Standard Chartered Bank Kenya Limited & 10 others v General & 3 others (Civil Appeal E847 of 2023) [2025] KECA 433 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 433 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E847 OF 2023

PO KIAGE, LA ACHODE & WK KORIR, JJA

MARCH 7, 2025

BETWEEN

STANDARD CHARTERED BANK KENYA LIMITED ..... 1ST APPELLANT

DAVID GICO KAMAU ..... 2ND APPELLANT

WALTER MUNGAI ..... 3RD APPELLANT

AZIRIKAM MUDIKA LUBIA ..... 4TH APPELLANT

BARTESH SHAH (AS THE TRUSTEES OF STANDARD CHARTERED KENYA PENSION FUND (THE 1ST SCHEME) ..... 5TH APPELLANT

DAVID GICO NJOROGE ..... 6TH APPELLANT

WALTER MUNGAI ..... 7TH APPELLANT

BEATRICE MAINGI ..... 8TH APPELLANT

JANE CHEGE ..... 9TH APPELLANT

NICHOLAS OTADO ..... 10TH APPELLANT

JULIUS MWANGI (AS THE TRUSTEES OF STANDARD CHARTERED KENYA PENSION FUND (THE 2ND SCHEME) ..... 11TH APPELLANT

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

ABDALLA OSMAN & 628 OTHERS ..... 2ND RESPONDENT

RETIREMENT BENEFITS AUTHORITY ..... 3RD RESPONDENT

THE RETIRMENT BENEFITS APPEAL TRIBUNAL ..... 4TH RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Chigiti, J.) dated 5th October 2023inJR Misc. Civil Appln. No. E110 of 2022)

JUDGMENT

1. The eleven appellants herein seek, through the appeal, to set aside the judgment and decree of the High Court (Chigiti, J.) dated 5th October 2023 by which the learned judge dismissed with costs their substantive notice of motion dated 16th July 2022. The 1st appellant ('the Bank') is a company duly licensed to carry on the business of banking while the 2nd -10th appellants were at all material times trustees of the Standard Chartered Kenya Pension Fund, a pension scheme established by virtue of a Trust Deed and Rules (TDR) dated 3rd June 1975, and variously amended thereafter, for the administration of a retirement benefits scheme for the Bank's then employees. The said motion sought an order of *Certiorari* to remove into the High Court and quash the decision of the Retirement Benefits Appeals Tribunal (The Tribunal), named herein as the 1st respondent contained in a judgment dated 28th April 2022. By that judgment the Tribunal set aside the decision of the Chief Executive Officer of the Retirement Benefits Authority (the RBA,) named herein as the 4th respondent, which dismissed a claim by Abdalla Osman & 628 Others ('The Claimants') against the appellants herein, on 22nd April 2021.

2. The Claimants were employees or former employees of the Bank and members of the Pension Scheme. They had initially filed their claim against the Bank and the trustees before the High Court at Nairobi seeking various orders, but the case was transferred to the Employment and Labour Relations Court once the latter came into operation as a specialized court of equal status with the promulgation of the 2010 Constitution.

3. In the proceedings before the ELRC, the Bank raised a preliminary objection dated 23rd February 2018 and sought to have the suit struck out on grounds that the court lacked jurisdiction to hear and determine it, the *Retirement Benefits Act* provided for an alternative dispute mechanism under section 46 and 47, and that the same was res judicata as the Tribunal had determined the dispute in Civil Appeal No. 9 of 2010, Hezekiah Isambo Sakwa & Others v Standard Chartered Bank Staff Pension Fund. By a ruling dated 12th October 2018, the ELRC (Makau, J.) found that notwithstanding that it had jurisdiction, it would under the doctrine of exhaustion withhold the same and down its tools in favour of the alternative dispute resolution mechanism under the relevant statute.

4. It accordingly referred the dispute to the CEO of the RBA to determine it on merits under section 46 of the Act, who, as we have stated, dismissed the claim only for the Tribunal to set aside that dismissal on appeal thereto.

5. The claimant's claim as was laid before the RBA and considered on appeal by the Tribunal revolved around complaints that;

   (a) the respondents used incorrect actuarial factors in computing the cash values for both deferred pensioners and the commuted values for immediate pensioners. The complainants also allege that the 2nd respondent reduced lump sum equivalent amounts due to them as a result of fraudulent misrepresentation, concealment and/or non-disclosure of material facts thereby resulting to reduced amounts contrary to the Trust Deed and Scheme Rules.

   b. the Bank and the Trustees act is not taking into account the cost of living adjustments when calculating the cost values for pensioners was in breach of the Trust Deed and Rules and was otherwise illegal, null and void.

c. the Bank and the Trustees did not and/or failed to take into account the complainants' Housing Allowance, an act which was in breach of the Trust Deed and Rules dated 16th July 1999 and otherwise illegal, null and void. In alleging this, the complainants sought to rely on the Supplemental Trust Deed dated 16th July 1999 and the memorandum dated 15th July 1997.

d. the Bank and the Trustees did not take into account the complainants' expectation of future increases to their pensions and this led to the payments to the members of reduced pensions. The Complainants relied on a Valuation Report dated 31st December 1997 stating automatic or mandatory increase and an interim valuation of the fund.

