REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION NO. E089 OF 2025

IN THE MATTER OF: AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION AND A DECLARATION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF: THE RETIREMENT BENEFITS ACT, CAP 197

-BETWEEN -

REPUBLIC ……..…… APPLICANT

-AND-

RETIREMENT BENEFITS APPEALS TRIBUNAL …….. RESPONDENT
RETIREMENT BENEFITS AUTHORITY …… INTERESTED PARTY

-VERSUS-

RODGERS W. WASHIKA
KENNETH BOINET
GORDON OCHENG OCHAR
JOHN O. JAKAITI …… EX-PARTE APPLICANTS
AGGREY SIMIYU
RONALD LUKA
MURITHI MAINA

JUDGMENT

1. By a Notice of Motion dated 8th April 2025, filed pursuant to leave granted by this Court on 24th March 2025 in HCJR No. E066 of 2025, which Motion is premised on Sections 8 and 9 of the Law Reform Act, Cap 26, Section 1A, 1B and 3A of the Civil Procedure Act, Order 53 Rule 1 of the Civil Procedure Rules 2010, Section 11 of the Fair Administrative Action

Act and all other enabling provisions of the law, the exparte applicants seek the following Orders:

(1) A DECLARATION that the Respondent had no jurisdiction to hear and determine Nairobi Civil Appeal No. 6 of 2024 Rodgers W. Washika and 6 Others vs. Retirement Benefits Authority.

(2) CERTIORARI to remove the decision of the Respondent dated and delivered at Nairobi on 7th November 2024 in Civil Appeal No. 6 of 2024 Rodgers W. Washika and 6 Others vs. Retirement Benefits Authority and quash or set aside the said decision.

(3) PROHIBITION directed against the Respondent and the Interested Party forbidding the enforcement of the award of costs given to the Interested party in Civil Appeal No. 6 of 2024 Rodgers W. Washika and 6 Others vs. Retirement Benefits Authority.

(4) That the costs of this Application be awarded to the ex-parte Applicants.

2. The Application is supported by the Verifying Affidavit sworn by the 1st *ex-parte* Applicant Rodgers W. Washika on even date, the Statutory Statement filed in HCJR No. E066 of 2025 on 18th March 2025 and premised on the grounds that:

(1). The Respondent failed to determine whether or not it had jurisdiction before delving into the Respondent's Preliminary

Objection and consequently, the decision was procedurally unfair.

(2). The Respondent failed to take into account relevant considerations.

(3). The decision was materially influenced by an error of law and was made in bad faith.

(4). The decision violated the legitimate expectation of the ex-parte Applicants.

(5). The Respondent did not have jurisdiction to hear and determine the merits of the Nairobi Civil Appeal No. 6 of 2024.

3. The background of this matter is that the *ex-parte* Applicants filed a Memorandum of Claim dated 25th July 2024 before the Respondent – Retirement Benefits Authority Appeals Tribunal- wherein they sought a declaration that their appeal should not be heard and determined by the Tribunal for want of jurisdiction, but that, if the Tribunal were to find that it had jurisdiction, then it should grant several orders *inter alia*, the winding up of the Kenya Railways Staff Retirement Benefits Scheme.

4. That the Interested Party then filed a Notice of Preliminary Objection dated 27th August 2025 raising *inter alia* issues of jurisdiction and *locus standi* of the Tribunal and that of the *ex-parte* Applicants.

5. That in a Ruling rendered on 7th November 2024, the Tribunal/Respondent dismissed the matter having found that the exparte applicants'

Memorandum of Claim was a non-starter and held that the *ex-parte* Applicants were guilty of abuse of the court process.

6. Aggrieved by this determination, the *ex-parte* Applicants approached this Court for Judicial Review Orders as listed herein above.

7. In opposing the said Motion, the Interested Party filed a Replying Affidavit dated 3rd July 2025 and sworn by **Antony Kiarahu**, the Interested Party's Deputy Director for Legal Services.

8. According to the interested party, the appeal before the did not outline any decision of the Interested Party or its Chief Executive Officer to invoke the jurisdiction of the Respondent as envisaged by Section 48 (4) of the Retirement Benefits Act.

