REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO.58 OF 2015

REPUBLIC………………………………….....................……………………………...APPLICANT

VERSUS

THE RETIREMENT BENEFITS APPEALS TRIBUNAL…………................…………1ST RESPONDENT

THE ATTORNEY GENERAL……………………………………......................………2ND RESPONDENT

THE RETIREMENT BENEFITS AUTHORITY……………...................……………….3RD RESPONDENT

AND

CHRISTOPHER WACHIRA GATHITERI…………………......................…………1ST INTERESTED PARTY

CALEB JUMA HONGO………………………………........................…………2ND INTERESTED PARTY

FRANCIS MUEMA MWENDWA…………………………..........................……..3RD INTERESTED PARTY

EX-PARTE

KENYA AIRPORTS AUTHORITY STAFF SUPERANNUATION SCHEME (SUING THRO' ITS TRUSTEES

JOHN TITO, JOHN THUMBI, YATICH KANYUGO AND KEN KAUNDA) &KENYA AIRPORTS AUTHORITY

JUDGEMENT

1. The 1st and 2nd ex parte applicants in this matter are Kenya Airports Authority Staff Superannuation Scheme and Kenya Airports Authority respectively. The 1st Respondent (the Retirement Benefits Appeals Tribunal) and 3rd Respondent (The Retirement Benefits Authority) are creatures of the Retirement Benefits Act. The 2nd Respondent is the Attorney General of the

Republic of Kenya. Christopher Wachira Gathitheri, Caleb Juma Hongo and Francis Muema Mwendwa who are the 1st to 3rd interested parties respectively are members of the 1st Applicant.

2. Through the Notice of Motion dated 3rd March, 2015 the applicants seek the following orders:

"1. An order of certiorari removing to the High Court to quash the Orders of the 1st Respondent dated 14th November 2014 in RBATC No.4 of 2013 C. W. Gathiteri & 2 others-vs-RBA and Another:

2. An Order of Prohibition to restrain the 1st Respondent from hearing and or entertaining any further proceedings in RBATC No.4 of 2013 C. W. Gathiteri & 2 others-vs-RBA and Another;

3. Costs of this Application to be borne by the 1st Respondent;

4. Such further or other relief as the Honourable Court may deem just and expedient to grant."

3. The application is premised on the grounds in the statement of facts and the verifying affidavit of Ken Kaunda which were filed together with the chamber summons application for leave on 24th February, 2015.
4. The applicants' case is that the 1st Applicant is a retirement benefits scheme set up for the 2nd Applicant's employees. The scheme is registered by the 3rd Respondent and has been in operation since 1996.
5. It is the applicants' case that the 1st, 2nd and 3rd interested parties retired on 31st December, 2005, 31st March, 2007 and 31st December, 2006 respectively. Sometimes in June, 2012, the interested parties filed a complaint with the 3rd Respondent in which they complained that the applicants had failed to give them annual pension increases as required by the law. They also accused the applicants of wrongful applying the trust deed and rules of 2002 instead of the trust deed and rules of 2006.
6. According to the applicants, the 3rd Respondent's reply to the interested parties' complaint was that it had investigated and addressed the issue in the year 2007. The interested parties nevertheless sought a review of the 3rd Respondent's position but the request was declined by the 3rd Respondent through a letter dated 12th August, 2013.
7. The interested parties being dissatisfied with this state of affairs proceeded to file an appeal against the 3rd Respondent's decision with the 1st Respondent seeking various orders.
8. According to the applicants, the 1st Respondent heard and determined the appeal without giving their counsel proper notice and delivered the judgement on the 14th November, 2014. The applicants fault the proceedings and decision of the 1st Respondent on various grounds.
9. The first ground is that although the 1st Respondent identified eight issues in its judgement for determination, it failed to give reasons on six of the issues and instead referred the parties to a different unrelated decision for their reasoning on the issues. It is the applicants' case that failure to give reasons is a breach of the duty to give reasons enshrined under Article 47 of the Constitution.
10. Secondly, the applicants contend that the 1st Respondent's orders to the applicants to calculate and pay, with effect from 1st July, 2006, each interested party monthly pension at the rate of not less than 40% of the final pensionable salary and further to pay interest on the sum found unpaid from 1st July, 2006 until payment in full was *ultra vires* its powers as donated by Section 48 as read together with Section 49 of the Retirement Benefits Act, 1997. It is the applicants' assertion that the 1st Respondent is not empowered by the Retirement Benefits Act, 1997 to grant any substantive relief as it did in the interested parties' appeal.
11. Thirdly, the applicants opine that the 1st Respondent failed to consider relevant provisions of the law including sections 4 and 20 of the Limitations of Actions Act. It is the applicants' position

