



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**MISC. APPL. NO. 205 OF 2011**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE RETIREMENT BENEFITS**

**APPEALS TRIBUNAL ..... 1<sup>ST</sup> RESPONDENT**

**AND**

**CAPTAIN (RTD) CHARLES**

**MASINDE ..... 1<sup>ST</sup> INTERESTED PARTY**

**RETIREMENT BENEFITS**

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

**GENERAL MOTORS**

**EAST AFRICA LTD ..... 3<sup>RD</sup> INTERESTED PARTY**

***EX PARTE***

**AUGUSTINE JUMA**

**FRED O. WASIKE**

**MAURINE OKELLO**

**CHARLES KARIUKI**

**JOSHUA MANYARA**

**EMMANUEL OGOT .....**

.. (SUING IN THEIR CAPACITY AS TRUSTEES OF GENERAL MOTORS KENYA STAFF  
RETIREMENT BENEFITS SCHEME)

JUDGMENT

**Introduction**

1. The six *ex-parte* applicants (hereafter referred to as “the Trustees”) have sued in their capacity as trustees of General Motors East Africa Staff Retirement Benefits Scheme (“the Scheme”) which is a scheme established under irrevocable trusts on 1<sup>st</sup> January 1977. The Scheme was registered on 15<sup>th</sup> December 2000 as a retirement benefits scheme under the ***Retirement Benefits Act, 1997, No. 3 of 1997*** (“the Act”).
2. In their Notice of Motion dated the 8<sup>th</sup> September, 2011, the applicants seek, “*An order of CERTIORARI to remove into the High Court and quash the judgment of the Retirement Benefits Appeals Tribunal (“the RBA”) dated 27<sup>th</sup> July 2011 in Civil Appeal Number 1 of 2010 in the Retirement Benefits Appeals Tribunal (“the impugned Decision”).*”

**The Facts**

3. The subject of the Notice of Motion is a decision of the Retirement Benefits Appeals Tribunal (“the Tribunal”) of 27<sup>th</sup> July 2011 in which it upheld the decision of the Chief Executive Officer of the Retirement Benefits Authority (“RBA”) to have all vested benefits in the scheme paid to Captain Masinde, the 1<sup>st</sup> interested party herein and former employee of General Motors Kenya Limited (“General Motors”).
4. The facts are set out in the statutory statement and the Verifying affidavit of Fred. O. Wasike dated 24<sup>th</sup> August 2011. Captain Masinde was employed by General Motors on 1<sup>st</sup> February 1990 and became a member of the Scheme. By a letter dated 9<sup>th</sup> November 2001, Captain Masinde resigned from employment with General Motors after having served for 11 years and 1 month. During his time of employment, contributions to the Scheme were made by him and General Motors.
5. When Captain Masinde retired, General Motors wrote to Kabage and Mwirigi Insurance Brokers Limited, the Scheme’s Fund Managers enclosing the Staff Pension Fund withdrawal form for Captain Masinde and calling for payment of the benefits due to its employee. By a letter dated 14<sup>th</sup> November 2001, the Fund Manager responded by forwarding a computation of Captain Masinde’s benefits. The amount due to him was a gross amount of Kshs 4,525,163.89 and a net amount of Kshs 3,564,384.72 after deduction of tax.
6. Barclays Securities Services, the Custodians of the Scheme, drew a cheque dated 28<sup>th</sup> November 2001 in favour of General Motors for the sum of Kshs 4,525,163.90 as the total benefits due to Captain Masinde. Upon receipt of the cheque, General Motors went ahead to compute together with his terminal dues and paid out to him less the outstanding liabilities which included taxes, advances and loans. According to the Final Payment Authorisation Form by General Motors, the gross amount due to Captain Masinde was Kshs 6,240,903.90. After several deductions totalling to Kshs 5,556,510.60, the net amount paid to Captain Masinde on 4<sup>th</sup> December 2001 as final dues was Kshs 684,393.30.
7. After receiving his terminal dues, Captain Masinde filed suit against General Motors in August 2005; **Nairobi High Court Civil suit No. 975 of 2005, Rtd. Capt Charles Masinde vs. General Motors East Africa Limited**. He challenged, among other issues, the manner in which he was dismissed from service claiming that he had been coerced by the Managing Director into signing a resignation letter to give a wrong impression that he had voluntarily resigned. He also disputed the manner in which his terminal dues were computed and paid out to him. He sought the following

prayers in the plaint:

1. Kshs 8,850,000 under Paragraph 23 of the plaint [this was the amount claimed as a result of non-employment for 34 months due to non-issuance of a Certificate of Service by the defendant].
2. A true and proper account of Kshs 5,556,510.60 deducted by the defendant from the plaintiff's terminal dues.
3. A declaration that the plaintiff was rendered redundant by the plaintiff.
4. Redundancy payments amounting to Kshs 17,352,000.
5. General Damages.
6. Exemplary and aggravated damages.
7. Return of the plaintiff's record and other testimonials seized by the defendant at the time of dismissal.
8. Further and/or any other relief this Honourable court may deem appropriate and fit to grant.
9. Costs.