e. the Trustees carried out an actuarial valuation dated 31st December 1997 that revealed a surplus of Kshs.1,536 billion. The Complainants alleged that the surplus was paid back to the Bank. They sought to rely on the letter by the Bank written to the Commissioner of Income Tax dated 17th December 1999 and the letter by the Commissioner of Income Tax to the Bank dated 18th January 2000. To support their Complaint, the Complainants relied on the supplementary Trust Deed dated 16th July 1999. The Complainants also alleged that the Bank and Trustees failed to utilize part of the surplus to improve the Scheme Members' benefits which was a condition attached to the purported approval by the Commissioner of Income Tax.

f. the conversion to a defined contributory scheme on 1st January 1999 resulted in a reduction of future accrual of benefits. The Complainants further claimed that the Trustees failed and/or neglected to distribute the surplus to the members who transferred to the new Contributory Section of the fund and specifically to correctly calculate their entitlements and/or interest in the Fund to the said conversation of a section of the Fund to the Contributory Section and that it resulted into substantial loss and damage to the said members."

6. The gravamen of the appellants' response before the Tribunal in its statement of facts dated 28th August 2021 was summarized in its ensuing judgment thus;

(a) The disputes which are the subject matter under reply were previously referred to and determined pursuant to the provisions of the Act by the RBA in 2004 and the decision of the CEO was not appealed to the Tribunal.

b. The letter from the Complainants dated 21st February 2020 and the copy of the ruling of 12th October 2018 cannot be an appeal to the CEO as contemplated under section 46 of the Act because:

i. Section 46 of the Act contemplates a written appeal by a member of the scheme.

ii. The letter dated 21st February 2020 is "merely a cover letter" forwarding a ruling by a court and not an appeal as contemplated by section 46.

iii. The dissatisfied member of the scheme was required by the express provision of section 46 to address an appeal in writing to the CEO, which was not done.

iv. The claim documents were not availed to the Board of Trustees to enable them respond adequately.

v. The Complaint had previously been a subject of consideration and determination by RBA and the Tribunal as the CEO made a decision on 3rd October 2012 on a similar appeal by Hezekiel Isambo Sakwa and others. The said decision was appealed to the Tribunal (Cause No. 9 of 2010) and ultimately to the Industrial Court in Cause NO. 13 of 2014, which appeal was dismissed."

7. The appeal before the Tribunal proceeded by way of statements of claim, statements of facts and various documents filed by the respective parties followed by written submissions and authorities cited. The parties were then afforded opportunity to highlight on the submissions they had filed. No *viva voce* evidence was tendered, nor were the documents filed by the parties subjected to cross examination scrutiny at the instance of any party.

8. In the ensuing judgment, the Tribunal made a number of findings the essence whereof the learned judge captured as;

> " a. the TDR that ought to have been applied in computing the ... was the one dated 16th July 1999 TDR and not the 3rd June 1975 TDR.
>
> b. The information made available to the 1st-629th Interested Parties was misleading considering the Ex parte applicants believed that the only factors that would determine the cash equivalent values of their accrued pensions were those published in the booklet of January 1996.
>
> c. However, the Ex parte Applicants used new factors that led to a reduction of their benefits.
>
> d. The Ex parte Applicants used incorrect actuarial factors in computing cash values for both deferred pensioners and the commuted values for immediate pensioners.
>
> e. The 1st-629th Interested Parties were entitled to cost of living adjustments under the Voluntary Early Retirement Scheme, housing allowance as provided under Rule 4 of the 16th July 1999 TDR and future increase in their pension payments in accordance with Rule 62 of the Rules of General Application of the 16th July 1999 TDR.
>
> f. The Commissioner of Income Tax had no authority to bypass the express provisions of Rule 22(2)(c) of the TDRs and allow the Bank to recover the surplus. Therefore, the transfer of the surplus to the Bank was not done within the confines of the governing laws and TDR."

9. Based on those findings the Tribunal allowed the appeal before it and made the following orders;

(a) The appeal be and is hereby allowed.

b. The 1st respondent's decision and/or directions dated 22nd April 2021 be and is hereby set aside.

c. The 2nd – 12th respondents be and are hereby ordered to disclose to the appellants all the actuarial and other factors to be used in the re-calculation of their retirement benefits.

d. The 2nd – 12th respondents be and are hereby ordered to re-calculate and pay the appellants lump sum benefits (commuted lump sums and pension) taking into account the 16th July 1999 Trust Deed and Rules.

e. The 2nd – 12th respondents be and are hereby ordered to re- calculate and pay the appellants lump sum benefits (commuted lump sums and pension) taking into account; the correct actuarial factors contained in annextures 3 and 8 of the memorandum of appeal, cost of living adjustments, housing allowance and future increases and payments.

f. Interest on Court rates on (f) above from 31st March 2009 until payment in full.

g. The 2nd respondent be and is hereby ordered to refund Kshs.1.1 Billion to the Standard Chartered Bank Kenya Limited Pension Fund together with interest thereon at court rates from 28th February 2000 until payment in full.

h. 2nd – 6th respondents to pay costs of the appellants.

i. The 1st respondent to supervise (a)-(g) herein above and to file a compliance report with the Tribunal within 60 days of this judgment."