that the cause of action arose in 2006 and the same was statutorily barred by the time the interested parties filed their appeal six years later to wit 15th August, 2013.

12. Fourthly, the applicants submit that the decision of the 1st Respondent is unreasonable as it provides for the interested parties who are retired employees of the 2nd Applicant to benefit from the 2nd Applicant's current employees. The decision if implemented will occasion substantial harm, prejudice and loss to the members of the 1st Applicant currently contributing to the scheme in that their contributions will be lost to the interested parties.
13. Another ground cited to support the applicants' assertion that the 1st Respondent's decision is unreasonable is that the decision backdates payment of interest to October, 2006 yet the decision was made on 14th November, 2014.
14. In support of its case, the applicants submitted that the jurisdiction of a statutory tribunal is limited to what is expressly conferred to it by its governing statute. It is their case that Section 49 of the Retirement Benefits Act provides for the jurisdiction of the 1st Respondent.
15. The applicants' argument is that the said Section does not provide for the grant of substantive relief by the 1st Respondent. It is the applicants' submission that by ordering them to calculate and pay, with effect from 1st July, 2006, each interested party monthly pension at the rate of not less than 40% of the final pensionable salary and further to pay interest on the sum found unpaid from 1st July, 2006 until payment in full, the 1st Respondent had provided substantive relief thus exceeding its jurisdiction as donated by the said Section 49. It is the applicants' position that this was clearly a substantive relief, the kind not covered by *section 49* aforesaid.
16. The applicants contend that a perusal of the Retirement Benefits Act reveals that there is no express provision which donates to the 1st Respondent the power to grant such a substantive relief. In order to drive their point home, the applicants assert that an express provision is a provision akin to the one found in 87(2)(c) of the Income Tax Act which confers jurisdiction on the Tribunal established under that Act in the following terms: **"the appellate body may confirm, reduce, increase or annul the assessment concerned or make any other order thereon which it may think fit…"**
17. The applicants submit that if Parliament intended the 1st Respondent to have the powers to grant substantive relief then it would have said so, as it did in the Income Tax Act. The applicants urged the court to adopt the decision of Madan J (as he then was) in **Choitram v Mystery Model Hair Salon [1972] EA 525** where he stated that:

> "If the legislature had intended that the tribunal should have power to award compensation in respect of such complaints it would I think have made specific provision as was done in s. 12 (1) and s. 13."

18. It is the applicants' position that any attempt to read into the Retirement Benefits Act jurisdiction to grant substantive relief would be met by the wise counsel of Madan, J in Choitram (supra) that:

> "…a provision giving powers to a statutory tribunal must be strictly construed. Powers must be expressly conferred; they cannot be a matter of implication."

19. The applicants also urged this court to be guided by decision in the recent case of Republic v Attorney General & 3 others Ex-Parte Kenya Airports Authority Staff Retirement Benefits Scheme [2015] eKLR in which it was held that:

> "It is therefore clear that where there are express powers donated to a Tribunal, it must necessarily be implied that the Tribunal also has the powers to effectually exercise the expressly conferred powers. In this case, however the Act does not expressly confer on the 2nd Respondent the jurisdiction to grant substantive reliefs. In an appeal as opposed to a review, the powers of the appellate Tribunal must be expressly conferred."

