REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 407 OF 2013

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF: ORDER 53, RULE OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF: SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: THE KENYA POSTS AND TELECOMMUNICATIONS CORPORATION (PENSION) REGULATIONS, 1985 (REPEALED)

AND

IN THE MATTER OF: THE RETIREMENT BENEFITS ACT CAP 197, ACT NO. 3 OF 1997

BETWEEN

THE REPUBLIC ..... APPLICANT

VERSUS

THE RETIREMENT BENEFITS APPEALS

TRIBUNAL.....1ST RESPONDENT

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

ROBERT KIBET KILEL….....3RD RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 29th November, 2013, filed the same day, the *ex parte* applicants herein, **Registered Board of Trustees of the Teleposta Pension Scheme**, seeks the following orders:

1. **An order of certiorari to remove into this Honourable Court for purposes of being quashed the decision of the Retirement Benefits Appeals Tribunal made on the 15th of May 2013 purporting to set aside the decision of the 2nd Respondent declaring that the 3rd Respondent was not pensionable under the Kenya Post and Telecommunications Corporation (Pension) Regulations 1985 (Repealed).**
2. **An order of certiorari to remove into this Honourable Court for purposes of being quashed the decision of the Retirement Benefits Appeals Tribunal made on the 15th of May 2013 declaring that the 3rd Respondent's period of pensionable service is between 9th April 1985 and 14th July, 1995 inclusive.**
3. **A declaration that the decision of the Respondent in Retirement Benefits Appeals Tribunal Civil Appeal 3 of 2013 was and is invalid and of no effect.**
4. **An order that the cost of this application be borne by the respondents.**

Ex Parte Applicant's Case

2. The said Motion is supported by Statutory Statement filed 12th November, 2013 and Verifying Affidavit sworn on 11th November, 2013 by **Peter K. Rotich**, the Administrator and Trust Secretary of the Applicant.
3. According to the deponent, the 1st Respondent on 15th May 2013 in Retirement Benefits Appeal Tribunal Civil Appeals Cause No. 3 of 2013 (hereinafter referred to as the said case) rendered a decision in which it decided that the 3rd Respondent was a pensionable employee which decision offends the rules of natural justice and is contrary to the ***Kenya Post and Telecommunications Corporation (Pension) Regulations, 1985*** (hereinafter referred to as the Regulations).
4. It was averred that by adjudicating over the matter the 1st Respondent acted in excess of its jurisdiction which is limited to disputes between pensioners and their schemes yet the Applicant was not a pensioner.
5. It was further deposed that the 3rd Respondent's claim was outside the statutory limitation and though the issue was raised the 1st Respondent failed to address its mind to it. It was further deposed that the decision was fundamentally and procedurally flawed as the 1st Respondent despite directing the parties to file submissions. The Applicant did not serve the Applicant with submissions yet the 1st Respondent proceeded to render the decision without hearing the Applicant's advocates and further failed to give reasons for the decision.
6. It was therefore the applicant's case that the 1st Respondent's decision was biased and was made in disregard of the rules of natural justice.
7. According to the deponent, the applicant's advocates were all along waiting for the 3rd respondent's submissions in order to respond thereto and highlight the response. However the 1st Respondent in its reasons given on 15th May 2013 purportedly considered the 3rd Respondent's submissions allegedly filed on 23rd April 2013 which submissions were not on record on 24th April 2013. It was therefore averred that the 1st Respondent did not fairly hear both parties and that it made up its mind on the decision to be made in spite of the submissions. Accordingly the Applicant was locked out of raising the substantive issues it intended to raise such as the fact that the 3rd Respondent's cause was time barred as well as the clear legal provisions applicable to the scheme. One of such matters was that the 3rd Respondent not being a member of the Scheme was not entitled to any benefit therefrom. Ton the Applicant, by failing to address itself to the issue of

limitation the 1st Respondent failed to address the issue of jurisdiction.