10. It was those findings and orders that provoked the judicial review proceedings which the learned judge dismissed leading to this appeal in which the appellants complain in their memorandum of appeal dated 25th October 2023 that in summary he erred by;Failing to find that the Tribunal acted without jurisdiction having failed to comply with the mandatory provisions of section 48 of the Act.Finding erroneously that the parties agreed to proceed with the hearing on the basis of filed documents which was its direction.Invoking article 159 of *the Constitution* or the permissive provision for admission of evidence to confer unfettered discretion without statutory conferment.Finding that the Tribunal's orders for computation of final benefits to the claimants were structural interdicts yet they were final and conclusive but contradicting and an abdication of jurisdiction.Failing to determine the issue of contradictory orders and directions on computation of pensions contrary to the Trust Deed and Rules.Being biased in expressing himself that the Tribunal had brought the claimants dreams close to fulfilment of their legitimate expectations.Proceeding on the wrong premise that the appellants' notice of motion was brought under order 53 of the Civil Procedure Rules and so declining any merit review ignoring the Constitutional provisions cited.Holding that as parties proceeded on the documents they filed such proceeding superseded section 49 of the Act and complied with the Fair Administrative Actions Act.Holding that the appellants failed to demonstrate how the Tribunal violated the provisions of the Fair Administrative Actions Act.Misconstruing the Supreme Court decision in Mitu-bell Welfare Society v The Kenya Airport Authority[2021]eKLR by finding that it overturned the principles of functus officio established in Telkom Kenya Limited v John Ochanda[2014]eKLR and KEnya Revenue Authority V Menginya Salim[2010]eKLR.Finding that the Tribunal could address an issue outside its jurisdiction.Being biased in taking the view that the appellants had defeated the claimant's legitimate expectations by not paying their pension yet they has been paid with computation only in contention.

11. The appellants thus prayed that the judgment and decree of the High Court be set aside and be substituted with an order allowing their notice of motion; and that the Tribunal's decision be set aside and the matter "be referred to the 1st respondent [the Tribunal] for re-hearing."

12. In preparation for the hearing, the respective counsel filed written submissions together with case bundles of authorities. For the appellants, the firm of Oraro & Co. Advocates filed submissions dated 23rd August 2024, stating that the Judicial Review application had been premised on Order 53 of the Civil Procedure Rules, Section II of the Fair Administrative Actions Act and various articles of *the Constitution*, the appellants urged us to reappraise the proceedings and submissions, and entire record of the High Court in line with our duty as stated in /Selle & Anor v Associated Motor Boat Co. Ltd [1969] EA 123.

13. After giving the factual background of the dispute, the appellants addressed the grounds stating that the judge erred in failing to find that the Tribunal acted without jurisdiction in proceeding to determine the appeal before it on the basis of documents filed and adopting a "flexible" procedure without calling witnesses to testify on oath or relying on affidavits as required under sections 48 and 49 of the Act. It was contended that by finding no fault with the procedure adopted by the Tribunal, the learned

judge sanctioned a prejudice against the appellant. Adero &anor v Ulinzi Sacco Society Ltd[2002] 1 KLR 577 was cited for the point that jurisdiction cannot be conferred by consent or acquiescence of parties. Further, pleadings and statements made without sworn testimony are of no probative value as was held in Musikari Kombo v Royal Media Services Ltd[2014] eKLR. Thus, it was contended, the documents relied on by the claimants, not having been produced in evidence, had no probative value and the proceedings and judgment of the Tribunal were rendered null and void. It was contended that the Tribunal's failure to comply with the mandatory requirements of section 49(1) and (2) amounted to procedural impropriety susceptible to judicial review. Lord Diplock's decision in Council of Civil Service Union & Others v Minister For Civil Service[1984] 3 ALL ER 935 was cited.

14. Next, the appellant addresses whether the Tribunal's order to compute amount to structural interdicts. It was charged that the order in question was an abdication of the Tribunal's adjudicating power as stated by this Court in Telkom Kenya Ltd v John Ochanda(Suing on behalf of 996 Former Employees of Telkom) [2014]eKLR and that the learned judge erred in attempting to cure that omission by invoking the Supreme Court's decision in the MITU BELL case (supra,) and misapprehending the latter as having overturned the long standing *functus officio* principle when the opposite was the case. The learned judge thus erred in finding that the Tribunal had jurisdiction to issue a structural interdict which is reserved for the High Court exercising its mandate under article 23 of *the Constitution*. Moreover, the Tribunal failed to reserve supervisory powers over the computation of pensions which rendered the judgment incomplete and inconclusive.

15. Next, the appellants assailed the learned judge for limiting himself to a process review and avoided going into merits of the Tribunal's decision contrary to the Supreme Court's guidance in Edwin Harold Dayan Dande & 3 Othersv The Inspector General,national Police Service & 5 Others,Supreme Court Petition No. 6 (E007) of 2022, when the appellants had, besides order 53 of the CPA, also invoked provisions of *the Constitution*.

16. Finally, the appellants posed whether the Tribunal's adopted procedure conformed with the provisions of the Fair Administration Actions Act, and contended that it did not. The non-compliance with the rules of procedure meant that the Tribunal's decision was irrational and illegal, for which Smep Retirement Benefits Trustees v Retirement Benefits Authority & Anor [2017] Eklr, R v Retirement Benefits Tribunal & 5 Othersex parte Willy Jeremiah Ombese[2014] eKLR, and Kenya Ports Authority v Industrial Court Of Kenya & 2 Others[2014] eKLR were cited.

