. Anwar Hussein [2014] eKLR** wherein he expounded on the principle of estoppel in the following words:

"The defendant cannot be heard to say that he does not owe the Plaintiff money. The Defendant is estopped from reneging on his promise which the Plaintiff reasonably relied on…When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

15. According to the Scheme, this principle was also stated in the finding of **Denning LJ** in **Combe vs. Combe (1951) 2 KB 215,** which is persuasive, when he stated:

> **"The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word."**

16. On *res judicata*, the Scheme cited **Nancy Mwangi T/A Worthlin Marketers vs. Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR** where the Court quoted the case of **E.T vs. Attorney General & Another [2012] eKLR** wherein the court noted thus:

> **"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to curt, then I do not see the use of the doctrine of res judicata….."**

17. It was therefore submitted that the Respondent failed to evaluate the evidence and find out that the decision of the CEO of the Authority was either illegal, null and void *ab initio* as there exist an appeal not yet decided and that the CEO of the Authority had no power and jurisdiction to render a conflicting decision on the same complaint lodged in May 2012 when a decision had been issued by another RBA official or the matter was *res judicata* having been determined on 25th July 2012. To the Scheme, the complaints by the Interested Party to the Respondent were directly and substantially dealt with by the Senior Supervision Officer's decision dated 25th July 2012. No new evidence was placed before the CEO of the Authority to review the decision of the Senior Supervision Officer. In support of the submission the Scheme relied on **Republic vs. Public Procurement Administrative Review Board & 3 Others [2014] eKLR**, in which the Court cited with approval **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28.**

18. According to the Scheme the disputed amount is subject to a High Court matter which is yet to be determined. To the Scheme the said case has relevance to this case as the Interested Party has admitted on oath as having authorized the Applicant to use the pension to offset his mortgage obligations yet this evidence was not evaluated by the Respondent. To the Scheme as the Authority had no jurisdiction as the disputed mortgage debt is a commercial matter that is pending in Machakos HCCC No.265 of 2009, the Respondent abrogated its responsibility by failing to evaluate the evidence thus arriving at an erroneous finding. It was contended that a Tribunal or a subordinate court cannot have jurisdiction over a matter that is alive before the High Court. In addition to the above, for the Interested Party too make a complaint before the Retirement Benefit Authority when the issue whether his instructions was acted upon was alive in the High Court amounts to abuse of the process of Court. It was submitted that as the Interested Party chose to have the issue determined by the High Court before moving to the Tribunal, he cannot be seen to advance a different argument. Unless the proceedings in the High Court were stayed, the Respondent and the Tribunal have no power to issue substantive orders and relied on **Governors Balloon Safaris Limited vs. Attorney General & 2 others [2014] eKLR, Standard Chartered Bank Ltd vs. Jenipher Atieno Odok Kisumu HCCC No. 120 of 2003** and **Republic vs. Retirement Benefits Appeals Tribunal Ex**

Parte Augustine Juma & 8 others [2013] eKLR.

19. According to the Scheme the decision of the respondent will deny the appellant its right to property and will further result into unjust enrichment by the interested party. In this respect the Scheme relied on Article 40 of the Constitution which guarantees the right to property. And contended that to demand that the Applicant should pay a total sum of Kshs. 479,162.00, which monies was used pursuant to the instructions by the Interested Party to have the said monies used to offset his mortgage liability, will not only amount to unjust enrichment (as the Interested Party enjoyed the mortgage) but also deprived the Applicant of its right to property and would amount to unjust enrichment by the Interested Party as he had authorized the use of his personal contribution to offset his debt. To order for the payment would not only be unlawful but also unconscionable. Further, the law (in this case the ***Retirement Benefits Act***) cannot be used as an engine of fraud. If the Court thus affirms the Respondent's decision for the Applicant to pay the Interested Party his pension which he had authorized the Applicant to use to offset his mortgage liability, and which authorization was acted upon, the decision will tantamount to the Interested Party unjustly enriching himself by fraudulently obtaining payment from the Applicant. The Court cannot be seen to aid or even sanction such an illegality.

20. It was therefore submitted that the impugned judgment of the respondent is contrary to the various provisions of section 7(2) of the ***Fair Administrative Action Act, 2015*** and hence the Scheme prayed that the Notice of Motion dated 22nd November 2016 be allowed as prayed.

Respondent's Case

21. In opposition to the application the Respondent filed the following grounds of opposition:

> **1. THAT the Application is frivolous vexatious and an abuse of court Process.**
>
> **2. THAT this an Appeal disguised as a Judicial Review Application. The grounds upon which this application is premised are grounds of appeal not judicial review.**
>
> 3. THAT **an order of declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced.**
>
> **4. THAT the application is an abuse of the principles of Judicial Review and is meant to ground the operations of the Retirement Benefits Appeals Tribunal.**
>
> **5. THAT the application is based on contradictory allegations which borders on mere belief, suspicion and speculations and hence incapable of any Judicial Review determination.**

22. It was submitted on behalf of the Respondent that the Retirement Benefits Appeals Tribunal in granting the orders herein remained faithful to its powers and mandate and did not divert from the same contrary to what is alleged herein.