9. It was also deponed that the *ex-parte* Applicants themselves, from the onset, questioned the jurisdiction of the Tribunal, that they failed to demonstrate the authority to act on behalf of the other Scheme Members and failed to enjoin the Kenya Railways Staff Retirement Benefits Scheme to the suit thereby denying those others an opportunity to be heard. That this formed the basis of the interested party's Notice of Preliminary Objection which objection was upheld by the Respondent on 7th November 2024 when the Statement of Claim in ***RBAT Civil Appeal No. 6 of 2024*** was struck out and the appeal dismissed for want of jurisdiction.

10. Mr. Kiarahu further deposes that the Application dated 18th March 2025 is a continuation of the *ex-parte* Applicants' vexatious litigation and that the

substantive Application dated 8th April 2025 raises no justiciable issue but is instead an abuse of the court process and ought to be dismissed.

11. The notice of motion was canvassed by way of written submissions.

The *ex-parte* Applicants' Submissions

12. The *ex-parte* Applicants filed submissions are dated 28th August 2025. It was submitted that a tribunal has to consider any jurisdictional challenge raised before it even if the claimants themselves have initiated the proceedings based on the principle that a body must satisfy itself on jurisdiction before proceeding further. They relied on the case of ***Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Ltd (1989) KLR1*** and submitted that the issue of jurisdiction by the RBAT was one which even the Interested Party agreed upon with them and that consequently, the Respondent could not have proceeded to determine the Preliminary Objection in the first place without disposing of the issue of jurisdiction.

13. The exparte applicants further submitted that the Respondent's decision was materially influenced by an error of law and was made in bad faith. To this end, the cited the case of ***William Odhiambo Ramogi & 3 Others vs. Attorney General & 4 Others; Muslim for Human Rights and 2 others [2020] eKLR*** for the proposition that parties had to first exhaust alternative dispute resolution mechanisms before proceeding to courts and that, that

was the basis for the *ex-parte* Applicants availing themselves before the Tribunal under Section 48 (2) of the Retirement Benefits Act.

14. They further submitted that they filed the Appeal before the Respondent against the Interested Party to comply with the exhaustion doctrine, despite knowing that the said hearing would infringe on their rights and fundamental freedoms. In support, they cited ***Constitutional Petition No. 353 of 2012 Tom Kusienya & 7 Others vs. Kenya Railways Corporation and 3 Others*** as consolidated with ***Petition No. 159 of 2012 Daniel Owuor Obop & 2 Others vs. Retirement Benefits Authority***.

15. Further submission was that the Respondent blamed the *ex-parte* Applicants for approaching it under the doctrine of exhaustion, then faulted them for simultaneously asserting lack of jurisdiction and proceeded to strike out their claim for abuse of process, which according to the exparte applicants, was contrary to the requisite administrative process and was a decision made in bad faith and by an error of law.

16. Lastly, the exparte applicants submitted that the Respondent did not have any jurisdiction as it is a tribunal established under ***Article 169 (1) (d) of the Constitution*** and ***Section 47 of the Retirement Benefits Act*** and that until the Respondent was properly constituted, the administrative dispute resolution mechanism under the Act was not available to the *ex-parte* Applicants. They urged this court to allow the application as prayed.

The Interested Party's Submissions

17. The Interested Party filed submissions dated 5th December 2025 in which they raised three issues for determination namely:

    i. *whether the Court can interfere with the Tribunal's decision where the Applicants themselves initiated proceedings in a forum they admitted lacked jurisdiction;*

    ii. *whether the Judicial Review remedies lie against a Tribunal Ruling based on undisputed lack of jurisdiction and abuse of process; and*

    iii. *whether the Applicants have established procedural unfairness, illegality, irrationality or excess of power.*

18. It was submitted that Judicial Review was not a gateway through which an unsuccessful litigant would re-litigate what has been conclusively determined or an escape for the consequences of one's own procedural missteps. The interested party relied on the case of ***Republic vs. Retirement Benefits Appeals Tribunal' Post Office Savings Bank and Another (Interested Parties; Kalume & 75 Others (Ex-Parte Applicant) (Judicial Review Application No. E162 of 2024) (2025) KEHC 5419 KLR*** where the court is said to have held that Judicial Review was not intended to be a way of appeal or a re-examination of the merits of a case but whether a public body or tribunal acted unlawfully, irrationally or unfairly in making its decision.

