



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**MISC CIVIL APPLICATION NO. 403 OF 2012**

**IN THE MATTER OF AN APPLICATION SEEKING AN ORDER OF JUDICIAL REVIEW BY  
LOCAL AUTHORITIES PENSIONS TRUST (LAPTRUST)**

**AND**

**IN THE MATTER OF RETIREMENT BENEFITS ACT NO. 3 OF 1997**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CHAIRMAN RETIREMENT BENEFITS**

**AUTHORITY APPEALS TRIBUNAL.....RESPONDENT**

**STEPHEN MBOROKI MUTEITHIA.....1<sup>ST</sup> INTERESTED PARTY**

**CHIEF EXECUTIVE OFFICER**

**RETIREMENT BENEFITS AUTHORITY...2<sup>ND</sup> INTERESTED PARTY**

**EX PARTE LOCAL AUTHORITIES PENSIONSTRUST (LAPTRUST)**

**JUDGEMENT**

1. By a Notice of Motion dated 14<sup>th</sup> November, 2012, the *ex parte* Applicants herein seek the following orders:

- a. **An order of Certiorari to bring to the High Court and quash the decision/ruling of the Respondent dated 19<sup>th</sup> October 2012 in the Retirement Benefits Appeals Tribunal at Nairobi Civil Appeals No. 5 of 2010 Stephen Mboroki Muteithia vs – Chief Executive Officer, Retirement Benefits Authority and Local Authorities Pensions Trust (Interested Party) Laptrust where it was held and ordered that:-**
  - i. **The Applicant herein do pay to the 1<sup>st</sup> Interested Party herein Kshs. 4, 158,308.70/=.**
  - ii. **The Applicant herein to pay to the Interested Party herein a monthly pension of Kshs. 49,157.30/= in accordance with its Rules.**
  - iii. **The Applicant herein do pay to the 1<sup>st</sup> Interested Party herein the costs of the application assessed at Kshs. 10,000/=**
- b. **Costs for and incidental to this application be in the cause.**

**EX PARTE APPLICANTS' CASE**

2. The application is based on the following grounds set out in the statement of facts dated 9<sup>th</sup> November, 2012 and the verifying affidavit of **Hosea Kili** sworn on the same date and the submissions filed thereon. In brief, the facts of this application originate from a judgement delivered by the Retirement Benefit Appeals Tribunal (hereinafter referred to as the Tribunal) on 27<sup>th</sup> July, 2011. The said judgement concerned calculation of the 1<sup>st</sup> Interested Party's pension benefits payable by the Applicants herein the Local Authorities Pensions Trust (hereinafter referred to as LAPTRUST). In the said judgement, the Tribunal ordered that:
  - a. **The Interested Party (LAPTRUST) to calculate the Appellant's (1<sup>st</sup> Interested Party herein) retirement benefits for the period 1<sup>st</sup> August, 1988 to 30<sup>th</sup> June, 2009 inclusive in accordance with the Interested Party's Rules;**
  - b. **The Interested Party does give the Appellant a true, full and proper account of all benefits due, paid or payable to him;**
  - c. **Either party has liberty to appeal.**
3. Following the delivery of the above judgement, the 1<sup>st</sup> Interested Party herein filed before the Tribunal a Notice of Motion dated 27<sup>th</sup> August, 2012 in which he sought interpretation of the said judgement in the following prayers:
  - a. ....
  - b. **That the Hon. Tribunal be pleased to interpret its judgement delivered on the 27<sup>th</sup> of July, 2011 and more particularly on the exact lump sum payable and the monthly pension due to the Applicant**
  - c. **That pursuant to the prayer (a) above, the Hon. Tribunal be pleased to adopt the actuarial calculations done by the Mr. Samuel Ngigi Bsc. Actuarial science.**
  - d. **That the Hon. Tribunal be pleased to order the Interested Party to immediately pay the sums due and or in arrears pursuant to prayers (a) and (b) above.**
  - e. **That the Appellant/ Applicant be awarded costs of the Application.**
4. Consequently, the Tribunal delivered its ruling on the Notice of Motion dated 27<sup>th</sup> August, 2012 containing the above prayers as follows:
  - a. **The Interested Party do pay to the Appellant the balance of Kshs. 4, 158, 308.70/- as set out above.**
  - b. **The Interested Party do pay to the Appellant a monthly pension of Kshs. 49,157.30/- in accordance with its Rules.**
  - c. **The Interested Party do pay to the Appellant the costs of this Application assessed at Kshs. 10,000.00/-**

