



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 110 OF 2015

REPUBLIC.....APPLICANT

VERSUS

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

THE RETIREMENT BENEFITS AUTHORITY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

SERAH WAHU NJOROGE & 88 OTHERS.....INTERESTED PARTIES

EX PARTE

THE TRUSTEES BARCLAY BANK OF KENYA STAFF PENSION

FUND & BARCLAYS BANK OF KENYA

JUDGEMENT

1 In this matter the Trustees Barclays Bank of Kenya Staff Pension Fund is the 1st ex parte Applicant and Barclays Bank of Kenya (BBK) is the 2nd ex parte Applicant. The 1st, 2nd and 3rd respondents are the Retirement Benefits Tribunal (“the Tribunal”) the Retirement Benefits Authority (RBA) and the Attorney General respectively. Serah Wahu Njoroge and 88 others are interested parties.

2. From the material placed before this Court, it emerges that the interested parties herein were the appellants before the Tribunal in **Civil Appeal No. 1 of 2012**. The RBA was the 1st Respondent and the Trustees Barclays Bank Staff Pension Fund was the 2nd Respondent. The appeal had arisen from RBA’s decision to dismiss the interested parties’ complaint regarding the calculation of their retirement benefits by the Trustees Barclays Bank Staff Pension Fund.

3. On 29th September, 2012 the Tribunal made an order whose concluding paragraph was as follows:

“The Tribunal has therefore unanimously agreed that the matter be referred back to the Authority for fresh consideration, taking into account all the matters that were not individually considered and all the subsequent documents, correspondence and admissions subsequently made.

Orders are made accordingly.

Mention on 19th October, 2012.”

4. Upon reconsidering the matter, the RBA made its fresh decision through a letter dated 27th November, 2013. The last paragraph of that letter again dismissed the interested parties’ complaint in the following words:

“In view of the foregoing, we find that the benefits for all the complainants were correctly computed by the trustees (particularly the application for early payment) and where variances were found these have been indicated for the trustees’ action. The variances that we have noted are either negative (showing overpayment by trustees) or positive (showing an underpayment). However, the positive variances are not substantial.”

5. Everything seems to have gone quiet thereafter until 8th July, 2014 when the interested parties filed a fresh Memorandum of Appeal before the Tribunal against the decision made by the RBA on 27th November, 2013. This fresh appeal was not given a number by the Tribunal but was instead consolidated with **Appeal No. 1 of 2012**. This state of affairs is what propelled the applicants to approach this Court on 8th April, 2015 to seek leave to commence these judicial review proceedings.

6. Upon being granted leave to commence these judicial review proceedings, the applicants through the Notice of Motion Application date 15th April, 2015 seek orders as follows:

“1. An Order of *certiorari* to quash the Orders of the 1st Respondent dated 14th November 2014 in RBATC No. 1 of 2012 – *Njoroge Serah Wahu & others v The Trustees, Barclays Bank of Kenya Pension Fund*.

2. An Order of *Prohibition* to restrain the 1st Respondent from hearing and or entertaining any further proceedings in RBATC No. 1 of 2012 – *Njoroge, Serah Wahu & Others v The Trustees, Barclays Bank of Kenya Pension Fund* and any proceedings concerning the same parties.

3. Costs of and incidental to the application be provided for.

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

7. From the statutory statement dated 2nd April, 2015, the grounds upon which relief is sought are:

“9. The decision of the 1st Respondent to rehear the matter when it is *functus officio* is contrary to the principle of finality of litigation.

10. The ‘merging’ of a determined appeal with a pending unnumbered appeal by the 1st Respondent is *ultra vires* the provisions of the Retirement Benefits Act, Act No. 3 of 1997 and is an irrational decision.

11. The decision of 1st Respondent to hear the (unnumbered) appeal that was filed seven (7) months after a decision was made by the 2nd Respondent is contrary to the express provisions of section 48(1) of the *Retirement Benefits Act*.

12. The orders issued by the 1st Respondent are therefore unreasonable, irrational and *ultra vires*.

13. The decision is also inconsistent with the legitimate expectation of the 1st Applicant with regard to the decision making process of the 1st Respondent.

14. If the 1st Respondent proceeds to hear and determine the matter before it, it will occasion substantial harm and prejudice to the 1st Applicant and its sponsor, the 2nd Applicant.

15. It is fair and just that the orders sought herein be granted.”

8. The interested parties opposed the application through a replying affidavit sworn on their behalf by Serah Wahu Njoroge on 4th May, 2015. Their case is that the applicants’ application as framed is an attempt to defeat justice and no judicial review orders should be granted to them.

9. Firstly, it is the interested parties’ position that there was no judgement delivered on 28th September, 2012 in **Retirement Benefits Appeal Tribunal Case No. 1 of 2012**. According to them only an order directing the RBA to consider the matter afresh was issued on that date. The RBA was directed to consider the matter afresh taking into account all the matters that were not individually considered and all subsequent documents, correspondences and admissions subsequently made. The interested parties’ view is that in issuing the order, the Tribunal wanted to ensure that all the facts of the case were before it before making its judgment.