19. Further, it was submitted that Judicial Review was a special supervisory jurisdiction under ***Article 47 of the Constitution*** and ***Section 7 of the Fair***

Administrative Action Act 2015, together with Order 53 of the Civil Procedure Rules and that as such, since the *ex-parte* Applicants' grievance is on the outcome and not the process of the Respondent in *RBAT Civil Appeal No. 6 of 2024*, they have not met the threshold for granting remedies under Judicial Review. In support of this, they relied on the cases of ***Republic vs. Commissioner of Customs Ex-Parte Africa K-Link International Limited (2012) eKLR, Judicial Review: Law, Procedure and Practices by Peter Kaluma at page 46, Pastoli vs. Kabale District Local Government Council (2008) 2 EA, 300*** and the case of ***Municipal Council of Mombasa v. Republic ex parte Umoja Consultants Ltd (2002) eKLR***.

20. It was submitted that ***Section 48 of the Retirement Benefits Act*** confers jurisdiction on the Tribunal under certain scenarios which the *ex-parte* Applicants failed to demonstrate existed and that the exparte applicants were well aware that the Tribunal lacked jurisdiction *ab initio* but still expected it to render a different decision.

21. Additionally, they contended that a Tribunal cannot confer upon itself jurisdiction and that where such jurisdiction is lacking, the jurisdiction must cease the proceedings as was held in the case of ***Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Ltd (supra)*** and in the Supreme Court case of ***Samuel Kamau Machari a& Another vs. Kenya Commercial Bank & 2 Others (2012) eKLR***.

22. The interested party submitted that the Tribunal properly declined to entertain a non-existent cause of action and was duty-bound to strike out the matter as an abuse of the court process.

23. Further submission was that a party cannot denounce a forum's jurisdiction and still expect a substantive remedy from that forum. Reliance was placed on the case of ***Banque de Moscou vs. Kindersley (1950) 2 All ER 549*** which is said to have clearly denounced the action of approbation and reprobation.

24. It was submitted further that these proceedings are a disguised appeal yet Certiorari and Prohibition do not exist to correct parties' litigation errors or to revive incompetent suits or rewrite statutory jurisdictional limits. Further, that courts cannot reward litigation ingenuity designed to circumvent statutory frameworks; that the suit was not a *bona fide* pursuit of the rights of the members under the Retirement Benefits Act and that since the Interested Party has expended significant time and resources to defend an unmerited case, it was only proper that they be entitled to costs.

Analysis and Determination

25. I have considered the exparte applicant's notice of motion application, the response thereto by the interested party and the respective parties' rival written submissions and arguments. I find that the main issue for

determination is whether the Notice of Motion dated 8th April 2025 is merited and whether the orders sought should granted.

26. Preliminary to this analysis, it is important to set out what Judicial Review entails, while appreciating that judicial review remedy is no longer a confined common law remedy in Kenya. The remedy has since been elevated to being a constitutional remedy for violated constitutional rights and freedoms. It is one of the remedies listed in Article 23 of the Constitution for violation of rights and fundamental freedoms. Accordingly, the court when confronted with an application seeking judicial review remedies, must not close its eyes to Articles 47, 22 and 23 of the Constitution, even if the application is brought under Order 53 of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act.(see the principle espoused in **Petition NO. 6 (E007) OF 2022 (Consolidated with Petition Nos. 4 (E005) & 8 (E010) OF 2022) Edwin Dande and others v Inspector General of Police and others.)**

27. That said, the applicants cite the constitutional provisions and the Fair Administrative Action Act but primarily, their application is predicated on Order 53 of the Civil Procedure Rules. In the often-cited Ugandan case of **Pastoli v Kabale District Local Government Council & Others (2008) 2 EA 300,** Judicial Review was explained as follows:

> ***"In order to succeed in an application for Judicial Review, the applicant had to show that the decision or act complained of is***

tainted with illegality, irrationality and procedural impropriety: see Council of Civil Service Union v Minister for the Civil Service (1985) AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

Illegality is when the decision-making authority commits an error of law in the process of taking the decision 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: Re An Application by Bukoba Gymnkhana Club (1963) EA 478 at page 479 paragraph "E".

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 (Al-Mehdawi vs. Secretary of State for the Home Department [1990] AC 876).”

28. Similarly, in the writings **Judicial Review (1997) by Michael Supperstone and James Goudie** at *pages 3.2 – 3.3, 3.20,* judicial review was explained as follows:

“…judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself…..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….where any person or body supervisions a power conferred by statute which affects the rights or legitimate expectations of citizens and is of a kind which the law requires to be supervision in accordance with the rules of natural justice, the court has jurisdiction to review the supervision of that power….for a decision to be susceptible to judicial review the decision maker must be empowered by public law to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers and that the decision must affect the private rights of some person or deprive another of some benefit which he had been allowed to enjoy in the

future or which he has a legitimate expectation of acquiring or enjoying."