10. It is pertinent to note that in the Further Amended Plaint, Captain Masinde pleaded at paragraph 9 that, "[I]t was reflected that a sum of Kshs. 5,556,510/= would be deducted and was actually deducted from the Plaintiff's terminal benefits amounting to Kshs. 6,240,903.80/=. The plaintiff avers that the said deduction of Kshs. 5,556,510.00 from his terminal dues was illegal, capricious and malicious."

11. This suit was heard and on 19<sup>th</sup> August 2010, Ali-Aroni J., rendered her decision in that matter dismissing all the prayers with the exception of prayer (b) ordering that the deductions be recalculated and the discrepancies noted rectified and the same explained to the plaintiff. The court held thus, "From the evidence on record the mathematics of the deductions were not clear not even to the defence witness. It is only reasonable that the deductions be re-calculated the discrepancies noted rectified and the same explained to the plaintiff. In this regard the court is inclined to grant prayer b of the further amended plaint, that a true and proper account of Kshs 5,556,510.60 deducted from the plaintiff's dues and benefits be made and any refund due to him be paid forthwith."

12. On 18<sup>th</sup> May 2009, Captain Masinde wrote to the Trustees of the Scheme requesting for payment of his deferred benefits having attained his retirement age. As there was no response to his requisition, he lodged a complaint with the Chief Executive Officer ("Chief Executive") of the RBA on 4<sup>th</sup> June 2009 against the Trustees complaining that upon termination of employment with General Motors, his pension benefits had not been paid.

13. By a letter of 27<sup>th</sup> November 2009, the Chief Executive of RBA ordered the Trustees to pay Captain Masinde all his vested benefits. The letter read in part as follows;

*Take notice that the Chief Executive Officer of the Retirement Benefits Authority has investigated the affairs of your scheme with respect to the complaint filed by **Mr. Charles Masinde** a member of your scheme and has determined that you have failed to do the following:-*

*-Ensure that the member is accorded membership rights to his vested benefits in the above scheme in accordance with Regulation 20 of the Retirement Benefits (Occupational Retirement Schemes) Regulations, 2000.*

*-Ensure that the member is paid his leaving service benefits in accordance with Regulation 21 of the Retirement Benefits (Occupational Retirement Schemes) Regulations, 2000.*

.....

*Your conduct as trustees is, therefore, unsafe and unsound and consequently detrimental to the above scheme. You are hereby DIRECTED to refrain from such conduct and immediately undertake the following remedial steps:-*

1. Confirm to Mr. Charles Masinde that he is entitled to his vested benefits in the above scheme in full.
2. Pay the said Mr. Charles Masinde all his vested benefits in the above scheme.

TAKE FURTHER NOTICE that you are required to comply with the directions given above within Fourteen (14) days from the date hereof.

.....”

3. Being dissatisfied with the decision of the Chief Executive, the Scheme lodged an appeal with the Tribunal being **Civil Appeal No. 1 of 2010** seeking to have the directions reversed. After hearing the appeal, the Tribunal in its majority judgment delivered on 27<sup>th</sup> July 2011 dismissed the appeal. The tribunal summarised the findings on the issues it had framed for determination as follows;
  1. *Whether the Respondent has jurisdiction to determine the complaint filed by Captain (Rtd) Charles Masinde against the Appellants. YES*
  2. *Whether the High Court has determined Captain (Rtd) Charles Masinde’s claim against the Appellants. NO*
  3. *Whether the Appellants are liable to Captain (Rtd) Charles Masinde YES*
  4. *Interest and costs.*

The tribunal then made the following final Orders:

1. *The Appeal be and is hereby dismissed;*
2. *The Appellants shall jointly and severally pay to Captain (Rtd) Charles Masinde the sum of Kshs. 4,525,163.89;*
3. *The Appellants shall jointly and severally prepare and submit to Captain (Rtd) Charles Masinde a statement of account showing how the sum of Kshs. 4,525,163.89 is calculated and arrived at;*
4. *The Appellants shall jointly and severally pay interest on the sum decreed in (b) above from 14<sup>th</sup> November, 2001 until payment in full which shall not be less than the investment interest declared by the General Motors Kenya Limited Staff Retirement Benefits Scheme in the years that the benefit remained due;*
5. *The Appellants shall jointly and severally pay the Respondent’s costs of the Appeal.*
6. It is this decision that is now subject of the present Notice of Motion.