17. The appellant concluded by stating that the claimants are being paid their pension benefits and the only dispute is on whether additional sums are due to them as held by the Tribunal, which they resist and urge that the learned judge should have set aside.

18. At the plenary hearing of the appeal, Mr. Oraro learned Senior Counsel highlighted those submissions. He took issue with the fact that what was before the Tribunal was a statement of fact signed by the Claimants' counsel yet it should have been signed by the party. He reiterated that there were no proper documents before the Tribunal upon which the computation it ordered could be conducted and the direction for computation amounted to an abdication of the Tribunal's adjudicative function. He asserted that there would have been nothing doctrinally wrong with the learned judge going into some merit review, and he should have gone into a minimal consideration of the facts.

19. Responding to question we posed to him, Mr. Oraro conceded that the question of the non-signing of the Statement of Claim was never raised before the Tribunal. He posited that the appellants' counsel did bring to the Tribunal's attention the fact that some of the documents relied on by the claimants were without attribution.

20. On behalf of the Claimants, the firm of Wanyonyi & Mutune filed submissions dated 9th September 2024. They first addressed the principles governing an appeal on judicial review and contended that as such orders are discretionary, the appellants have a burden to prove to this Court's satisfaction that the learned judge misdirected himself and arrived at a wrong decision or that it is manifest from the case as a whole that he was clearly wrong in his exercise of discretion and occasioned injustice. They cited Independent Electoral & Boundaries Commission v Nasa & 6 Others,ca 224 Of 2017, a decision of this Court.

21. The Claimants defended the directions given by the Tribunal for the conduct of the proceedings before it by written submissions and stated that it was not in dispute;

22.

1. That the said directions were given by the 1st respondent in the presence of the appellants;
2. That the appellants on the day the directions were given did not raise any objection against the said directions with the 1st respondent;
3. That the appellants fully complied with the 1st respondent's directions;
4. That the appellants in both their written and oral submissions to the 1st respondents referred to the bundle or documents filed;
5. That the appellants in both their written and oral submissions to the 1st respondents did not in any way whatsoever or howsoever object to the manner in which this bundle of documents were produced and/or relied upon; and
6. That the appellants in both their written and oral submissions to the 1st respondent focused solely on demonstrating the probative value of their documents vis-à-vis those of the 3rd respondent, and not on whether the said documents had been properly produced."

23. The Claimants contended further that the appellants gladly complied with those directions only to raise issue therewith after judgment of the Tribunal as an afterthought aimed at stealing a match on the Claimants but they are "estopped by their conduct, and deed (submissions)" and precluded by law from approbating and reprobating. They referred to section 120 of the *Evidence Act* as well Kairu V Shaw & 6 Others [1986-89] EA 221 which addressed an "argument in estoppel by inconsistent positions," as well as Mary Kitsao Ngowa & 36 Others v Kystalline Ltd [2015]eklr And George Owen Nandy v Ruth Watiri Kibe [2016]eKLR.

24. The Claimants defended the learned judge's upholding of the Tribunal's decision to accept their appeal notwithstanding that it deviated from the prescribed form by dint of the *Interpretation and General Provisions Act* that subordinated form to substance and it was enough that the appeal was in writing as required. They relied on section 72 of the*Interpretation and General Provisions Act*, which provides that a deviation from form that does not affect substance is not fatal. Also cited were Martha Wangari Karua v Independent Electoral And Boundaries Commission & 3 Others [2018]eKLR and Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission [2013]eKLR.

25. They urged further that section 49(2) of the Act is akin to the 'Oxygen Rule' and confers both procedural and substantive latitude on the Tribunal. Kenya Commercial Bank Ltd V Kenya Planters Co-operative Union[2010]eKLR and Abok James Oderat/a A.J. Odera Associates v John Patrick Machirat/a Machira& Co. Advocates[2013]eKLR were referred to with regard to the aim of the overriding objective principle which is to enable courts and tribunals to achieve fair, just, speedy, proportionate, time-and cost-saving disposal of cases guided by a broad sense of justice and fairness.

As the directions by the Tribunal were given in the appellants' counsel's presence, who acted thereon without objection, they consented thereto and are estopped by conduct, an intentional relinquishment or abandonment of a known right or privilege. John Mburu v Consolidated Bank Of Kenya [2018]eklr And Sita Steel Rolling Mills Ltd v Jubilee Insurance Co. Ltd[2007]eKLR were referred to. It was contended that the appellants had failed to furnish satisfactory proof of abuse of discretion to warrant our interference.

26. The Claimants next contended that the duties of the various players in the retirement benefits ecosystem are provided by the Act. The Trustees' obligations remain until all the benefits accruing to the Claimants have been paid while the Tribunal ensures that management of retirement benefits adhere to the Trust Deed or the law and protect the interests of members and sponsors by enforcing the rights and duties conferred by the Act. Placing reliance in Joshua Sembei Mutua v Attorney General & 2others[2019] eKLR, the Claimants submit that the Tribunal had the power to compel the appellants to discharge their mandate in compliance with the Trust Deed and Rules. In many cases, the Tribunal has reserved the right to re-engage litigants thereby exploding the functus officio argument. For this proposition, reference was made to the Local Authorities Revisions Trust (laptrust v Chairman Retirement Benefits Appeals Tribunal & 2others [2019]eklr And Captain (ltd) Charles Masinde v Augustine Juma & 8 Others[2016]eKLR.