29. In **Matemu vs. Trusted Society of Human Rights Alliance & 5 others (Civil Appeal 290 of 2012) [2013] KECA 445 (KLR) (26 July 2013) (Judgment),** the Court of Appeal at paragraph 54 made reference to the case of **PIL & Another vs. Union of India** and explained that Judicial Review does not entail an appellate process. It stated thus:

"54…. Supreme Court of India in Centre for PIL and Another v Union of India [Petition Writ no. 348 of 2010]) where the Court, in rejecting "merit review" of appointments by the courts, stated thus:

> ***…33… Judicial review seeks to ensure that the statutory duty of the HPC to recommend under the proviso to Section 4(1) is performed keeping in mind the policy and the purpose of the 2003 Act. <u>We are not sitting in appeal over the opinion of the HPC. What we have to see is whether relevant material and vital aspects having nexus to the object of the 2003 Act were taken into account when the decision to recommend took place on 3rd September, 2010</u>."***

30. From the above referenced material, the scope of Judicial Review is only to the extent that the courts, being vested with the authority to ensure accountability of public bodies and authorities in line with the principle of checks and balances alongside the constitution, is limited to considering

the decision-making process and not to sit as an appellate court. The **Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment)** decision of the Supreme Court of course, permits limited merit review in the circumstances stated in that case but those circumstances are not available in this case.in that case, the Supreme Court held *inter alia*, as follows:

> ***"When a party approached a court under the provisions of the Constitution then the court ought to carry out a merit review of the case. However, if a party filed a suit under the provisions of order 53 of the Civil Procedure Rules and did not claim any violation of rights or even violation of the Constitution, then the court could only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision per se.***
>
> ***The appellants invoked the judicial review jurisdiction of the High Court alleging that their rights to among others, fair administrative action under article 47 of the Constitution were violated, and applied for judicial review orders under article 23 of the Constitution. The appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, that required the superior courts to***

conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided."

31. In the instant case, it is apparent and not in dispute that the *ex-parte* Applicants herein instituted proceedings before the Retirement Benefits Appeals Tribunal vide Statement of Claim in *Nairobi Civil Appeal No. 6 of 2024* dated 25th July 2024 in which they sought several reliefs *including the fact that the Tribunal was to find and make a declaration that it lacks jurisdiction over the matter and that it could not hear the matter since that would amount to a violation of the ex-parte Applicants' constitutional rights.*

32. The grievances by the *ex-parte* Applicants stem from the registration and administration of the Kenya Railways Staff Retirement Benefits Scheme where the *ex-parte* Applicants decry that the Interested Party has neither adhered to certain statutory requirements nor enforced the legally established mechanisms for holding the officials of the Scheme accountable to the members. Those grievances cannot be constitutional questions.

33. In their Statement of Claim before the Respondent/Tribunal herein, the *ex-parte* Applicants outlined a myriad of issues ranging from the alleged illegal appointment of trustees, embezzlement and mismanagement of the Schemes' funds and assets, failure of the Interested Party to ensure

remittance and release of donations from the World Bank by the National Treasury, to ensure the Scheme's liquidity needs were met, to the allegation that some of the immovable assets of the Scheme were disposed of in an un-procedural manner. The *ex-parte* Applicants contended in the said claim that the Interested Party had denied them an opportunity to inspect the register contrary to **Section 30 of the Retirement Benefits Act** and that consequently, they sought the winding up and deregistration of the Scheme for want of legality.

34. The *ex-parte* Applicants decried in the said claim that they were apprehensive of their right to have a fair hearing of the matter before the Tribunal because it was not possible for the Respondents Tribunal to be impartial, being that the Tribunal answered to the National Treasury, which was one of the government agencies alleged to be frustrating the proper functioning of the Scheme.

35. From the foregoing, it is evident that the ex parte Applicants themselves placed the question of the Tribunal's jurisdiction at the forefront of their claim, inviting the Tribunal to determine, in the first instance, whether it was properly seized of the matter. In addition, the Interested Party duly raised a Notice of Preliminary Objection before the Tribunal, setting out several points of law, including the issue of jurisdiction.