### **Applicants’ Case**

7. The Trustees contend that in arriving at the above decision, the Tribunal acted *ultravires*, exceeded its jurisdiction and acted in breach of Wednesbury principles. Further, that the Tribunal disregarded the principles of fairness and failed to consider pertinent facts resulting in Captain Masinde being paid terminal benefits already due to him.
8. The Trustees argue that the Chief Executive exceeded his mandate by ordering the Trustees to pay money to Captain Masinde. According to the applicants, **section 39** of the Act under which that order was made only allows the Chief Executive to order the trustee, manager, custodian or administrator to refrain from an act or course of conduct. That in so far as the Tribunal upheld such *ultra vires* decision, then it acted *ultra vires* the Act.
9. The applicants’ contend that Captain Masinde’s claim was entertained over eight years after he had left the Scheme contrary to **section 20(2)** of **Limitation of Actions Act (Chapter 22 of the Laws of Kenya)** which provides that an action by a beneficiary to recover trust property or in respect of any breach of trust may not be brought at the end of six years. That in disregarding the fact that Captain Masinde had left employment in the year 2001, both the Chief Executive and the Tribunal acted *ultra vires* the **Limitation of Actions Act** by upholding a claim made outside the period allowed in law.

10. The Trustees also contest the Tribunal's imposition of joint and several liability on them for the payment of the amount of Kshs 4, 525,163.89 implying that they were personally liable for the payment of the pension dues. They claim that the decision was made in total disregard of the fact that the Trustees sued were not trustees of the Scheme at the time Captain Masinde made his claim after leaving employment. It is their contention that the ***Trustee Act (Chapter 167 of the Laws of Kenya)*** indemnifies the Trustees from accounting or being responsible hence liable for funds which they had no control over. Thus, by directing them to jointly and severally account for funds which they did not receive or manage, the Tribunal acted *ultra vires* the ***Trustee Act***.
11. The Trustees accuse the Tribunal of failing to take into account the following pertinent material facts. First, that since Captain Masinde left employment on 9<sup>th</sup> November 2001, the Tribunal ought to have been guided by the trust deed existing on that date. It instead relied on the amended Trust Deed dated 29<sup>th</sup> November 2001 which was applicable after Masinde had left employment. Second, the Tribunal failed to take into account **Nairobi HCCC No. 975 of 2005** where Captain Masinde had sought an account of Kshs. 5,556,510.60. Third, the Tribunal failed to take into account the fact that the applicants were not Trustees at the time Captain Masinde left the employment and could not thus be liable for the actions of the previous Trustees. Accordingly and in as far as the Tribunal disregarded material facts, its decision was unreasonable and irrational.
12. The Trustees contend that the funds in the Scheme belong to the present members and hence any pay out from the scheme would prejudice innocent contributors. Closely related to this is the contention that the Tribunal failed to take into account RBA's responsibility of protecting the funds held in Scheme on behalf of members.
13. Mr Marete, counsel for the Trustees, emphasised that the issue of personal liability ought not to arise as these were mere trustees. He reiterated that the Tribunal's decision was *ultra vires*, that it laboured under a jurisdictional error and that it was *Wednesbury* unreasonable. Counsel also noted that it was an undisputed fact that in the year 2001, the Scheme removed from its assets, monies due and payable to Captain Masinde and therefore no liability as against the Scheme was established.
14. General Motors, the 3<sup>rd</sup> interested party, supports the Trustees case through the replying affidavit sworn on 4<sup>th</sup> November 2011 by Anthony Musyoki, its legal officer. Regarding the civil suit, General Motors deposes that Captain Masinde has been paid and derived benefit from the dues payable to him by the Scheme and that any further payment to him would result in unjust enrichment. Further that such payment would be drawn from the Scheme to the detriment of innocent members and therefore the decision of the RBA, in as far as it allows for amounts to be drawn from the members of the scheme is unreasonable and contrary to the RBA's statutory duty to ensure protection of members' deposits and the court ought not allow the Tribunal's decision to stand.