20. The applicants assert that there is a danger if statutory tribunals were permitted to operate

outside the confines of their governing statutes. This argument was boosted by citing the statement in Republic v Attorney General & 3 others Ex-Parte Kenya Airports Authority Staff Retirement Benefits Scheme (supra) to that the "Court cannot countenance a situation where a Tribunal's powers are not circumscribed by the parent statute" for to "do so would be to create a monster in the name of a statutory Tribunal".

21. The applicants therefore urged this Court to make a finding that the 1st Respondent had no jurisdiction to make the impugned decision.

22. Turning to the 1st Respondent's failure to give reasons, the applicants submitted that administrative bodies, such as the 1st Respondent, are bound by Article 47 of the Constitution to give reasons for their decisions. According to the applicants, the duty to give reasons for a decision has been held by the courts to be grounds for grant of judicial review orders. The decisions in Republic v Attorney General & another ex parte Waswa & 2 others [2005] 1 KLR 280 and Zachariah Wagunza & another v Office of the Registrar Academic Kenyatta University & 2 others [2013] eKLR were cited in support of this assertion.
23. The applicants contended that it was wrong for the 1st Respondent to refer them to the decision in another case for the reasons for their decision on some of the issues it had identified for determination in their matter. It is their firm view that the 1st Respondent's failure to give reasons amounted to a procedural impropriety.
24. As to why they think that the 1st Respondent's decision was unreasonable, the applicants opened their submission by referring this court to the decision in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680 where the actions of a reasonable public officer were highlighted in the following words:

> "For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority"

25. The applicants asserted that the 1st Respondent in executing its mandate as a statutory tribunal, whose sole purpose is to determine disputes between pensioners and pension schemes, is bound to consider the laws and regulations concerning such disputes. Such laws include the Limitations of Actions Act, which will aid it determine whether a claim is out of time, and the Retirement Benefits (Occupational Retirement Benefits Schemes) Rules, which contain the regulations governing the pension schemes appearing before it.
26. The applicants submitted that the 1st Applicant holds the contribution of its members in trust and administers them in accordance with its scheme rules and any suits against it are governed Section 20 of the Limitations of Actions Act which covers actions concerning trust property which limits suits by beneficiaries of trust property to six years from the date on which the right of action accrued. According to the applicants, the exceptions to that limitation were not applicable to the appeal before the 1st Respondent. The applicants contend that the 1st Respondent acted unreasonably by failing to call this limitation provision to its attention.
27. The applicants also contended that the orders issued by the 1st Respondent amounted to a deprivation of the rights and interests of the members of 1st Applicant and its sponsor, the 2nd Applicant as it permitted retired employees of the 2nd Applicant to benefit from the contributions of its current employees. According to the applicants this is contrary to Regulation 16 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Rules which provides for the protection of the accrued rights and interests of the members of contribution schemes.
28. The application was opposed by the 1st and 2nd respondents by way of grounds of opposition dated 30th April, 2015 and filed on 6th May, 2015 as follows:

"1. THAT the Orders prayed for are not available to the Applicant and is otherwise an abuse of court process.

2. THAT Judicial review cannot be used to curtail or to stop tribunals from the lawful exercise of power within their judicial mandates.

3. THAT Judicial Review proceeding purely deal with the procedure and process of the decision making and not the merits and /or substance of the case.

4. THAT the application is based on contradictory allegations which borders on mere belief, suspicion and speculations and hence incapable of any Judicial Review determination.

5. THAT there are no clear reliefs sought as the applications especially as against the 2nd respondent and as such it's neither here nor there and ought to be dismissed with costs."