36. In my considered view, once a matter is placed before a court or tribunal, the foremost and determinative issue to be addressed, at the earliest opportunity,

is that of jurisdiction. Jurisdiction is a foundational principle upon which the authority of any adjudicative body rests; without it, such a body cannot lawfully take any step in the proceedings.

37. It follows, therefore, that where a court or tribunal proceeds to render a decision in the absence of jurisdiction, such a decision is null and void from the outset. It is, in law, a decision made without authority and cannot be allowed to stand.

38. In this case, the ex parte applicants, having themselves expressly challenged the jurisdiction of the Tribunal in their pleadings, now contend that the Tribunal, once divested of jurisdiction, was precluded from making any further determinations, including addressing the Preliminary Objection raised by the interested party. This argument is, with respect, fundamentally flawed and devoid of any sound legal basis.

39. In essence, the applicants invite the Court to accept that the Tribunal was so bereft of jurisdiction that it ought not to have entertained the matter at all, yet paradoxically argue that the interested party was equally barred from raising a Preliminary Objection on that very issue of jurisdiction. Such a position is internally inconsistent and cannot be sustained in law.

40. In my view, even where a court or tribunal ultimately lacks jurisdiction, the presentation of a claim before it imposes a duty on the tribunal to make an appropriate determination. The tribunal cannot simply ignore or wish away the proceedings. It must, in the first instance, satisfy itself as to whether it is

properly seized of the matter and if it finds that it has jurisdiction, it may proceed to determine the dispute on its merits, but if it finds otherwise, it must decline jurisdiction and strike out the matter accordingly.

41. The question of jurisdiction is one that must be addressed at the earliest opportunity and as a preliminary issue. This obligation arises irrespective of whether the parties themselves have raised it. Indeed, a court or tribunal is entitled, and, in appropriate cases, duty-bound, to raise and determine the issue of jurisdiction on its own motion, where it becomes apparent that its authority to adjudicate is in question. This principle was espoused in the case of Owners **of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR) (17 November 1989) (Judgment)** where the Court of Appeal stated that:

> ***"A question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It was immaterial whether the evidence was scanty or limited. Scanty or limited facts constituted the evidence before the court. A party who failed to question the jurisdiction of a court may not be heard to raise the issue after the matter was heard and determined. There were no grounds as to why a question of jurisdiction could not be raised during the proceedings. As soon as that was done, the court should hear and dispose of that issue without further ado."***

42. In this case, the issue of jurisdiction was, fortunately, raised by all parties from the outset, and was duly acknowledged and addressed by the Tribunal in the impugned decision. It is therefore difficult to reconcile the *ex parte* Applicants' position. On the one hand, they invited the Tribunal to find that it lacked jurisdiction to entertain their claim; on the other hand, they now fault the Tribunal for undertaking precisely that inquiry and making a determination on it.

43. Such a position is plainly inconsistent and legally untenable. A party cannot, in the same breath, both invite and impugn a determination on a fundamental issue such as jurisdiction. This Court cannot endorse a situation where litigants oscillate between contradictory positions on jurisdiction in an apparent attempt to secure a forum that they perceive to be more favourable to their cause.

44. The conduct of the ex parte Applicants, viewed in this light, amounts to an impermissible attempt to approbate and reprobate on a central issue and this Court must discourage such practice which undermines the integrity of the adjudicative process and the orderly administration of justice.

45. In my assessment, at the heart of this Application lies the possibility that the ex parte Applicants may indeed have a genuine grievance warranting redress, particularly when viewed against the historical background they have outlined. However, the manner in which they have elected to pursue those claims, and to ventilate the serious concerns raised in relation to their

Scheme, reflects a calculated invocation of procedure for redress in a way that is not contemplated by law.

46. This conduct presents a clear instance of a party adopting inconsistent positions before the Court, to suit its own ends. Such an approach cannot be tolerated. While the right to seek redress is fundamental, it must be exercised within the bounds of proper legal process and with sincerity and consistency.

47. In the circumstances, there is but one inescapable conclusion that the manner in which the ex parte Applicants have prosecuted their case amounts to nothing but an abuse of the process of the Court.

48. Furthermore, to grant the orders sought, whose effect would be to nullify and set aside a jurisdictional determination properly made by the Respondent, which did not delve into any merits of the claim would, in essence, require this Court to assume the role of an appellate court rather than that of a Judicial Review Court. This is a mandate that this Court does not possess in the circumstances of this case. The function of this Court in judicial review proceedings is not to re-evaluate the merits or substituting its own decision for that of the Respondent.