5. It is the aforesaid decision which triggered these proceedings.
6. The Applicant contends that the Tribunal in making the said ruling acted *ultra vires* its jurisdiction and its judgement of 27<sup>th</sup> July 2011 by making substantive orders that had neither been sought nor obtained in the appeal determined by it on 27<sup>th</sup> July, 2011. It is also the Applicant's contention that by relying on the calculations of one Samuel Ngigi (herein after referred to as the actuary) to calculate the 1<sup>st</sup> Interested Party's benefits and which calculations were not before the Tribunal in the Appeal, the Tribunal acted *ultra vires* its judgement of 27<sup>th</sup> July, 2011. Therefore, according to the Applicant, the Tribunal ought to have considered the Applicant's previous calculations which it had done according to its Rules in compliance with the judgement and which calculations were before the Tribunal as an annexure to the Appellant's (1<sup>st</sup> Interested Party) application.
7. The Applicant submit that the Tribunal did not ascertain the qualifications and competence of the said actuary; whether he had made his calculations in accordance with rule 87(1) of the **Local Authority Pension Trust Rules, 2007** (herein after referred to as rules) but blindly relied on his calculations which were based on data and information provided by the 1<sup>st</sup> Interested Party and not on the Applicant's Rules as the Tribunal had ordered in the 27<sup>th</sup> July, 2011 Judgement. In adopting the report of the said actuary the Tribunal acted *ultra vires* its judgement 27<sup>th</sup> July, 2011 as the said actuary's report was not part of the Appeal on which the said judgement had been delivered. The Applicant further argues that after delivery of the said judgement the court became *functus official* and therefore that judgement could only be reviewed or set aside.
8. The Applicant submits that the said actuary's report was not impartial but a document a document of the 1<sup>st</sup> Interested Party to the prejudice of the Applicant. The qualifications of the actuary are also contested.
9. The Applicant also contend that the Tribunal did not accord it an opportunity to present it side of the case either orally or through submissions and therefore it is guilty of breaching the rules of natural justice. In this regard, the Applicant states that when its advocate appeared before the Tribunal on 28<sup>th</sup> September, 2012, they were not allowed to file submissions but the court stood over the matter for ruling on 19<sup>th</sup> October, 2012.
10. The Applicant relies on the case of **Lawrence B. Keitany vs. Retirement Benefits Authority Tribunal & Another [2011] eKLR** to the effect that this court has jurisdiction to intervene where the Tribunal acts without taking into account the relevant trust deed and rules. The Applicant also cited **Three Ways Shipping (K) vs. KPA [2012] eKLR** on the point that the High Court has jurisdiction in all matters save those reserved to specific courts by the Constitution. Through the supplementary submissions filed on behalf of the Applicant, attempt was made to distinguish the authorities relied upon by the 1<sup>st</sup> Interested Party.

### **INTERESTED PARTY'S CASE**

11. In opposition to the application, **Mr. Stephen Mboroki Muteithia**, the 1<sup>st</sup> Interested Party herein swore an affidavit on 15<sup>th</sup> December, 2012. He also filed submissions. The 1<sup>st</sup> Interested Party stated that the application herein is bad in law and as is nuanced with misrepresentations of material facts and evidence pertaining to the proceedings before the Tribunal. He sought to clarify the background of the application through a detailed chronological set of events which led to the Tribunal's ruling of 19<sup>th</sup> October, 2012, the subject matter of the present application.
12. The 1<sup>st</sup> Interested Party argues that after the judgement of 27<sup>th</sup> July 2011, the Applicant did not adhere to the methodology of calculation as was ordered by the Tribunal prompting him to for apply for the interpretation of the said judgement from the Tribunal. Accordingly, he filed the application before the Tribunal and served the Applicant together with the other parties. The application was scheduled for hearing and all parties were represented on the date of hearing. However, the Applicant had not filed a response to his application or even submissions and its advocate was not ready to proceed thus forcing the Tribunal to adjourn the matter. As such, in the 1<sup>st</sup> Interested Party's view the Tribunal followed due processes of the law both procedural and substantive and all parties were afforded an opportunity to be heard. He submits that the Applicant on its own volition chose not to respond to the application for interpretation of judgement despite having occasioned an adjournment as evidenced by the Tribunals proceedings.