29. The 1st and 2nd respondents on their part submitted that the applicants' claim that the 1st Respondent failed to give reasons for its decision is not correct as paragraph two of the judgment gives the reasons of the judgment by counter referencing with case No. RBATCA No. 3 of 2013- Stephen Wahome Ihiga & 16 Others v Retirement Benefits Authority and Kenya Airports Authority Superannuation in which the 1st Respondent had rendered a determination on issues which were the same with those in the applicants' appeal. According to the said respondents, pages 15 and 16 of the judgment gives reasons as to why the 1st Respondent did not find it necessary to repeat itself in the current case where the decision would be the same. They submit that in doing so, the 1st Respondent employed the doctrine of *stare decisis*.

30. On the question as to whether the 1st Respondent failed to consider whether the interested parties' claim was statute barred under the Limitation of Actions Act, the 1st and 2nd respondents asserted that this issue was not among the five grounds of appeal raised by the interested parties and it could not have addressed the same as it was not pleaded.

31. The respondents also contended that the 1st Respondent did not act *ultra vires* the provisions of Section 48 of the Retirement Benefits Act, 1997 which provides:

"Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made thereunder may appeal to the Tribunal within thirty days of the receipt of the decision. (2) Where any dispute arises between any person and the Authority as to the exercise of the powers conferred upon the Authority by this Act, either party may appeal to the Tribunal in such manner as may be prescribed".

31. The respondents submitted that an appeal had been lodged with the 1st Respondent in accordance with the said Section. It is their position that 1st Respondent carried out its judicial duty as per the law and there is nothing that was warrants judicial review orders.
32. The 1st and 2nd respondents' contended that there are well established grounds for issuance of judicial review orders and the applicants have not established the conditions of grant of such orders in this matter.
33. The interested parties opposed the application through a replying affidavit sworn by the 1st Interested Party, Christopher Wachira Gathiteri on 17th March, 2015. Their starting point is that the applicants are not deserved of the judicial review orders as all the grounds relied upon are grounds for appeal touching on the merits of the decision of the 1st Respondent and not the process leading to the making of the decision.
34. It is the interested parties' case that the 1st Respondent acted within the jurisdiction conferred upon it by Section 48 of the Retirement Benefits Act. Further, that the 1st Respondent fully

complied with the rules of natural justice by giving all the parties a chance to be heard.

35. It is the interested parties' position that Section 49 of the Retirement Benefits Act gives the 1st Respondent the power to review the 3rd Respondent's decision. Furthermore, Section 52 of the Retirement Benefits Act gives the 1st Respondent the authority to adopt the Civil Procedure Rules in dealing with appeals filed before it. According to the interested parties, the Civil Procedure Rules allow the 1st Respondent to make a decision just like a subordinate court would.

36. The interested parties contend that the 1st Respondent decided the appeal before it in accordance with the provisions of the Trust Deed and Rules of the Scheme. They conclude by stating that it would be against public policy to find that the 1st Respondent has power to hear an appeal but has no power to arrive at a decision or judgement.

37. The interested parties stressed that judicial review is not available in the circumstances of this case. They cited the case of **Republic v Robert Kibet Kilel Retirement Benefits Appeals Tribunal ex-parte JR. Misc. Application No. 407 of 2013** in support of their proposition that a party cannot challenge the merits of the decision of the 1st Respondent if they cannot show any procedural breaches or excesses by the 1st Respondent.

38. From the papers filed in court, I find that the issues for the decision of this court are:

a. Whether the 1st Respondent had jurisdiction to grant the orders in question to the interested parties;
b. Whether the 1st Respondent failed to give reasons for its decision and if so, whether that amounted to a breach of fair administrative action as guaranteed by Article 47 of the Constitution;
c. Was the decision of the 1st Respondent unreasonable? and
d. Who should bear the costs of these proceedings?

39. I have already reproduced the arguments of the parties at length and I will directly proceed to make my decision. The 1st Respondent is a creature of Section 47 of the Retirement Benefits Act. The reason for its establishment is to hear appeals under the Act-see Section 47(1). Section 48(1) reduces accessibility to any person aggrieved by a decision made under the provision of the Act or its regulations by the Retirement Benefits Authority or its Chief Executive Officer. An appeal can also be filed in regard to any dispute between any person and the Retirement Benefits Authority as to the exercise of powers conferred upon the Retirement Benefits Authority by the Retirement Benefits Act.