27. Ultimately, the learned judge's holding that the Tribunal properly issued a structural interdict was defended as being in line with the Supreme Court's binding authority in MITU-BELL (supra) and did not warrant this Court's interference. It was urged that the appellants had not demonstrated, as behoves them, that by applying the structural interdict to the case the learned judge had misused precedent. The Claimants cited the Supreme Court's decision in National Bank ofKenya Ltd v Anaj Warehouging Ltd[2025]eKLR which laid down the law that courts, as custodians of justice, must proceed on a case-by-case basis, invoking and applying equitable principles in relation to every dispute coming up.

28. The Claimants asserted that in the case at Bar the appellants elected to pursue the path of judicial review under order 53 which is anchored in section 8 and 9 of the *Law Reform Act* and adopted its procedures including the application for leave. They thus elected to pursue the common law judicial review approach as opposed to the Constitutional Petition or the *Fair Administrative Action Act* path. Having made that election, they cannot blame the learned judge for ensuring that the supervising jurisdiction they invoked was not a disguised appeal, which would have been outside jurisdiction. They cited this Court's decision in George Omono & 210 Others v Retirement Benefits Tribunal & 2 Others [2020] to name the point that the Act did not provide for escalation of disputes beyond appeals to the Tribunal. They relied on the Supreme Court's caution in SAISI & 7 Others v Director of Public Prosecutions & 2 Others [2023] KESC 6 KLR against transforming judicial review into full-fledged inquiry into the merits of the matter or "to convert a judicial review court into an appellate court." To them, the learned judge was right to avoid A trial based an affidavit evidence relating to weighty matters and did not err thereby. Finally, the claimants asserted that the appellants were accorded the rights stipulated under Article 47 of the Constitution and section 4 of the Fair Administrative Actions Act. They consented to and acted on the directions given by the Tribunal without objection, and the action taken was lawful and procedurally fair, and the learned judge was right to hold that the appellants failed to demonstrate violation of their rights under Article 47 of the Constitution. They asserted, on the authority of this Court's decision in Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR, that there is no rule that fairness always requires oral hearing.

29. At the hearing, Mr. Karani learned counsel adopted those written submissions. He contended that the appellants did not challenge the how or manner of production of the documents before the

Tribunal, but only attempted to question their veracity. He then sought to distinguish this case from this Court's Ochandadecision (supra) by stating that whereas therein the judge essentially asked the Deputy Registrar to write a judgment on quantum, in this case the Tribunal simply affirmed the Trustees' duty to compute the pensions as guided by the Trust Deed, the Rules and the law and there was no confusion about the task. He reiterated the law on judicial review as limited to process review by stating that the appellants moved the High Court under Order 53 of the Civil Procedure Rules and commenced the process by first seeking leave. For the RBA, the 4th respondent, learned counsel Ms. Misiati indicated that they had no horse in the race and they stand ready to comply with whatever order the Court should give. She opined that the Tribunal was not *fuctus officio* once it issued a structural interdict as happened in this case.

30. Mr. Oraro's brief reply was that a question of jurisdiction could be raised at any point and reiterated that the Tribunal gave final orders and could not extend its jurisdiction by structural interdict, having become *functus officio*.

31. We have carefully perused the entire record before us and given full consideration to the written and oral submissions made, as well as the many authorities cited by the parties before us. From the memorandum of appeal and the submissions of the main contesting parties herein, the following issues fall for our consideration and decision:

    i. Whether the learned judge erred in not finding the Tribunal acted without jurisdiction.

    ii. Whether the Tribunal's order for computation of pension benefits was an abdication of jurisdiction.

    iii. Whether the learned judge should have conducted a merit review.

    iv. Whether the procedure adopted by the Tribunal violated the Fair Administrative Actions Act.

32. The appellants base their contention that the Tribunal acted without jurisdiction, and that the learned judge should have so found, on the provision of section 49 of the Retirement Benefit Act, which are in these terms;

    (1) On the hearing of appeal, the Tribunal shall have all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath and affirmation and to call for the production of books and other documents.

    (2) Where the Tribunal considers it desirable for the purpose of avoiding expense or delay or any other special reason so to do, it may receive evidence by affidavit and administer interrogatories and require the person to whom the interrogatories within the time specified by the Tribunal.

    (3) In its determination of any matter, the Tribunal may take into consideration any evidence which it considers relevant to the subject of an appeal before it, notwithstanding that the evidence would not otherwise be admissible under the law relating to admissibility of evidence."

33. According to the appellants, the Tribunal was duty bound, by dint of those provisions to proceed by way of taking evidence "only through witnesses under oath or affirmation." The only alternative is for the Tribunal to receive evidence by affidavits where it considers it desirable to avoid expense or delay or any other special reason. It requires judicious consideration before determining to take evidence by affidavit "and in that event, interrogations have to be administered." To the appellants, the Tribunal acted in excess of its powers under section 49 when it did not take oral evidence.