10. It is the interested parties’ case that the Tribunal acted within the jurisdiction conferred on it by Section 48 of the Retirement Benefits Act which allows it to call for further evidence and/or interrogate a case before passing judgment. The Tribunal could not have determined the appeal in the absence of a final decision being made.

11. It is the interested parties’ averment that the fact that the Tribunal had fixed the matter for mention on 19th October, 2012 meant that the Tribunal was awaiting the Report of the RBA as directed in the order of 28th September, 2012.

12. The interested parties asserted that the RBA did not make its report until 27th November, 2013. This report was meant to assist the Tribunal in arriving at a just and fair decision. They submit that the Tribunal did not make any error of law as it is empowered under Section 49 of the Retirement Benefits Act to review the decisions of the RBA and even call for fresh and additional evidence before making any decision. The interested parties also submitted that judicial review is not available in this case as the Tribunal acted within its jurisdiction and afforded every party an opportunity to be heard.

13. The interested parties are of the opinion that even the language of the report of the RBA issued on 27th November, 2013 clearly shows that it was a report made pursuant to the order issued by the Tribunal on 28th September, 2012. The interested parties assert that it is this report which the applicants refer to as an **“unnumbered Appeal.”** According to the interested parties, the only way they could have placed the RBA’s report of 27th November, 2013 before the Tribunal was through a pleading and that is why their advocate filed a supplementary appeal in the original **Appeal No. 1 of 2012** and attached the report to the same.

14. The decision in this matter will be guided by the interpretation of the ‘order’ issued by the Tribunal on 28th September, 2012. The applicants’ position is that the said ‘order’ amounted to a judgment in respect of **Appeal No. 1 of 2012** which was pending before the Tribunal. It is therefore their view that the ‘order’ determined the appeal with finality.

15. On the other hand, the 1st and 3rd respondents and the interested parties are of the view that the

decision of 28th September, 2012 was not a judgment but an order issued in the course of the proceedings. They posit that since the Tribunal had not finalised the appeal, it was entitled to revisit the same with a view to finalising it.

16. In order to determine whether the Tribunal's decision dated 28th September, 2012 was a disposal of the appeal one has to consider the entire proceedings. The Tribunal's record of 28th September, 2012 shows that Mr. Amadi was acting for the appellants (the interested parties in these judicial review proceedings). Mr. Echesa was holding brief for Mr. Momanyi for the 2nd Respondent (Trustees Barclays Bank Staff Pension Fund – the 1st Applicant in these judicial review proceedings) and Ms. Wanjiru Ngige was for the 1st Respondent (the RBA – the 2nd Respondent in these judicial review proceedings).

17. Mr Amadi is recorded to have addressed the Tribunal thus:

“Matter is coming up for hearing. We have placed all material necessary before the Tribunal. A decision can be made.”

18. Mr. Echesa stated:

“I am not in a position to give Mr. Momanyi's position. All parties have filed their pleadings. Tribunal may consider.”

19. What followed thereafter is the Tribunal's decision which is titled “order.” The Tribunal opened its decision with the following words:

“We have a duty to make sure that no delays are caused for whatever reasons. We have all the documents before us and have noted that the advocate for the 2nd Respondent is absent; the advocate of the Appellant is present as well as the one for the 1st Respondent who is holding brief for the 2nd Respondent.

We have seen all the papers, documents and submissions made to date and thus proceed in the absence of the advocate for the 2nd Respondent. We have diligently considered all the grounds of appeal before us and all the positions/grounds submitted to date and have perused and tried to consider fully the opinion of the 1st Respondent from which the appeal arises.”

20. The Tribunal then proceeded to summarise the appeal before it and went ahead to state:

“Having considered their decision and the challenge to it and having considered all the documents, papers, affidavits, statements filed before us, we note that subsequent to the decision of the 1st Respondent, the 2nd Respondent in relation to a letter dated 2nd April, 2012 made sudden confessions. They admit that they had made a number of errors and miscalculations in certain matters.

The letter dated 2nd April, 2012 is subsequent to the 1st Respondent's decision of 6th December, 2011. It therefore follows that after having ruled and considered this matter, it is evident that the 1st Respondent made an error in stating that they had considered all the details before it ruled that the 2nd Respondent's decision was correct.”

21. The Tribunal then proceeded to fault RBA's decision on other grounds and concluded that:

“Having considered all this matter, we have come to a conclusion on the weight of the evidence before us that the grounds of appeal submitted by the Appellants are fully merited. Consequently, we are of the view that any judgement which is devoid of a fair hearing does not amount to a proper decision.

The decision of the 1st Respondent contained in a letter dated 6th December, 2011 leads us to conclude that this is not a proper decision and was not made as required under the Retirement Benefits Act.

The Tribunal has therefore unanimously agreed that the matter be referred back to the Authority for fresh consideration, taking into account all the matters that were not individually considered and all the subsequent documents, correspondence and admissions subsequently made.

Orders are made accordingly.

Mention on 19th October, 2012.”

