



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

HC MISC. JR. NO. 331 OF 2012

BETWEEN

REPUBLIC APPLICANT

AND

THE RETIREMENT BENEFITS APPEALS

TRIBUNAL 1ST RESPONDENT

THE RETIREMENT BENEFITS

AUTHORITY 2ND RESPONDENT

TELEPOSTA PENSION SCHEME 3RD RESPONDENT

AND

MACKENZIE M. MOGERE 1ST INTERESTED PARTY

JOHNSON MURIGU NDORIA 2ND INTERESTED PARTY

TELKOM KENYA LIMITED 3RD INTERESTED PARTY

EX PARTE

WILLY JEREMIAH OMBESE

RULING NO. 2

1. After leave was granted on 23rd August 2012, the *ex-parte* applicant (“the applicant”) filed the Notice of Motion dated 12th September 2012 seeking the following orders;
 - i. An order of certiorari to remove to this Honourable Court to be quashed the decision of the Retirement Benefits Appeal Tribunal made on 23rd February 2012 purporting to direct that Retirement benefits to given pensioners will be calculated based on their consolidated salaries.
 - ii. Further and in the alternative to prayer one above an order or mandamus compelling the

Retirement Benefits Appeal Tribunal to review the decision made on 23rd February 2012 in light of the interests of the pensioners who directly benefit from the scheme and were not at the Senior Management level.

2. Although the prayers in Motion did not refer to the specific decision to be quashed, the grounds upon which the application was premised is disclosed at paragraph (ii) on the face of the motion which states that, “*The Retirement Benefits Appeals Tribunal sat in Nairobi on 23rd February 2012 for RBAT Civil Appeals Case Number 2 of 2009 and made a decision that went contrary to the rules of the Scheme’s Trust Deed and Rules*”.
3. In the course of hearing the motion, counsel for the 1st and 2nd interested parties, Mr Odero, submitted that the decision which the applicant seeks to quash by the order of certiorari is not the one that is annexed to the applicant’s verifying affidavit sworn on 22nd August 2012. According to that deposition, the applicant states as follows;

[15] THAT am also aware that one of the said staff obtained a decision on 23rd February 2012 in his favour in RETIREMENT BENEFITS APPEAL TRIBUNAL CAUSE NUMBER 2 OF 2009 whereupon the Tribunal has adjudicated that remember is to have his pension revaluated on the basis of his consolidated salary and opposed to the basic salary.

4. The decision attached to the verifying affidavit as exhibit “**WJO-5**” is the decision in **Civil Appeal No. 3 of 2009, Johnson Muringu Ndoria v Retirement Benefits Authority and Trustees of Teleposta Pension Scheme** which was delivered by the Retirement Benefits Appeal Tribunal on 24th July 2012.
5. Mr Odero contended that the Notice of Motion is incompetent as it seeks to quash a decision that is not the subject of these proceedings as it has not been annexed to the verifying affidavit. In other words, counsel submitted, that if the application concerns **RBAT Civil Appeal No. 2 of 2009** which was delivered on 23rd February 2012, then the decision in that appeal is not before the Court, it cannot be quashed and as a result the entire application is vitiated. Counsel further submitted that this defect had been raised early in the proceedings and in the written submissions yet the applicant did not take any steps to rectify it.
6. The issue raised by Mr Odero arose during the proceedings and since it is a preliminary point which could dispose of the application within the meaning of the decision in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A 696**, I called upon Mr Okindo, counsel for the applicant, to respond to this specific objection.
7. Mr Okindo conceded that the impugned decision was not annexed to the applicant’s verifying affidavit. He attributed this to an advertent error on the advocate’s part. He urged that the applicant should not be penalised for the error of counsel. Counsel called in aid **Article 159(2)(d)** of the Constitution and submitted that the should eschew technicalities in determining issues before it. He contended that the interested parties would not suffer any prejudice by the failure to furnish the proper decision. He pointed to the fact that the two Tribunal decisions dealt with the same issues and were now available to the court. He noted that the decision to be quashed was annexed to the replying affidavit of the 1st interested party. In the circumstances he argued that the court would be able to adjudicate the dispute substantively. He urged the court to be guided by the overriding objective and to do justice in the matter.
8. As the objection taken by the 1st and 2nd interested parties is a matter of compliance with procedure, I am guided by the broad principle set out in the Constitution. **Article 159(2)(d)** of the Constitution provides that, “(2) *In exercising judicial authority, the courts and tribunals shall be guided by the following principles—(d) justice shall be administered without undue regard to procedural technicalities.*” The Supreme Court elaborated the meaning of this provision in **Raila Odinga v Independent Electoral and Boundaries Commission SCK Petition No. 5 of 2013 [2013]eKLR** where it observed that, “*The essence of that provision is that a Court of law should*