34. In answer to that complaint, the Claimants retort that under section 48 of the Act, which donates jurisdiction to the Tribunal, it has jurisdiction to hear any person aggrieved by the RBA or its Chief Executive Officer so long as the appeal is made within thirty (30) days of receiving the decision. They add that whereas it is true the Tribunal did give directions that the appeal before it would be determined on written submissions, the appellants cannot be heard to complain so late in the day not having raised the complaint before the Tribunal, and gone ahead to fully comply with those directions. They decry the appellant's adoption of inconsistent positions, which is a shifting of goal posts, an approbation and reprobation, which they are estopped from doing as stated in KAIRU v SHAW (supra) and Mary Kitsao Ngowa &36 Others v Krystalline Ltd(supra).

35. The only complaint the appellants herein had raised before the learned judge was that the appeal before the Tribunal deviated from the form prescribed in Rules 5 and 6 of the Retirement Benefits (Tribunal) Rules 2000 and was for dismissal. The learned judge considered that objection and rejected it, correctly in our view, because those rules did not render the forms mandatory and, more critically, there is a fundamental duty to render substantive justice without undue regard to procedural technicalities, and substance must triumph over form.

36. Regarding section 49 of the Act and whether the Tribunal could proceed to hear the case without taking oral testimony, the claimants likened sub-section (2) to the Overriding Objective or the Oxygen Principle which was given ringing endorsement by this Court in Kenya Commercial Bank v Kenya Planters Co Operative Union(supra) going as far as to hold that it prevails over and supplants any procedural rules that may be a hindrance to the attainment of substantive justice in a manner that is just, expeditious, efficient and cost-effective. It was in an attempt to meet the overriding objective of substantive justice that the Tribunal gave those directions, we were urged, and the appellants having consented to and complied therewith, they must be taken to have waived their right to object. They filed submissions before the Tribunal, and are estopped by conduct and deed from resiling from that position.

37. Having carefully considered the record before us, we think, with respect, that the learned judge was not in error to hold as follows on this point:

> This Court has considered the rival arguments and the court holds that where parties have opted to embrace a flexible form of hearing by way of documents and submissions as was the case before the Tribunal, a party who lost in appeal cannot then turn around and disown the process that they subscribed to and even participated in by way of filing documents, submissions and participated in highlighting."

38. Allowing that would open up an avenue for procedural convenience on the part of the litigants at the expense of procedural fairness and the Right to Fair Hearing as guaranteed under Article 47 of *the Constitution*. I decline to be drawn into that pendulum.

39. I am in agreement with the Interested Parties that on 20th January, 2022 the applicants, the Interested Parties and Retirement Benefits Authority agreed to proceed with the hearing of the appeal before the Tribunal based on the filed documents and the Tribunal granted the parties leave to file their written submissions. The applicants cannot attack nor undermine the same process that they accepted to conform with and be bound by after the judgment. The Tribunal conducts its hearings in a flexible form which allows admission of evidence in a more relaxed way away from the *Evidence Act* framework."

40. It seems clear to us that the appellants are not entirely candid when citing section 49 of the Act. They focus on the first two sub- sections but most curiously make no mention of section 49(3), which provides expressly as follows:

> " In its determination of any matter, the Tribunal may take into consideration any evidence which it considers relevant to the subject of an appeal before it, notwithstanding that the evidence would not otherwise be admissible under the law relating to admissibility of evidence." (Our emphasis)

41. While clothing the Tribunal with the powers of a Magistrate's Court of the 1st class, Parliament in its wisdom, no doubt in appreciation of the specialized nature of the work of the Tribunal, and desirous of keeping its processes simple and expeditious, made express provision for a process that is untrammeled by the complexities, niceties and exoteric requirements of strict adherence to evidentiary rules. It is this statutory license that renders lawful the Tribunal's decision on the present case, to proceed on the basis of the filed documents unburdened by the strictures of strict rules of evidence. Parties acceded to that mode of proceeding without objection, with both sides of the dispute relying on and commenting on the documents they or their counterparts filed, respectively. We think that there is no magic in oral evidence and the absence of oral hearing where the context and relevant law seems to anticipate other evidence, does not render the process and proceedings infirm by that reason alone. It is enough for us to adopt what the Court stated in Kenya Revenue Authority v Menginya Salim Murgani [2010]eKLR.

... The thrust of Dr. Kuria's submissions was that the internal disciplinary procedures of the appellant should have involved an oral hearing of the respondent either by the Staff Committee or the Board being the appellate body or both.

42. However, in our view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing.

In the case of Local Government Board v Arlidge [1915] A.c. 120.132-133, Selvarajan v Race Relations Board [1975] 1 Wlr 1686, 1694 And In R v Immigration Appeal Tribunalex parte Jones [1988] 1WLR 477, 481 it was held:-

> 'the hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing.
>
> Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made ..."'

43. We therefore have no difficulty finding on this issue that the learned judge did not err in rejecting the contention that the Tribunal acted without jurisdiction.

44. The next issue addresses the nature and propriety of the order given by the Tribunal concerning computation of the pension benefits due to the Claimants. The appellants contend that the Tribunal directed them to compute using "a formula contradicting not only its judgment ...but also the Trust Deed and the Rules," in what was an abdication of the Tribunal's power and therefore a nullity in keeping with this Court's decision in Telkom Kenya Limited v John Ochanda(supra) as the Tribunal became functus officio once it determined the appeal before it. The appellants see the learned judge's

invocation of the Supreme Court decision in Mitubell(supra) as an erroneous attempt to cure the Tribunal's 'obvious violation' in granting orders when it was already functus officio.