13. In respect to the Applicant's argument that the Tribunal acted *ultra vires* its judgement and in excess of jurisdiction, the 1<sup>st</sup> Interested Party argues that the Tribunal's ruling dated 19<sup>th</sup> October, 2012 was sound in law and more so in respect to the following:-
- a. **The reliance by the Tribunal on the report of the 1<sup>st</sup> Interested Party was as a result of implied admission for non-averments on the same.**
  - b. **That the Ruling did not add a new order but merely interpreted the judgment dated 27/7/2011 in terms of specific amount payable as a result of a dispute over computation.**
  - c. **That at page 100 of the judgement particularly paragraph (c) the Honourable Tribunal had reserved the right of either party to apply to the tribunal for interpretation of its judgement.**
  - d. **That the payments as ordered by the Appeals Tribunal amounted to his rightful constitutional share of the retirement benefits as provided for in the law.**
14. According to the 1<sup>st</sup> Interested Party, the report by the actuary was not relied on by the Tribunal as a factual and evidential report on a contentious matter of fact but as a tool to aid the Tribunal in interpreting its judgement. Further, he opines that the professional qualification and experience of the actuary was contained in his report and also the methodology used in calculation.
15. It is also the 1<sup>st</sup> Interested Party's position that the Tribunal akin to other courts have jurisdiction to interpret their judgements to ensure that the ends of justice are met.
16. The 1<sup>st</sup> Interested Party contend that the finding of the Tribunal was sound in facts and in law as in litigation responses are made to the facts contained in the pleadings filed. Therefore, on the strength of the ***Retirement Benefits (Tribunal) Rules, 2000***, Rule 12 and Order 2 rule 2 of the ***Civil Procedure Rules***, he opines that response should come after the pleading and in the absence of that, it is trite law that non response to the facts amount to admission. He relies on **Mary Wambui Munene vs. Independent Electoral and Boundaries Commission, Nairobi HCPT No. 549 of 2012.**
17. It is also the 1<sup>st</sup> Interested Party's case that the Applicant's calculations were not properly adduced before the Tribunal and therefore could not be considered by it. Furthermore, he states that the said Applicant's calculations had already been the subject of determination by the Tribunal in its judgement of 27<sup>th</sup> July, 2011 and the methodology of calculation was rejected by the Tribunal.
18. It is also the 1<sup>st</sup> Interested Party's case that the Tribunal had jurisdiction to interpret its judgement by virtue of Section 3A, 1A and 1B of the ***Civil Procedure Act*** which allows courts to exercise its inherent power and make such orders as maybe necessary for the ends of justice to be met or to prevent abuse of the process of the court.
19. In his opinion, the 1<sup>st</sup> Interested Party states that the issue of impartiality of the report by the Actuary is an issue which ought to have been raised at the hearing of the application for interpretation of judgement and is not a subject of judicial review. Allegations of impartiality raise an issue of factual evidence otherwise not amenable to Judicial Review Application. He stressed that in an adversarial system of litigation like ours, parties must present their rival arguments and evidence as a Tribunal can only rule based on materials presented before it.
20. The 1<sup>st</sup> Interested Party states that he does not dispute the jurisdiction of this court but only the appropriateness of the grant of the orders sought. In this regard, he submits that judicial review deals with the manner of decision making and not the merit of the decision. The following decided cases are cited to that effect: **Kenya Pipeline Company Limited and Housing Finance Ebara Company Limited and Others [2012]e KLR, Grain Bulk Handlers Limited vs. J.B. Maina and Co. Ltd and 2 Others [2006]eKLR, Republic vs. Judicial Service Commission ex parte Pareno (2007) 1 KLR, Nicholas Muchora and 5 Others vs. Senior Resident Magistrate[2011] eKLR and Republic vs. The National Environment Management Authority, Civil Appeal No. 84 of 2010.**