not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course.” [Emphasis mine] As the Court stated, I am now called upon to examine all the facts and determine the best course in the circumstances.

9. **Order 53 rule 7(1)** of the **Civil Procedure Rules** provides that in the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, *“unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.”* As the order of certiorari is directed at a particular decision, it is important that a party who wishes the Court to quash such a decision ought to exhibit the decision in question or account to the satisfaction of the Court the inability to do so. Assuming that order referred to under **Order 53(7)** includes the decision of Tribunal to be quashed; the decision in **Civil Appeal No. 2 of 2009** which was delivered on 23rd February 2012 ought to have been annexed to the verifying affidavit.
10. This is not the end of the matter because, under the rule, the applicant may, before the hearing of the motion, lodge a copy of the decision or account for the failure to do so to the satisfaction of the court. Although the applicant has not lodged such an affidavit contemplated in **Order 53(7)(1)** of the **Civil Procedure Rules**, the applicant counsel has attempted to explain the fact that there was an inadvertent mistake in attaching the wrong decision to the verifying affidavit.
11. I have considered the record and I take the following view of the matter. The decision attached to the verifying affidavit marked as **“WJO-5”** at the footer states **“Judgment Civil Appeal No. 2 of 2009”** yet the judgment is the one for **Civil Appeal No. 3 of 2009**. Although the appellants are different in both matters, the respondents are the same and both judgments deal with the same subject matter. There is a reasonable basis for me to conclude that there was an inadvertent mistake by the counsel preparing the documents. In the circumstances, I do not think it would be proper to penalise the applicant for such inadvertence. I adopt the sentiments of Madan JA **Murai v Murai (No.4) [1982] KLR 38, 47** in which stated that, *“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it was committed by Senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”*
12. Both decisions of the Tribunal are before the court through the depositions of the 3rd respondent and the 1st interested party hence the court is not in the dark about what the Tribunal decided. The beneficiaries of both decisions, Johnson Muringu Ndoria and Mackenzie M. Mogere are the 1st and 2nd interested parties in the matter. I am therefore satisfied that they will not suffer any prejudice as they are entitled to contest the decision.
13. My determination is buttressed by my ruling of 16th May 2013. When I first heard the matter, it became apparent that the parties directly affected by this decision of the Tribunal had not been served. I considered that matter one of public interest whereupon I directed that the application be advertised so that interested parties may be joined to the proceedings. I therefore find that it is also in the public interest not to strike out the suit.
14. I have no doubt that the decision impugned by the applicant is the decision **Civil Appeal No. 2 of 2009, Mackenzie M. Mogere v Chief Executive Officer Telkom Kenya Staff Pension Scheme**. The decision is available to the court and all the parties have filed extensive written submissions

on the matter.

15.I decline to strike out the motion as the ends of justice would not be met by taking such drastic action. I direct the *ex-parte* applicant to file an affidavit verifying the decision in ***Retirement Benefits Appeals Tribunal, Civil Appeal No. 2 of 2009, Mackenzie M. Mogere v Chief Executive Officer and Telkom Kenya Staff Pension Scheme.***

DATED and **DELIVERED** at **NAIROBI** this 15th day of May 2014

D.S. MAJANJA

JUDGE

Mr Okindo instructed Wangechi Munene and Company Advocates by for the ex-parte applicants.

Mr Kiche instructed by Ochieng' Onyango Kibet and Ohaga Advocates for the 2nd respondent.

Mr Aloo instructed by Mwaura and Wachira Advocates for the 3rd respondent.

Mr Odero instructed by Meshack Odero and Company Advocates for the 1st and 2nd interested party.

Ms Mate instructed by Iseme, Kamau and Maema and Advocates for the 3rd interested party.