45. The Claimants answer to that complaint is that the learned judge was correct to uphold the Tribunal's order that the appellants compute and pay the pension benefits to them as, under Rule 7(g) of the Retirement Benefits (Administration) Regulations, that is an obligation placed upon Trustees such as the appellants were and remain, for which they place reliance on Staff Pension Fund & Kenya Commercial Bank Statt Retirement (dc) Scheme 2006 & Anor v Ann Wangui Ngugi & 524 Others[2018]eKLR. The duty of the appellants as trustees, argue the Claimants, does not cease until, as stated by this Court in Captain(Rtd) Charles Masinde v AugustineJuma& 8 Others(supra) they are "discharged in accordance with the law, that is, once the benefits accruing to the appellant have been paid directly to him." The Claimants in consequence defended the learned judge's reliance and following of the Mitubelldecision as apposite, and not a misuse of precedent, as charged by the appellants.

46. Having gone through the relevant statutory provisions ourselves, it is patently indisputable that the Trustees such as the appellants are under a duty, flowing from the Act itself, to always manage the funds under their charge in accordance with the law and to act in the best interest of the members of the scheme, such as the claimants, and the sponsors thereof. That much is clear from section 40 which states that the mandate of Trustees in a scheme to be:

    a. To ensure that the scheme fund is at all times managed in accordance with the Act, any regulations made thereunder the scheme rules and any directions given by the Chief Executive Officer; and

    b. To take reasonable care to ensure that the management of the scheme is carried out in the best interest of the members and sponsors of the scheme."

47. This is amplified and augmented by the stipulation under Ruled 7 of the Regulations that it is the duty of the administrator of the Scheme, appointed by the Trustees, such as the appellants herein, to compute and pay benefits to the members and their beneficiaries as provided for in the law and the scheme rules.

48. Given that state of the law it seems to us logical and absolutely essential that when the RBA or its CEO make a determination and an appeal is preferred to the Tribunal, what direction, and orders the Tribunal may give as reflecting the proper appreciation of the law and interpretation of the Trust Rules must, per force, be complied with by the Trustees and supervised for proper implementation in accordance with the law so declared unless the same is stayed or set aside by the High Court. This has to be so because the Tribunal's mandate in adjudicating disputes is to supervise management of the schemes to ensure adherence to the Trust Deed, Rules and the law, and to protect the interests of the members and sponsors by enforcement of the rights and duties conferred by the Trust Deed and the law. Thus, on first principles, when reading these provisions of law together, it becomes obvious that the issuance of directions such as the Tribunal issued herein, is done within the law and does not thereby impose on the Trustees, such as the appellants, an adjudicatory burden. It only requires them to act within the Act and Trust Rules, which it is within the Tribunal's express statutory mandate to require and enforce.

49. The Court in Joshua Sembei Mutua v Attorney General & 2 Others(supra) had occasion to examine at length the powers of the Tribunal in hearing appeals from the decision of the RBA and in particular whether it could make certain orders and dipositive directives. The Court determined that in the absence of the Rules to be made by the Chief Justice as contemplated by section 52 of the Act, then the stipulation in the same section took effect until such rules are made and, "subject thereto, the provisions

of the *Civil Procedure Act* shall apply as if the matter appealed against were a decree of a subordinate court exercising original jurisdictions."

50. The Court therein went on to hold, and we are in full agreement, that both under section 78 of the *Civil Procedure Act* which deals with the powers of the appellate court, and Order 42 Rules 31 and 32 of the Rules thereunder on what a judgment may direct, and the powers of an appellate court, an appellate court, and thus the Tribunal exercising such powers, has power to determine a case finally, remand a case, take additional evidence or order a new trial. It has power therefore to confirm, vary or reverse the decisions of the court [or body] appealed from. Moreover, it has power under Rule 32 to pass any decree or make any order which ought to have been passed or made and to "pass or make such further or other decree or order as the case may require."

51. The Court then concluded, and we cannot but concur, in the following explicit terms:

> "In our view until the rules as required under section 52 of the Act are made, the CPA and CPR provide sufficient basis for RBAT to exercise its jurisdiction. It is express power, not implied, given to RBAT to exercise mutatis mutandis. We find and hold that the construction adopted by the trial court that RBAT had the power to hear the appeal and decide on it, but had no power to grant any final or consequential orders would result in absurdity, anomaly or illogical result, which courts have always avoided. It follows from that finding that the decision made by the trial court that RBAT had no jurisdiction or power to make the orders it did on 29th August 2013 is for setting aside ..."