### **Respondent's Case**

15. The respondent, the Tribunal differed with the applicants' view point. According to the Tribunal, the Trustees failed in their fiduciary duty to Captain Masinde. They were required to directly vest full benefits in him and were under a legal obligation to act in his best interests. It is the Tribunal's case that the Trustees reneged on their duties when they failed to inform Captain Masinde that the payment was made to him and the fact that the cheque was drawn in the name of his employer instead of Captain Masinde without consulting him.
16. The Tribunal argues that in so far as the Trustees vested the pension dues on the sponsor, the beneficiary's former employer instead of directly on the member, they failed in their fiduciary duty to the 1<sup>st</sup> interested party. It was submitted that the Trustees breached **Rule 15** of the Scheme Rules which provided that, "*All benefits derived from contributions made by a member shall vest immediately in that member and the benefits derived from contributions made by the Founder*

- shall fully vest in a member after a maximum of five years of contribution years.”*
17. Ms Sirai, submitting on behalf of the Tribunal, reiterated that the Tribunal had jurisdiction under **section 48** of the Act and that the Chief Executive carried out his mandate according to **section 46** of the Act. She submitted that the decision was not unreasonable as the matter was based on the evidence and it was fair and reasonable.
18. Captain Masinde supported the decision of the Tribunal. He filed a replying affidavit sworn on 4<sup>th</sup> October 2011. Concerning the issue of the liability of Trustees, he countered that once a trust was formed, the Trustees’ actions bound their successors in office and at all times all the Trustees have perpetual succession.
19. Captain Masinde contends that upon becoming a member of the Scheme and upon having contributed to it for 5 years, he had legitimate and legal expectation that the benefits shall vest in him. According to him, vesting of pension benefits confers on a member absolute rights which can only be dealt with consent of the member upon whom the benefit is vested. He relied on **Rule 10** of the Rules of the Scheme which provide that upon resignation of a member of the Scheme, the member shall be entitled to the whole of his contributions to the Scheme plus full benefit of the contributions made to the Scheme by the Sponsor if the member has contributed to the scheme for over 5 years. Captain Masinde was emphatic that the sponsor has no lien over the pension benefits due and payable to the contributor and as such the sponsor, in this case General Motors, had no right to make the deductions and he was entitled to be paid the full pension benefits directly from the Scheme. Further that General Motors ought to have consulted him prior to making any deductions to his pension benefits. It was his case, therefore, that the Trustees were in breach of their fiduciary duty owed to him by delegating their trusts to the sponsor and by allowing the sponsor’s human resource manager who was not a trustee at the time to process transactions involving his retirement benefits.
20. Regarding **HCCC No. 975 of 2005**, Captain Masinde averred that its institution did not deny the RBA jurisdiction because in that suit, the issue of his pension benefits did not arise. That in instituting the suit, he was merely seeking a true and proper account of the purported deductions amounting to Kshs 5,556,510.60/= that was deducted from his terminal dues payable to him and that he was not seeking intervention in matters regarding his retirement benefits.
21. Mr Kilonzo, counsel for Captain Masinde, submitted that the Chief Executive made the decision as the Trustees failed to make a response. According to counsel, the Chief Executive and the Tribunal exercised their respective jurisdictions correctly, took into account all relevant factors and their decisions cannot be faulted.
22. The 2<sup>nd</sup> interested party, the RBA, supported the Tribunal’s decision through an affidavit sworn on 23<sup>rd</sup> September 2011 by Edward Odundo, Chief Executive Officer. The RBA opposes the application and supports the tribunal’s decision in finding fault in the trustee’s actions.
23. Mr Gichamba, counsel for the RBA, submitted that the Chief Executive relied on **section 46** of the Act and insisted that the decision was made in accordance with the RBA and the Scheme Rules. He reiterated that payments are to be made to the beneficiary and not to 3<sup>rd</sup> party and therefore any act contrary to this was illegal.

### **Determination**

24. To put the essence of this application in perspective, it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision. The case of **Republic v Chief Magistrate’s court Nairobi & 4 others ex parte Beth Wanja Njoroge [2013] eKLR, Nairobi Civil Misc Appl. 327 of 2011**, is apposite in this regard where Odunga J., held, “[20] *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. 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. I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or the ‘wrongness’ or error in interpretation or application of the law is not appropriately tested in a judicial review forum. In simple terms, 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 the prerogative writs. The Court of Appeal in ***Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others***, CA Civil Appeal 145 of 2011 [2012]eKLR expressed this view as follows; “[21]Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (*certiorari*) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter...”