Respondent's Case

8. In Response to the application, the 3rd Respondent on 15th November, 2013 filed a replying affidavit sworn on 14th November, 2013.
9. According to him, the application as framed does not lie for the grant of Judicial Review Orders since all the grounds relied upon in the application are grounds of appeal and not Judicial Review. To him, the grounds relied upon in the application relates to the merits or otherwise of the decision of the Tribunal, which ordinarily are not grounds for Judicial Review.
10. According to the 3rd Respondent, the Tribunal acted within its jurisdiction as conferred under Section 48 of the ***Retirement Benefits Act*** and that the procedure followed by the Tribunal was fair and lawful and each party was allowed to file their documents and submit accordingly hence all the rules of natural justice were followed. The applicant, according to him, is not alleging that they were denied a chance to defend themselves but is only attacking the merits of the decision which does not lie in Judicial Review.
11. He further deposed that there is no error of law as the calculations adopted by the tribunal took into account the issue of taxation of the benefits payable to him and moreover, the applicant never raised such an issue in their pleadings and submissions before the tribunal and therefore the same cannot form a basis for Judicial Review. He therefore contended that the application has had no merit, an abuse of court process, frivolous and filed in bad faith to delay the conclusion of this matter since no order of Judicial Review can be granted where the Tribunal acted within its jurisdiction and afforded each party a fair opportunity to be heard.
12. To the 3rd Respondent, the application is an attempt to challenge the merits of the decision of the Tribunal through an orthodox way by the applicant to seek judicial review orders and further that the tribunal relied upon the correct proposition of the law and facts and took into account all the relevant statute laws and regulations at the time.
13. He contended that the claim at the Tribunal was premised on one main fact, whether he had worked for 10 years to qualify for pension and the trustees, applicants being in a superior position fraudulently concealed the material facts relevant to his pension from him yet he had worked for 10 years and 3 months to qualify for pension whereas the applicant deliberately computed his years as less and denied him pension. He deposed that he was employed on 9th April 1995 up to 14th July 1995.
14. In his view, the alleged interest of third parties who never participated in the proceedings before the tribunal cannot form a ground for Judicial Review to vitiate the decision of the Tribunal. In his averments he reiterated and adopted the contents, meanings and effects of the contents of his written submission dated 19th April 2013 and the memorandum of Claim filed at the Tribunal in response to this application and stated that based on his years of service his pension ought to be 1/500 X 123 X 78480 = 19,306/= per month effective 14th July 1995 hence he is entitled to arrears of Kshs. 3,938,440/-

Applicant's Submissions

15. On behalf of the Applicant it was submitted that the 1st Respondent's decision is unreasonable, unfair and full of fundamental errors for failing to take into account the fact that its decision could adversely affect the many pensioners almost 7,237 who depend on their monthly pensions for survival should the scheme collapse as a result of the enforcement of the decision. In the Applicant's view, the 1st Respondent in arriving at the impugned decision acted ultra vires hence the need to subject to judicial review. It was further submitted that the 1st Respondent entertained a claim which was statute barred and over which it had no jurisdiction.
16. While reciting the principles which guide judicial review remedies, it was submitted that the question whether the 3rd Respondent qualified for pension was purely an employment matter which ought to have been adjudicated over by the Industrial Court and not the 1st Respondent since the 1st Respondent had no powers to declare the 3rd Respondent a pensioner. According to

the Applicant the law as it is envisages a situation where persons who are "pensioners" and have disputes over their pension are the ones with the right to seek redress before the 1st Respondent and those whose status have not yet been confirmed. It was therefore contended that by adjudicating over the matter the 1st Respondent conferred upon itself jurisdiction to preside over a matter which jurisdiction no statute has conferred upon it.

17. It was submitted that the 1st Respondent did not consider the submissions made by the parties since despite directing the parties to file submissions the Tribunal went ahead to deliver its decision without hearing the parties but promising to give reasons later.
18. In support of the submissions the Applicant relied on **Council of Civil Service Unions vs. Minister for the Civil Service [1984] 3 All ER 935**, **Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 273**, **Kenya National Examination Council vs. Republic ex parte Geoffrey Gathenji Njoroge & 9 Others Civil Appeal No. 266 of 1996**, **Anisminic Limited vs. Foreign Compensation Commission [1969] 1 All ER 208**, **Republic vs. The Public Procurement Administrative Board ex parte Avante International Technology Inc. Nbi HCJR Application No. 451 of 2013**, **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Kuria and 3 Others vs. Attorney General [2002] 2 KLR 69**, **Republic vs. The Commissioner of Lands ex parte Lake Flowers Limited Nbi HCMA No. 1235 of 1998** and **Owners of Motor Vessel "Lillian S" vs. Caltex Oil (Kenya Ltd [1989] KLR 1**.