40. Section 49 gives the 1st Respondent powers as follows:

> **"49. Powers of Appeals Tribunal**
>
> **(1) On the hearing of an appeal, the Tribunal shall have all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.**
>
> **(2) Where the Tribunal considers it desirable for the purpose of avoiding expense or delay or any other special reason so to do, it may receive evidence by affidavit and administer interrogatories and require the person to whom the interrogatories are administered to make a full and true reply to the interrogatories within the time specified by the Tribunal.**
>
> **(3) In its determination of any matter, the Tribunal may take into consideration any evidence which it considers relevant to the subject of an appeal before it, notwithstanding that the evidence would not otherwise be admissible under the law relating to admissibility of evidence.**
>
> **(4) The Tribunal shall have power to award the costs of any proceedings before it and to direct that costs shall be paid in accordance with any scale prescribed for suits in the High Court or to award a specific sum as costs.**

(5) All summons, notices or other documents issued under the hand of the chairman of the Tribunal shall be deemed to be issued by the Tribunal.

(6) Any interested party may be represented before the Tribunal by an advocate or by any other person whom the Tribunal may, in its discretion, admit to be heard on behalf of the party."

41. Looking at the provisions of the Retirement Benefits Act it becomes apparent that Parliament did not state the orders the 1st Respondent can issue upon hearing an appeal. This is what the applicants are riding on when they assert that the 1st Respondent exceeded its jurisdiction by granting substantive relief to the interested parties.

42. The question of the powers of the 1st Respondent was addressed at length by my brother Odunga, J in the case of Republic v Attorney General & 3 others Ex-parte Kenya Airports Authority Staff Retirement Benefits Scheme [2015] eKLR. After reproducing Section 49 of the Retirement Benefits Act the learned Judge proceeded to arrive at his decision as follows:

"25. It is clear that the section does not expressly confer upon the 2nd Respondent powers to grant certain reliefs in the exercise of its appellate jurisdiction apart from the power to "*summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents"; "receive evidence by affidavit and administer interrogatories and require the person to whom the interrogatories are administered to make a full and true reply to the interrogatories"; "take into consideration any evidence which it considers relevant to the subject of an appeal before it"; and "award the costs".* There is for example no express power to review the evidence presented before the 1st interested party.

26. In <u>Choitram vs. Mystery Model Hair Salon</u> (supra), Madan, J (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in <u>Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734</u>, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them.

27. It was in appreciation of the foregoing position that the Court in <u>Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981</u> held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal such as Rent Control Board, the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication and that a Tribunal is a creature of statute and has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See <u>Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon</u> (supra); <u>Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461</u>.

28. In <u>Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981</u> (supra) the Court proceeded to hold that if the legislature had intended that the tribunal should have power to award compensation in respect of the complaints the subject of the appeal it would have made

specific provision as the power to award compensation must be express and cannot be implied. Compensation for damage is a matter for the ordinary court on whose jurisdiction pecuniary limits have been placed. If this provision were to be interpreted as giving jurisdiction to the tribunal to award compensation it is unlimited. Indeed it exceeds the jurisdiction of the High Court since no right of appeal is given.

29. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly.

30. It must however be appreciated that a Tribunal must necessarily have powers to effectuate its decisions. As was correctly appreciated in Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval **(supra), the exercise of the powers to exercise jurisdiction in all civil matters implies the power to adjudicate on the matters investigated and a duty imposed or power granted by the legislature carries with it the power necessary for its performance and execution. The implied power must be read into the statute in order to enable the express power or jurisdiction expressly conferred, to be effectually exercised. It is difficult to see what useful purpose mere advice, legally unenforceable, would serve in disputes of the kind covered. Similarly in** **Khimji Gordhandas & Another vs. Chanrasen Narotam & Others [1957] EA 223, it was held that the implied power must be read into the Statute in order to enable the express power, or the jurisdiction expressly conferred, to be effectually exercised.**

31. It is therefore clear that where there are express powers donated to a Tribunal, it must necessarily be implied that the Tribunal also has the powers to effectually exercise the expressly conferred powers. In this case, however the Act does not expressly confer on the 2nd Respondent the jurisdiction to grant substantive reliefs. In an appeal as opposed to a review, the powers of the appellate Tribunal must be expressly conferred.