26. It is these principles that will form the milieu for my determination in the present matter.

### ***Liability of current Trustees***

27. The applicants anchored their appeal to the Tribunal on the issue of liability. Their case being that in holding them personally and severally liable, the Tribunal failed to take into account pertinent facts that the applicants herein were not trustees at the time of the Captain Masinde’s exit from employment. Further, that by holding them so liable, it exposed the applicants to personal hardship and put at risk the Scheme’s members’ contributions. Closely connected to this issue is the question whether the tribunal acted *ultra vires* the ***Trustee Act*** in holding the trustees liable for breach of trust.

28. I have examined the Tribunal’s decision and find that indeed, the Tribunal assessed the applicants’ concern *vis a vis* the law applicable including ***the Act*** and the Trust Deed and rules with regard to duty of the Trustees to Captain Masinde. In finding the applicants’ liable, the tribunal made reference to the trustees’ duty under **sections 24 and 40 of *the Act*** which included the duty to ensure that the Scheme was at all times managed in accordance with the law, the Trust Deed and Rules and any directions given by the CEO, and to ensure that the management of the Scheme is carried out in the best interests of the members including Captain Masinde. In the majority judgment, the Tribunal observed that, “*It is trite law that in all cases, one identifies a breach of trust by showing that the term of the trust or a general duty imposed on the trustees has been contravened.*”

29. The Tribunal found that the applicants’ action of permitting General Motors through the Human Resource Manager to sign a retirement benefits claim form when he was not a trustee and without consulting Captain Masinde, they delegated their trusts in breach of their fiduciary duty to him. It also found that by permitting payment of the retirement benefits of Captain Masinde to General

Motors, they were in breach of the Scheme Rules and their general duty to pay benefits to the correct recipient in particular **Rule 15** and Clause 3 of the Trust Deed. Finally, it was the Tribunal's finding that by allowing General Motors to use the retirement benefits to satisfy alleged liabilities, they acquiesced in illegal assignment of retirement benefits in violation of **Regulation 22** of the **Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000** and **Rule 16** of the Trust Deed and Rules which state that no benefits or contributions accruing to a beneficiary shall be assigned.

30. In light of the findings, the Tribunal then concluded that, *“Where a trustee pays money to a person who is not a proper beneficiary of the trust, the liability of the trustees is strict. The law does not inquire into whether the trustee breached the trust innocently, negligently or intentionally. The trustee is liable for the breach regardless. The settled law is a trustee is bound to pay the right amount of benefits to the correct recipient. The trustee's duty to act loyally, honestly and in good faith are an irreducible core set of trustee obligations, breach of which cannot be relieved. ..The Appellants acted in breach of these duties. The Appellants are jointly and severally liable to Captain (RTD) Charles Masinde in the sum of Kshs. 4,525,163.89 allegedly paid by them to General Motors Limited.”*

31. I find and hold that the Tribunal was entitled to inquire into and make a finding as to the nature and extent of the Trustees liability in the circumstances. However, the main issue for consideration in this matter is what relief the Chief Executive could issue.

32. The letter dated 27<sup>th</sup> November 2009, which I have referred to at paragraph 11 above, is clear that the Chief Executive was exercising powers under **section 39** of the Act. Having found the Trustees liable, the Chief Executive had two options; first to direct the Scheme to pay the beneficiary the amount due to him but for the regulatory infraction or second, cause the Trustees to be charged with an offence under **section 39(2)** or **section 54** of the Act for failing to comply with his direction. The decision of the Chief Executive was what precipitated the appeal.

33. In deciding whether to order the Scheme to pay the Captain Masinde, the Tribunal considered the effect of the civil suit on the proceedings before the Tribunal. The Tribunal concluded that the issue of retirement benefits was not an issue before the court and that the Trustees were not parties to that suit thus the issue of payment of retirement dues was not dealt with by the Tribunal.