3rd Respondent's Submissions

19. On behalf of the 3rd Respondent, it was submitted that the grounds adduced and relied upon in the application are grounds of appeal and not judicial review since the grounds relate to the merits or otherwise of the decision of the 1st Respondent yet in order to succeed in an application for judicial review, the applicant has to show that the decision complained of is tainted with illegality, irrationality and procedural impropriety.
20. It was submitted that the Tribunal acted within its jurisdiction as conferred under section 48 of the ***Retirement Benefits Act***. To the said respondent a wrong decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for judicial review. According to him, the procedure followed by the 1st Respondent was fair and lawful and each party was allowed to file the relevant documents and submit accordingly hence all the rules of natural justice were followed.
21. With respect to the calculations it was submitted that the 1st Respondent took into account the issue of taxation of benefits payable to the applicant and in any case that issue was not raised in the pleadings and submissions before the 1st Respondent. It was submitted that the claim before the 1st Respondent was premised on the issue whether the applicant had worked for 10 years to qualify for pension.
22. According to him since the dispute revolved around the issue of trust, under section 20(1)(b) and 2 of the ***Limitation of Actions Act***, Cap 22 Laws of Kenya, the matter was not time barred. In any case the issue of limitation was not argued before the 1st Respondent.
23. In support of the submissions the said Respondent relied on **Republic vs. Commissioner of Customs Services ex parte Africa K-Link International Limited Nairobi HCMJR No. 157 of 2012 [2012] eKLR**, **Benson Hongo Hugo Mwangi & 40 Others vs. National Bank of Kenya & Others HCCC No. 89 of 2008**.

Determinations

24. As rightly submitted by the applicant based on **Pastoli vs. Kabale District Local Government Council and Others** (supra), **Council of Civil Service Unions vs. Minister for the Civil Service** (Supra), **Associated Provincial Picture Houses vs. Wednesbury Corporation** (Supra):

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural

impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

25. The Applicant contends that the 1st Respondent's decision is irrational due to the fact that the applicant stands to suffer a substantial loss and that the Applicant's functions may be crippled should former Senior Management Staff opt to lodge with the 1st Respondent similar claims. With due respect that is not what 'irrationality' in terms of judicial review means. What is meant by irrationality is that there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision such a decision being in defiance of logic and acceptable moral standards. Therefore it is not just any unreasonable decision which will amount to irrationality but the unreasonableness must be gross. In this case the Applicant has not shown that the 1st Respondent's decision is grossly unreasonable. The mere fact that other people may lodge similar claims based on the 1st Respondent's decision does not necessarily elevate it to the level of gross unreasonableness.
26. The next issue is whether the failure by the 1st Respondent to address itself to the issue of limitation rendered its decision being one made in excess of jurisdiction. Limitation it must be recognized does not extinguish causes of action. As was held by **Bosire, J** (as he then was) in **Rawal vs. Rawal [1990] KLR 275**:

"The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims".

27. This decision cited Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321 where it was stated:

"The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case".

28. The same position was taken in Iga vs. Makerere University [1972] EA 65 in which it was held:

"A plaint which is barred by limitation is a plaint "barred by law". A reading of the provisions of sections 3 and 4 of the Limitation Act (Cap 70) together with Order 7 rule 6 of the Civil Procedure Rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court "shall reject" his claim...The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief".

29. Since the Act does not extinguish a claim but only bars the bringing of the same, where the barrier is lifted by extension of time the claim may still be sustained. Apart from extension the parties themselves may either expressly or by implication waive the defence of limitation. This was held by the Court of Appeal in **Stephen Onyango Achola & Another vs. Edward Sule Hongo & Another Civil Appeal No. 209 of 2001 [2004] 1 KLR 462:**

"Order 6 Rule 4(1) and (2) require a person relying on the provision of a statute such as limitation to specifically plead the statute on whose provisions he relies to defeat the Appellant's claim and not just raise it as a preliminary objection…….A party who has not specifically pleaded limitation is not entitled to rely on that issue and base his preliminary objection on it; nor is he entitled to rely on that defence during the trial as cases must be decided on the issues pleaded and a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit."