## **DETERMINATION**

21. I have considered the Notice of Motion, affidavits, the written submissions and judicial authorities herein. At the outset it is important to set out the jurisdiction of the court in judicial review proceedings and the scope of the orders amenable thereunder. The scope of the judicial review

remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996 in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

22. 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.”

23. 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 4<sup>th</sup> Edition Vol (1)(1) Para 60.***
24. 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.**
25. 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) 1 WLR 1155.**
26. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** the Court citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** held:

**“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.”**

27. Having considered the broad principles I have come to the conclusion that this court is called upon to adjudicate on two substantive issues as follows:
- a. **Did the Tribunal act *ultra vires* its jurisdiction and judgement of 27<sup>th</sup> July, 2011 by relying on the said actuary's calculations to interpret its judgement?**
  - b. **Was the Applicant afforded an opportunity to be heard by the Tribunal?**

28. The Applicant argues that the calculations the Tribunal ought to have relied on while interpreting its judgement to compute the 1<sup>st</sup> Interested Party's retirement benefits are its calculations which were annexed in the 1<sup>st</sup> Interested Party's application for interpretation of judgement. The 1<sup>st</sup> Interested Party on the other hand contends that the Applicant's calculations were not properly adduced before the Tribunal and therefore could not be considered. Furthermore, he states that the said Applicant's calculations had already been the subject of determination by the Tribunal in its judgement of 27<sup>th</sup> July, 2011 and the methodology of calculation was rejected. As such, owing to

- the failure of the Applicant to file a response to his application, the Tribunal had no option but to rely on his pleadings on which the actuary's report was attached.
29. The Applicant contended that its failure to file response to the 1<sup>st</sup> Interested Party's application notwithstanding, the Tribunal should not have relied on actuary's calculations which were not before court at the time of appeal. To do so amounted to introducing extraneous materials after judgement and thus *ultra vires*. The 1<sup>st</sup> Interested Party disputes this argument and states that the calculations of the actuary were not used by the Tribunal as a factual and evidential report on a contentious matter of fact but as a tool to aid the Tribunal in interpreting its judgement.
30. Materially, the specific part of the judgment stated:

**“The Interested Party (LAPTRUST) to calculate the Appellant's (1<sup>st</sup> Interested Party herein) retirement benefits for the period 1<sup>st</sup> August, 1988 to 30<sup>th</sup> June, 2009 inclusive in accordance with the Interested Party's Rules..”**

31. From the going, it is clear that the real issue in contention is whether the court was justified within its mandate in the circumstances to rely on the said actuary's report and whether the said actuary's calculations were done in accordance with the Applicant's rules as envisaged by the Tribunal's judgement which was interpreted.
32. That the Court and by extension a Tribunal such as the instant one retains a residual power in no longer in dispute. In **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself *inter alia* as follows:

**“The Law of Succession Act, like section 3A of the Civil Procedure Act has a saving provision as to the court's jurisdiction under section 47 which is affirmed by rule 73 of the Probate and Administration Rules. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.”**

33. Similarly **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru Hccc No. 262 Of 2005** held:

**“The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”**

34. In **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA** (as he then was) emphasised that it is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice.
35. One of the instances in which the court exercises this residual power is in the fulfilment of its

obligation to ensure that the orders it issues are not issued in vain. This was recognised by the Court of Appeal in **Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another Civil Application No. Nai. 101 of 2009** where it was held that the Court has the duty to ensure that its orders are at all times effective.