34. In the present case, however, I find that the Tribunal's decision, in as far as it made the applicants jointly and severally liable to pay the full amount of Kshs. 4,525,163.89 is irrational and unreasonable. I say so because contrary to the decision of the Tribunal the issue before the court was Captain Masinde's termination and payment of his retirement benefits as I have illustrated in the second part of this judgment. It was common ground that Captain Masinde had already been paid and received sums of Kshs 684,393.30 which was termed as terminal dues way back in the year 2001 which fact was not controverted. The sum paid to him was part of the total sum of Kshs. 4,525,163.89 from the Scheme paid by the Custodians of the Scheme to the Sponsor. It was not in dispute that the sum released from the Scheme and ultimately paid to the Captain Masinde less liabilities to the General Motors was part of the retirement dues. The Final Payment Authorisation Form is clear that the sums from the Custodian consisting of the personal and company contributions were included in the total sum making the employee's entitlement.

### ***Effect of HCCC No. 975 of 2005***

35. At the material time, Captain Masinde elected to file suit to contest the terminal benefits paid to him by his employer by seeking, *“A true and proper account of Kshs 5,556,510.60 deducted by the defendant from the plaintiff's terminal dues.”* Having elected to pursue the deductions from his retirement benefits from General Motors, Captain Masinde was estopped from demanding further payments from the Scheme since he had taken the benefit of payment made from the Scheme. In fact the substance of his case before the High Court was that General Motors ought not to have made any deduction from his retirement dues and it is for the reason that he sought an account.

Once the High Court had pronounced itself by ordering an account of the deductions made, the Tribunal could not circumvent the decision by ordering the Trustees to pay what the Scheme had already released to the Captain Masinde's employer.

36. While the Tribunal was correct to state that the Trustees were not sued in the High Court, the issue of deductions from the Captain Masinde's dues was the issue before the High Court and the remedy issued was that of an account. The learned Judge held, "*Although, the plaintiff signed a clearance certificate it was his contention that he did not agree with the computation neither did he sign the discharge certificate. From the evidence on record the mathematics of the deductions were not clear not even to the defence witness. It is only reasonable that the deductions be re-calculated and the discrepancies noted and rectified and the same explained to the plaintiff. In this regard the court is inclined to grant prayer b of the further amended plaint, that a true and proper account of Kshs. 5, 556,510.60 deducted from the plaintiff's dues be made and any refund due to him be paid forthwith.*"

37. Captain Masinde had alleged that the deductions were, "*illegal, capricious and malicious*" and in an action for account, the defendant must justify each disputed item of the account and where resolution is not reached on that account, the decision of the Court is sought on the contested items. Whether the General Motors could deduct its liabilities from the pension dues was a live issue in the matter which Captain Masinde was entitled to pursue in the suit rather than filing a fresh complaint before the RBA. In either case his argument was that the deductions were illegal for the reasons advanced and grounded on the Act and regulations governing payment of retirement dues.

38. It is clear that as a result of the judgment in the civil case, General Motors had the duty to justify each deduction from the Captain Masinde's retirement dues. By imposing on the Trustees liability to make payment for sums that had already been paid out of the Scheme and which were the subject of the civil case, the Tribunal's decision was unreasonable and irrational in the circumstances. It is my finding that by requiring the Trustees to pay the whole amount, in disregard of the effect of the judgment in the civil case renders the Tribunal's decision liable to quashing.

39. Although the Trustees had failed to comply with legal provisions in the manner in which they caused Captain Masinde's retirement benefits to be paid to General Motors, the decision by the Tribunal to order the Trustees to pay the sum of Kshs 4,525,163.89 in light of the judgment in **HCCC No. 795 of 2005** is irrational and unreasonable and must be quashed.

### **Disposition**

40. In the circumstances, I will allow the Notice of Motion and order as follows;

1. **An order of CERTIORARI is hereby granted to remove into the High Court and quash the final orders of the Retirement Benefits Appeals Tribunal ("the RBA") dated 27<sup>th</sup> July 2011 in Civil Appeal Number 1 of 2010 in the Retirement Benefits Appeals Tribunal dated 27<sup>th</sup> July 2011.**

1. I make no order as to costs.

**DELIVERED and DATED at NAIROBI this 1<sup>st</sup> November 2013.**

**D.S. MAJANJA**

**JUDGE**

Mr Marete with him Ms Ajiambo instructed by Kemboy and Company Advocates for *ex-parte* applicants and 3<sup>rd</sup> interested party.

Ms Mbilo, Litigation Counsel, instructed by the State Law Officer for respondent.

Wambua Kilonzo and Mr. Malonza instructed by Sisule, Munyi Kilonzo and Associates Advocates for 1<sup>st</sup> interested party.

Mr Gichamba instructed by Rachier and Amollo Advocates for 2<sup>nd</sup> interested party.