22. Any bystander reading the proceedings and the order of the Tribunal will come to the quick conclusion that the appellants’ appeal against the decision made by the RBA on 6th December, 2011 was heard on 28th September, 2012. The proceedings will also reveal that the appeal was allowed, the decision of the RBA set aside, and the matter referred back to the RBA for a fresh hearing. That is the conclusion I have reached.

23. Not only are the proceedings unambiguous, even the conduct of the parties thereafter shows that they all knew that **Appeal No. 1 of 2012** had been heard and concluded by the Tribunal.

24. Evidence of this is found in the letter of the Tribunal addressed to the RBA on 20th November, 2012. That letter states:

“RE: RBATCA Number 1 of 2012

Sarah Njoroge & Others – Versus- Retirement Benefits Authority & Another

On 28th September, 2012 the Tribunal referred the above matter to you for further consideration and determination. At its meeting yesterday, the tribunal noted that your decision had not been given to the parties.

Kindly advise by return mail, the progress so far made in finalising the matter.”

25. Again the language is very clear that the matter had been referred to the RBA for hearing and determination. Upon conclusion, the outcome was to be communicated to the parties. There is no mention that the matter was to be referred back to the Tribunal for further action.

26. The letter dated 27th November, 2013 and which all parties agreed was the RBA’s fresh decision is clear that the matter was meant to be dealt with afresh. The decision states in part:

“The Authority in complying with the Tribunal’s orders, calculated each member’s benefits (the summary of calculations is attached herein). The findings arrived at by the Authority were disclosed to both the trustees and the appellants’ Advocates on record. All the parties in the suit were given a chance to a fair hearing. A meeting between officials of the Authority and representatives of the Appellants was scheduled for 5th June, 2013. The Appellants and their Advocate failed to attend the meeting despite being invited to do so. A meeting was scheduled between the Scheme Administrator and Authority officials on 14th June, 2013 at 11 a.m. This meeting also did not take place. Having received no objection, the Authority herein makes its final decision.”

27. Even the interested parties’ actions shows that a fresh decision had been made by the RBA on 27th November, 2013. They therefore proceeded to file a new appeal in 2014. That appeal was not given a

number by the Tribunal. In their papers filed in Court, the interested parties clearly stated that matter was **“an Appeal from the further decision of the Retirement Benefits Authority at Nairobi dated 27th November, 2013.”**

28. Everything therefore points to the conclusion that the order issued by the Tribunal on 28th September, 2012 was a disposal of the interested parties’ appeal. Any decision made by the RBA would be a new decision which could only be challenged through the filing of a fresh appeal as was correctly done by the interested parties.

29. However, the matter did not end logically as it was supposed to. On 14th November, 2014, the Tribunal issued a ruling merging the interested parties’ **Appeal No. 1 of 2012** with the appeal filed in 2014.

30. I have already pointed out that **Appeal No. 1 of 2012** was concluded through the order of 28th September, 2012. Consequently, the Tribunal became *functus officio* and had no business revisiting the matter or merging it with another appeal.

31. Secondly, as correctly pointed out by the applicants, the appeal filed in 2014 was filed outside the 30 days prescribed by Section 49(1) of the Retirement Benefits Act. Thankfully, the respondents and interested parties did not attempt to contest this clear point of law. Any action done outside the period fixed by statute is invalid. The Tribunal had no jurisdiction to entertain an appeal that had been filed several months after the period provided by statute for filing appeals had lapsed.

32. The applicants are indeed correct that the Tribunal erred when they purported to merge a concluded appeal with a fresh appeal. The Tribunal did not have jurisdiction to merge a decided appeal with a fresh appeal.

33. As was stated in **Republic v Vice Chancellor Jomo Kenyatta University & Technology ex parte Dr. Cecilia Mwathi & another [2008] eKLR**, judicial review is available:

- “1. Where there is abuse of discretion.**
- 2. Where the decision maker exercises discretion for an improper purpose.**
- 3. Where the decision maker is in breach of duty to act fairly.**
- 4. Where the decision maker has failed to exercise statutory discretion reasonably.**
- 5. Where the decision maker acts in a manner to frustrate the purpose of the Act donating power.**
- 6. Where the decision maker fails to exercise discretion.**
- 7. Where the decision maker fetters the discretion given.**
- 8. Where the decision is irrational and unreasonable.”**

34. In the circumstances of this case, I am satisfied that the applicants have met the conditions for grant of judicial review orders. An order of *certiorari* will therefore issue calling into this court and quashing the Tribunal’s ruling dated 14th November, 2014 in **RBATC No. 1 of 2012 – Njoroge Serah Wahu & others v the Trustees, Barclays Bank of Kenya Staff Pension Fund**. An order of *prohibition* will also issue prohibiting the Tribunal from hearing or entertaining any further proceedings in **RBATC No. 1 of 2012 – Njoroge Serah Wahu & Others v The Trustees, Barclays bank of Kenya Staff Pension Fund** or any other matter between the parties concerning the same facts which gave rise to the said appeal. There will be no orders as to costs.

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

W. KORIR,

JUDGE OF THE HIGH COURT