36. Accordingly, I find nothing wrong in the Tribunal entertaining the proceedings whose effect was to ensure that its earlier decision was given effect since it had the power to give effect to its decision. No provision of the rules should be so construed as to preclude a court from giving effect to its decision. To the contrary, any court must have the power to give effect to its decisions. See **Peter Mburu Echaria vs. Priscilla Njeri Echaria Civil Appeal No. 75 of 2001 [2007] 2 EA 139; Mawji vs. Arusha General Store Civil Appeal No. 19 of 1969 [1970] EA 137.**
37. In my view what the Respondent was doing was to simply give effect to its earlier decision and if it went wrong that would not be a ground for interference. In reaching its determination, it must however, be recognised that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. 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.”**

38. In **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others, Civil Application No. 307 of 2003**, Omolo JA stated as follows;

**“The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of**

**existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way.”**

39. The Applicant argues that the Tribunal did not ascertain whether the actuary had made his calculations in accordance with rule 87(1) of the *Local Authority Pension Trust Rules*. I have perused the Tribunal’s ruling the subject matter herein and I find that indeed the Tribunal scrutinised the report of the actuary for compliance with the rules and found it compliant. On page 4, paragraph 2 of the said ruling, the Tribunal stated:-

**“We have perused and fully considered the Report of actuary, Samuel Ngigi annexure SM8 in the Affidavit of the Appellant. We have not found any reason to interfere or depart from the facts stated therein. The Actuary has not made or relied on any assumptions. The report sets out the facts necessary in the Rules of the Interested Party so as to arrive at fair and reasonable computation of the benefits payable to the appellant.”**

40. The Tribunal after stating the above went ahead to interpret its judgement using the actuary’s report to arrive at the benefits payable to the 1<sup>st</sup> Interested Party.

41. No rule or a decided authority has been cited to show that a Tribunal was wrong in relying on the 1<sup>st</sup> Interested Party’s calculations as done by the actuary. Further, the Applicant has not demonstrated to this court which of its rules was violated by the said actuary’s report. Instead, what the Applicant has done in this application is to attack the qualification of the actuary an issue not relevant to a judicial review court since that goes to the merits rather than the decision. I also agree with the 1<sup>st</sup> Interested Party that the Tribunal relied on the actuary’s report not as a factual and evidential report on a contentious matter of fact but as a tool to aid the Tribunal in interpreting its judgement. As such, I find the Tribunal did all that it was expected to do in the circumstances. In so doing, the Tribunal had no option but to rely on the 1<sup>st</sup> Interested Party’s arguments which were guided by the actuary’s calculations. For this court to find otherwise it will have to make extraneous considerations regarding rules and methodology of calculations ought to have been used to determine the 1<sup>st</sup> Interested Party’s benefits. This will in effect seek to solve the core dispute between the Applicant and the 1<sup>st</sup> Interested Party herein against the tenets of judicial review as was set out by Lord Diplock in Council for Civil Service Unions (supra). See also R vs. Judicial Service Commission ex parte Pareno Misc. Civil Application No. 1025 of 2003, where the court held that it is not the function of the courts to substitute their decision in place of those made by the targeted or challenged body.

42. **Was the Applicant afforded an opportunity to be heard by the Tribunal?** It is trite law that the right to be heard embodies a basic fundamental of fairness, justice and Constitutionalism.

Nyamu J. (as he then was) citing with approval *Halsbury Laws of England 4<sup>th</sup> Edition Vol 1 Para 74 pg 20-21*, In the Matter of an Application by Ali Sele, Benson Wairagu & Joseph Ng’ethe gitu [2008] eKLR, held:

**“The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice....”**

13. However, 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.”**

43. The Applicant contend that the Tribunal did not accord it an opportunity to present its side of the case either orally or through submission and therefore it acted in breach of the rules of natural justice. In this regard, the Applicant states when its advocates appeared before the Tribunal on 28<sup>th</sup> September, 2012 they were not allowed to file submission but the court in disregard of their pleas stood over the matter for ruling on 19<sup>th</sup> October, 2012.
44. I have perused the Tribunal's proceedings of the said date and nothing could be far from the truth. The said proceedings show that the Applicant who was the Interested Party in that Tribunal application was represented by a **Mr. Amadi**. **Mr. Amadi** appeared on instructions to hold brief for **Mr. Mbabu** the Interested Party's advocate in present application. The Respondent, the 2<sup>nd</sup> Interested Party herein was represented by **Mr. Echesa**. **Mr. Amadi** indicated that he had no instruction to proceed with the hearing of the application but did not say anything about filing of response or submissions. On the other hand, **Mr. Echesa** informed the court of intention to file submissions within 7 days.
45. Further, from the Tribunal's proceedings and the ruling of 19<sup>th</sup> October, 2012, it is clear that neither the Applicant nor the 2<sup>nd</sup> Interested Party herein filed any response or submissions. I believe this court would have viewed its plea differently if the Applicant had filed its submissions even after 28<sup>th</sup> September, 2012 and the Tribunal ignored the same.
46. The Applicant submitted that it had no problem with the Respondent interpreting its judgement and therefore it needed not file any objection thereof. Nonetheless, it did not expect the Tribunal to use the actuary's report to interpret its judgement. With due respect this argument is untenable and is unfair to the Tribunal as the 1<sup>st</sup> Interested Party had served the applicant with the Notice of Motion dated 27<sup>th</sup> August, 2012 in which the 1<sup>st</sup> Interested Party sought to have the Tribunal adopt the report of the said actuary for computation of his benefits.
47. It is also my opinion that, for what it would have been worth, the Applicant ought to have filed a relevant reply opposing the use of the said actuary's report rather than wait to challenge the decision of the Tribunal afterwards. The Tribunal in its 27<sup>th</sup> July, 2011 judgement had already ordered the computation of the 1<sup>st</sup> Interested Party benefits according to the Applicant's Rules and therefore it was incumbent upon the Applicant to present its computations for the Tribunal to consider. To sit passively and wait for the court to make its finding on the basis of its adversary's arguments robbed the Applicant the right to lament that it was not accorded an opportunity to be heard. The applicant slept on his rights and it is now too late to lament in these nature of the proceedings as opposed to an appeal.
48. The Court of Appeal in **Kenya National Examinations Council vs. Republic & Kemunto Regina Ouru (Suing through her next friend James Ouru) & Others [2010] KLR**, cited ***Michael Fordham, Judicial Review Handbook; 4<sup>th</sup> Edition at pg. 1007*** with approval that:

**“Procedural fairness is a flexi-principle. Natural Justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The context of the duty depends on the particular function and circumstances of the individual case.”**

49. In **Russel v Duke of Norfolk [1949] ALL ER at 118**, **Turker LJ** had this to say concerning the requirements of natural justice:

**There are in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of every case, the nature of inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted one essential is that the person concerned should have a reasonable opportunity of presenting his case. (emphasis mine).**

50. In the present case, as properly stated by the 1<sup>st</sup> Interested Party, the **Civil Procedure Rules** were applicable by virtue of **Retirement Benefits (Tribunal) Rules, 2000**, Rule 12 which provides:-

***In the matters of procedure not governed by these rules or the Act, the Tribunal may adopt the Civil Procedure Rules made under the Civil Procedure Act where Applicable.***

51. The applicable Order 2, rule 11 of the **Civil Procedure Rules** states:

***11. (1) Subject to subrule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it.***

***(2) A traverse may be made either by denial or by a statement of non-admission and either expressly or by necessary implication.***

***(3) Subject to subrule (4), every allegation of fact made in a plaint or counterclaim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence to counterclaim; and a general denial of such allegations, or a general statement of non-admission of them, shall not be a sufficient traverse of them.***

52. This position found favour with the Court of Appeal in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997** in which the Court said:

***“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.***

53. In the result the order that commends itself to me and which I hereby make is that the Notice of Motion dated 14<sup>th</sup> November, 2012 lacks merit and is hereby dismissed with costs to the 1<sup>st</sup> Interested Party.

**Dated at Nairobi this 5<sup>th</sup> day of July 2013**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of Mrs Mbaabu for the applicant and Mr Kamau for the interested party:***