30. In this case, it is clear that the issue of limitation was never raised before the 1st Respondent. The Applicant however contends that it was never afforded an opportunity of being heard on the issue since it was never served with the 3rd Respondent's submissions in order for it to respond thereto and later on highlight the submissions. That may be so. However the position remains that limitation was never raised before the 1st Respondent and the 1st Respondent was not obliged to consider it. Whether or not the Applicant was afforded an opportunity to raise the issue is the subject of the next determination.
31. That the parties were directed to file their submissions is agreed by both the parties herein. There is no allegation that the 3rd Respondent was directed to file and serve his submissions first before the Applicant could file his. Apart from that the proceedings before the 1st Respondent have not been exhibited in these proceedings to enable the Court determine what the exact directions were. It was incumbent upon the Applicant to annex the same. If the directions were simply that the parties file their submissions, it would follow that by waiting to be served with the 3rd Respondent's submissions, the Applicant squandered the opportunity to raise the issues it intended to raise and it has itself to blame for that. In **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** the Court of Appeal held:

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

32. The Applicant further raised the issue that the 1st Respondent had no jurisdiction to entertain the matter before it since a determination had to be made whether or not the 3rd Respondent was a pensioner. Whether or not the 3rd Respondent was a pensioner was clearly a factual matter and the 1st Respondent was clearly empowered to deal with the issue since that was a prerequisite to the hearing. In my view, if the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction. Where the Tribunal has made a factual finding, it is not for this Court in judicial review proceedings to interfere with such finding since such a decision would go to the merit of the decision and by interfering with such a finding this Court would be acting as an appellate court rather than a judicial review court.
33. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

"It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly..... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise..... Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction.....Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction."

34. However where the Tribunal makes a finding on facts which findings clearly show that it has no jurisdiction this Court would no doubt be entitled to interfere. That however is not the same thing as saying that no matter what decision is made this Court must interfere. In my view a tribunal is properly entitled to make a decision on the limits of its jurisdiction. However, whatever decision it makes is not final but is subject to a review by the Court. As aptly put in **Anisminic Ltd vs. Foreign Compensation Commission** (supra):

"if one party submits to a tribunal that its powers are wider than in fact they are, then the tribunal must first deal with that submission. But if they reach a wrong conclusion as to the width of their powers, the court must be able to correct that – not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on true construction of their powers, they had no right to deal".

35. In other words the issue of jurisdiction must first be dealt with by the tribunal before proceeding further depending on the outcome of the issue. However, the tribunal ought not to down its tools at the mere mention of the word "jurisdiction".
36. In any case as the Applicant did not file submissions, the issue whether or not the 3rd Respondent was a pensioner was not raised before the 1st Respondent. On whether or not the Applicant ought to have been given a chance to highlight submissions, there were no submissions filed on behalf of the Applicant to be highlighted. In any case the 1st Respondent having directed the parties on the mode of hearing which was by way of written submissions, it was not obliged to hear the parties orally.
37. I agree with the 3rd Respondent that the rest of the matters raised in the submissions are matters which went to the merits of the dispute between the parties herein. However judicial review proceedings do not deal with the merits of the decision but by the decision making process. In

Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 the Court of Appeal held:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

38. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
39. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.
40. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.
41. Consequently I find no merit in this application.
42. With respect to costs, it is clear that nowhere in the title is the applicant mentioned. In fact this Court had to peruse all the documents filed in this matter before deducing who the applicant is. In other words the application was not properly intituled. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -

"REPUBLIC……..……..……..……..APPLICANT

V

THE ELECTORAL COMMISSION OF KENYA……..…RESPONDENT.

EX PARTE

JOTHAM MULATI WELAMONDI"

ORDER

43. In the result the Notice of Motion dated 29th November, 2013 fails and is dismissed but with no order as to costs.

Dated at Nairobi this day 5th of May 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ogutu for the Applicant

Mr Otara for Mr Koceyo for 3rd Respondent

Court Clerk Kevin