23. It was contended that the applicant's prayers for declarations are not available in judicial review and reference was made to **Republic vs. Director of Public Prosecution & another Ex Parte Chamanlal Vrajlal Kamani & 2 Others [2015] eKLR** where the Court cited **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354 and** expressed itself as hereunder:

> **"Currently, a declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before granting the declarations sought. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application**."

24. The Respondent also relied on the Constitutional Court of South Africa case of **Pharmaceutical**

Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99, in which **Chaskalson, P** expressed himself as follows:

> **"Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution…Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was "the main crucible" for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control."**

25. To the Respondent, the High Court's jurisdiction in judicial review is circumscribed by the provisions of the ***Law Reform Act*** which confers to the court the jurisdiction to issue any of the three judicial review orders; section 8 of the Act provides that the High court shall not issue any of the orders in the exercise of its civil or criminal jurisdiction, it goes further to state that the orders will be issued in any case where the High Court in England is by virtue of the provisions of section 7 of the ***Administration of Justice (Miscellaneous provisions) Act, 1938***, of the United Kingdom empowered to make an order of Mandamus, Prohibition or Certiorari the High Court shall have power to make like order. In support of its case the Respondent relied on **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43, Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR, Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR, Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited, Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR**, **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] e KLR.**

26. It was submitted that in order for an applicant to move the Court into giving orders on the ground that a tribunal has committed an error of law, the applicant must demonstrate that there is indeed a mistake that goes to the jurisdiction of the tribunal. Misinterpretation of the law is not sufficient to move a judicial review application. In the Respondent's view, this Application is an appeal disguised as a Judicial Review Application and should therefore not be entertained as there is a clear distinction between an appeal and judicial review proceedings. In Judicial review the court is only concerned with the fairness of the process under which the impugned decision or action was reached. Once a judicial review court gives a clean bill of health to the process, it must down its tools without considering the merits of the decision for to do so would amount to usurping the power of the body that was mandated by the law giver to make the decision and relied on the Court of Appeal's decision in **Municipal Council of Mombasa vs. Republic &**

Another [2002] eKLR where it was held 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 of did he take into account irrelevant matters? These are the kind of the 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 ore there was not sufficient evidence to support the decision –and that, as we have, is not the province of judicial review".**

27. It similarly relied on **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** where the learned Judge quoting a decision of the Court of Appeal stated:

> **"The Board considering all the arguments of the Applicant and made findings on each of these issues. The Board may have been wrong in its decision but this Court would be usurping the statutory function of the Board were it to substitute its own views for those of the Board"**

28. The Respondent further appreciated that judicial review orders of certiorari, mandamus and prohibition are public law remedies and the court has the ultimate discretion to either grant or not to grant the remedies to the successful applicant and contended that the applicant had not demonstrated any breaches of the law or procedure which would entitle this court to intervene in this matter and grant the orders sought. It had not been demonstrated that the Respondent is in breach of any statutory provision or that they acted in excess or without jurisdiction or breached rules of natural justice envisaged in a particular statute. Thus the application does not meet the basic tenets of judicial review application and should be dismissed which the Respondent urged the Court to do.

Determinations

29. I have considered the cases of the various parties as presented in this application.

30. In this case what comes out clearly is that there exist various proceedings both in form of appeal and civil proceedings whose substance if determined may well resolve the issues raised in these judicial review proceedings.

31. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

> **"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.Accordingly, the special procedure provided by any law must be strictly adhered to since there are good**

reasons for such special procedures."

32. It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment:

> **"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge , in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge."**

33. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425,** where it held that;

> **"Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure....In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions."**

34. It is now a 'cardinal principle that, save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

35. In **Ex parte Waldron [1986] 1QB 824 at 825G-825H,Glidewell LJ** observed that the court should always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly. Therefore where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.

36. Section 9(2), (3) and (4) of the ***Fair Administrative Action Act***, No. 4 of 2015 provides:

> ***(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***
>
> ***(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***
>
> ***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional***

circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

37. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. In this case in the applicant's own words, the disputed amount is the subject of Machakos HCCC No.265 of 2009, a matter which is yet to be determined. It was contended that a Tribunal or a subordinate court cannot have jurisdiction over a matter that is alive before the High Court. In addition to the above, for the Interested Party to make a complaint before the Retirement Benefit Authority when the issue whether his instructions was acted upon was alive in the High Court amounts to abuse of the process of Court.

38. In my view it would have been efficacious for the applicant herein to have invoked the supervisory jurisdiction of the High Court pursuant to Article 165(6) of the Constitution and applied to have the matters pending before the inferior Tribunals stayed pending the determination of the said High Court matter rather than to commence these proceedings in which some of the issues raised if determined may have the effect of disposing of some of the issues pending for determination by way of appeal or by ordinary hearing.

39. Having considered this application, I find that these proceedings ought not to have been commenced and are accordingly incompetent.

40. In the premises the Notice of Motion dated 22nd November, 2016 is struck out but with no order as to costs.

41. It is so ordered.

Dated at Nairobi this 12th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Madialo for Mr Gichuhi for the Applicant

Mr Munene for the Respondent

CA Mwangi