32. It is therefore not without some regret that I have to reach a conclusion that the 2nd Respondent had no jurisdiction to grant the orders outside those expressly conferred on it by section 49 of the Act. Whereas the effect of this decision is to render the 2nd Respondent's existence virtually purposeless, this Court cannot countenance a situation where a Tribunal's powers are not circumscribed by the parent statute. To do so would be to create a monster in the name of a statutory Tribunal.

33. It is however hoped that the Attorney General will expeditiously put into motion a process by which the *Retirement Benefits Act, Cap 197 Laws of Kenya* can be amended in order to expressly confer the necessary powers on the 2nd Respondent."

43. The learned Judge's conclusion was that the 1st Respondent had no jurisdiction to make any substantive orders after hearing an appeal. In his view, the 1st Respondent is impotent and the existence of that Tribunal is of no use to anybody. I beg to differ.

44. Sections 48 and 49 clearly reveal that in creating the 1st Respondent, Parliament intended it to be an appellate body. The 9th Edition of Black's Law Dictionary defines the term "appeal" at page 112 as follows:

> "A proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal."

45. The principles governing the interpretation of statutes were summarized by E. M. Githinji, JA in the case of Center for Rights Education and Awareness & 2 others v John Harun Mwau & 6 others [2012] eKLR when he stated that:

"[21] I now turn to the consideration of the appeal.

Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus:-

- **that as provided by Article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.**
- **that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.**
- **that the Constitution must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism."**
- **that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).**

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution."

46. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it. Whereas it is important to limit the powers of a statutory body to the letter of the law that created it, the reading of the law should not be done in a manner that gives rise to absurdities. In creating the 1st Respondent, Parliament's intention was to give a chance to any aggrieved person to appeal to the 1st Respondent. Parliament could not then have made the 1st Respondent incapable of granting tangible relief.
47. Although it is important for drafters of laws to specify the functions of the bodies created by the laws, I find that it would defeat the intention of Parliament to say that the 1st Respondent cannot overturn the decisions appealed against and issue appropriate orders.
48. Where the law is silent on the remedies that an appellate tribunal or court can give, it would not be wrong to imply that the appellate body is mandated to grant the minimal orders that an ordinary appellate body can grant. Such power would include the power-

a. to determine a case finally;
b. to remand a case;
c. to take additional evidence or require the evidence to be taken; and
d. to order a new trial.

49. I agree with my brother Odunga, J that the Attorney General should relook at the Retirement Benefits Act with a view to clarifying the appellate powers of the 1st Respondent. However, I find

that the 1st Respondent did not exceed its jurisdiction in reaching the decision it reached in the appeal that was before it.

50. Having found that the 1st Respondent's orders were issued within its mandate, I find it necessary at this stage to deal with the allegation of unreasonableness of the 1st Respondent's impugned decision. The applicants contended that the 1st Respondent in executing its mandate as a statutory tribunal whose sole purpose is to determine disputes between pensioners and pension schemes, is bound to consider the laws and regulations concerning such disputes and failure to do so would render any decision issued by the 1st Respondent unreasonable.

51. Specifically, the applicants asserted that the 1st Respondent failed to consider the Limitations of Actions Act and the Retirement Benefits (Occupational Retirement Benefits Schemes) Rules. The applicants also submitted that the decision by the 1st Respondent to award interest backdated to October, 2006 instead of awarding interest from the date of the decision was unreasonable. On their part the 1st and 2nd respondents asserted that the issue of limitation was not among the five grounds of appeal raised by the interested parties and the 1st Respondent could not have addressed the same as it was not pleaded.