49. Moreover, the decision by the ex parte Applicants to lodge their claim before the Tribunal, ostensibly in compliance with the doctrine of exhaustion, while being fully aware that the Tribunal lacked jurisdiction, demonstrates a clear disregard for the fundamental requirement that matters be instituted before the proper forum. It is one thing for a party to be mistaken or be unaware of

a court or tribunal's jurisdiction; it is quite another to act in deliberate disregard of that jurisdictional limit, as was the case herein.

50. This Court warns that the perfunctory filing of a claim before a body known to be devoid of jurisdiction, merely as a procedural formality or a means of "*ticking the box*" to satisfy the exhaustion doctrine before approaching another appropriate forum, cannot be countenanced by this Court. Such conduct undermines both the purpose and integrity of that doctrine.

51. I must emphasise that judicial time is a valuable resource and courts are not to be used as avenues for circumventing established legal procedures or as forums for speculative litigation or "*testing the waters.*" In my view, such an approach reflects a disregard for the authority of the Court and amounts to an improper attempt to mislead or manipulate the judicial process.

52. In '***Administrative Law'*** (6th Edition) (1988) by H. W. R. Wade the authority of the courts in Judicial Review was explained thus: -

> ***"…judicial review is designed to prevent the excess and abuse of power by public authorities. The powers of public authorities are conferred by statute…The courts are evidently determined not to allow any powerful quasi-governmental body to contract out of the legal system, even where there may be good reasons for avoiding*** **the** ***law's delays and uncertainties. …the only essential elements are what can be described as a public element, which can take many***

forms, and the exclusion from jurisdiction of bodies whose sole source of power is a consensual submission to their jurisdiction. ..The primary object of certiorari and prohibition is to make the machinery of government operate properly in the public interest, rather than to protect private rights'…judicial review...is the supervision of the court's inherent power to determine whether action is lawful or not and award suitable relief. For this no statutory authority is necessary: the court is simply performing its ordinary functions in order to uphold the rule of law. The basis of judicial review, therefore, is common law…Judicial review is thus a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not…

Judicial control, therefore, primarily means review, and is based on a fundamental principle, inherent throughout the legal system, that powers can be validly supervisioned only within their true limits. ...The ultra vires doctrine is therefore not confined to cases of plain excess of power; it also governs abuse of power, as where something is done unjustifiably, for the wrong reasons or by the wrong

procedure. In law the consequences are exactly the same: improper motive, or a false step in procedure, makes an administrative act as illegal as does a flagrant excess of authority….It is a cardinal axiom, accordingly, that every power has legal limits, however wide the language the empowering Act. If the court finds that the power has been supervisioned oppressively or unreasonably, or if there has been some procedural failing, such as not allowing a person affected to put forward his case, the act may be condemned as unlawful."

53. Having considered the impugned Ruling that triggered these proceedings, I find no evidence of excessive application of the mandate and authority of the Respondent, nor an illegality, irrationality or procedural impropriety. If anything, the *ex-parte* Applicants seem to be contesting the substance of the said Ruling and not the manner in which it was arrived at. That is a reserve of a different court and not a Judicial Review court. There is no demonstration of an unreasonable or illogical decision made by the ex-parte Applicants.

54. In the end, I find that the exparte applicants have not satisfied this court that they are entitled to any of the orders sought in the notice of motion dated Motion dated 8th April 2025 and the same is hereby dismissed.

55. On the issue of costs, the general principle is that costs follow the event and are ordinarily awarded to the successful party. However, this Court retains discretion to depart from that principle where the circumstances so permit.

56. In the present case, the Respondent and the Interested Party are public entities, while the ex parte Applicants are members of a retirement benefits scheme seeking redress for their grievances. It is apparent that the issues giving rise to these proceedings might well have been avoided had the Applicants received proper legal counsel at the outset. While it is true that an advocate is under no obligation to institute proceedings which, in their professional judgment, are unnecessary or misconceived, this does not appear to be a case where the Applicants fully appreciated the legal consequences of the course they adopted before the Tribunal and subsequently before this Court.

57. In those circumstances, and bearing in mind that the Applicants' substantive grievance remains unresolved, I am reluctant to penalise them in costs. Accordingly, I order that each party shall bear its own costs of these proceedings.

58. This file is closed.

Dated, Signed & Delivered virtually at Nairobi this 25th Day of March, 2026

R.E. ABURILI

JUDGE