52. There is need to straight away disapprove the 1st and 2nd respondents' assertion that the question of the interested parties claim being statute barred was not an issue before the 1st Respondent. It was indeed one of the eight issues identified at page 15 of the 1st Respondent's impugned decision. The issue was framed as Issue No. 3 as follows: "Whether the Appellants' case is barred by Limitation of Actions Act". Unfortunately, the decision in regard to that question is not contained in the impugned judgement.

53. The 1st Respondent stated in its decision that:

> "We have decided issue numbers 1 to 5 in RBATCA No. 3 of 2013- *Stephen Wahome Ihiga & 16 Others – Versus – Retirement Benefits Authority AND Kenya Airports Authority Staff Superannuation Scheme……*The same Advocates and parties (except the Appellants in this case who share same facts with the Appellants in RBATCA No. 3 of 2013- *Stephen Wahome Ihiga & 16 Others – Versus – Retirement Benefits Authority AND Kenya Airports Authority Staff Superannuation Scheme)* were involved in that case on same shared facts. It is not necessary for us to repeat our decision in this case….. We shall, therefore, consider issue numbers 6 to 8 inclusive in their order."

54. The 1st Respondent therefore addressed the Limitation of Actions Act before reaching its decision. I did not get the opportunity of reading the 1st Respondent's decision on the issue. It suffice to say that the 1st Respondent must have concluded that its decision was not statute barred and that is why it went ahead to decide in favour of the interested parties. The 1st Respondent may have reached the wrong decision on the issue of limitation of the interested parties' claim but that cannot be equated to unreasonableness. Those given power to make decisions are entitled to reach a wrong decision. This finding will apply to question of the award of interest by the 1st Respondent.

55. My decision is fortified by the judgement of the Court of Appeal in Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] eKLR in which it was stated that:

> **"Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter."**

56. Looking at the material placed before this court there is nothing to make me reach the conclusion

that the 1st Respondent's decision is unreasonable.

57. Another issue is whether the 1st Respondent's failure to give reasons for its decision amounted to procedural impropriety. I have already reproduced part of the 1st Respondent's judgement which shows that it did not give reasons for five of the eight issues identified for determination.
58. According to the 1st and 2nd respondents, pages 15 and 16 of the judgment gives reasons as to why the 1st Respondent did not find it necessary to repeat itself in the current case where the decision would be the same. They submit that in doing so, the 1st Respondent employed the doctrine of *stare decisis*.
59. The said respondents' submission, I must state, is a misinterpretation of the doctrine of *stare decisis.* The 9th Edition of Black' Law Dictionary at page 1537 states that *stare decisis* is "[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation."
60. The issue raised by the applicants is not about failure by the 1st Respondent to follow decisions it had made in other cases. The issue is the failure by the 1st Respondent to give reasons for its decision. It is not the responsibility of a party who appears before a tribunal or a court to go looking for other decisions of that court or tribunal in order to understand the reasons behind the decision in his/her case. The tribunal or court must give the reasons in the case of that particular party.
61. I agree with the applicants that the giving of written reasons where the right of a person is adversely affected by administrative action is now a constitutional imperative-see Article 47(2) of the Constitution. Decisions should be backed by reasons.
62. In the circumstances of this case, I find that the 1st Respondent failed to give reasons for its decision. This amounts to procedural impropriety as the applicants were left to speculate on the reasons behind the decision.
63. Judicial review is available where there is illegality, irrationality or procedural impropriety on the part of the decision maker- see Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300.
64. An order of certiorari is therefore issued calling into this Court and quashing the orders issued by the 1st Respondent on 14th November, 2014 in RBATC No. 4 of 2013 C. W. Githiteri & 2 others v RBA & another. Having quashed the decision of the 1st Respondent, an order of prohibition becomes unnecessary and the prayer for an order of prohibition is dismissed.
65. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 5th day of Nov., 2015

W. KORIR,

JUDGE OF THE HIGH COURT