52. Given that state of the law with regard to the powers of the Tribunal on appeal, we must conclude, with respect, that there is no substance in the complaint that the learned judge erred in not quashing the Tribunal's judgment. It is clear that there have been multiple cases where the Tribunal's has given directions or orders that the Trustees do compute scheme benefits and pension funds in accordance with the findings and directions given. The Tribunal simply enforces the law as it ought in directing Trustees to apply the law properly in its dealings. There can be no question that such directions are issued by the RBA to trustees as a matter of course. Since on appeal the Tribunal exercises all the powers the RBA or its CEO could and should have exercised in a particular case, there is no error in law in its giving the kind of directions it did and retaining a supervisory role, flowing from statute to keep itself informed on implementation or compliance. The doctrine of functus officio does not apply to bar the Tribunal from doing that which its appellate jurisdiction as the express provision of the Act permit it to do. See Local Authorities Pensions Trust (laptrust) v Chairman Retirment Benefits Appeal Tribunal & 2 Others(supra).

53. We think that the sentiments expressed by this Court on this very subject in Captain (Rtd) Charles Masinde v Augustine Juma & 8 Others(supra) with which we are in complete agreement, bear repeating;

> ...25. Once the Tribunal found that the Trustees had not discharged their duties under the law, it follows that it had the jurisdiction to issue such orders it deemed appropriate within the confines of the law. As was appreciated by Professor Wade in a passage in his treatise on Administrative Law., 5th Edition at page 362. The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended." On our part, having taken

the foregoing into account, we find nothing wrong with the Tribunal directing the Trustees jointly and severally to pay the appellant's benefits."

54. Before we leave this aspect of the appeal, we must point out that we were unable to appreciate the basis for the appellants' contention that in applying the Supreme Courts' Mitubelldecision (supra) the learned judge misapprehended it as having overruled this Court's decision in John Ochanda(supra). We did not see anywhere in his judgment such erroneous understanding by the learned judge. We think, with respect, that the learned judge merely used Mitubellas authority for the conclusion that thefunctus officio doctrine was inapplicable in the face of structural interdicts which can properly issue as confirmed by the apex court in Mitubell.We, too, pay homage to the binding precedent of the Supreme Court and need only add that the nomenclature aside, especially in the face of the appellants' complaint that structural interdicts are to be confined to bill of rights litigation flowing from Article 23 of *the Constitution*, a matter we need not decide, the Tribunal's orders with regard to computation are accommodable within the Mitubell decision. This conclusion is inescapable given the broad sweep of the Supreme Courts' holding that:

> " ...the interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts have to be specific, appropriate, clear, effective and directed at the parties to the suit or any other state agency with a Constitutional or Statutory mandate to enforce the order."

55. We find and hold that the orders made by the Tribunal requiring computation by the appellants as guided by its directions and requiring the RBA to report to it on compliance within 60 days were lawful orders and did not violate decisional law as laid down by the Supreme Court in Mitubell.Accordingly, the learned judge committed no error in upholding and not quashing the said orders.

56. We now turn to the issue of whether the learned judge should have conducted a merit review when considering the motion for judicial review. The learned judge expressly eschewed a detailed merit of the matter of him stating that had the appellants required such an intervention they should have filed an appeal and not a judicial review application, as the latter was suited for question of procedural impropriety only. He found and held that the appellants had moved the High Court under the provisions of Order 53 of the Civil Procedure Rules "as a result of which this Court will not delve into any merit analysis." The learned judge found authority for so holding in the Supreme Court's decision in the Dandecase (supra) in which it stated at paragraph 85 that;

> " It is clear from the above decisions that when a party approaches 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 files a suit under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the Court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se."

57. The Claimants defend the learned judge's finding as sound and consistent with established authority. Citing both the Court's decision in Mumo Matemu Vs. Trusted SocietyOf Human Rights Alliance & 5 Others [2013]eklr And The High Court's Masai Mara (sopa) Ltd v Narok County Government[2016] eKLR, they argue that the proper procedure for redress of alleged denial, infringement or threat to right and fundamental freedom as provided for under Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental/Freedoms) Practice and Procedure Rules, 2013 [the Mutunga Rules] is expressly and unequivocally decreed to be by petition. According to them, the appellants' choice of

the methodology of judicial review citing order 53 of the *Civil Procedure Act*, and proceeding by way of first seeking leave of the High Court, showed that they brought their claims under the *Law Reform Act* and the common law, but not under *the Constitution*. They surmised that the procedure followed was an attempt to bring in an appeal not contemplated under the Act disguised as an invocation of the High Court's supervisory jurisdiction, and that the learned judge was right to recognize and reject it.

58. We have considered what was placed before the learned judge and must conclude that notwithstanding the mention of certain provisions of the Fair Administrative Actions Act, the substantive and procedural law under which the appellants approached the High Court was the judicial review jurisdiction flowing from the English Common Law and the *Law Reform Act*. It is the reason they first filed a chamber summons application dated 6th July 2022 by which they sought leave before they could file the substantive judicial review motion. Had they been seeking judicial review under *the Constitution* by reason of alleged violation of Article 47 which provides for fair administrative action, they would have complied with Section 7 of the eponymous statute whereunder there is no requirement for leave. In the result, we are satisfied, as was the learned judge, that what was before the High Court was an Order 53 judicial review application as opposed to one under the *Fair Administrative Action Act*, or a petition under the Mutunga Rules.

59. There is no denying that judicial review proceedings brought under the Fair Administrative Actions Act do admit to a measure of merit review as was recognized by the Supreme Court itself in Praxidis Namoni Saisi & 7 Others v Director ofPublic ProsecutionKESC 6 (KLR). Even then, such merit examination is limited to the examination of uncontroverted evidence. Such necessary latitude does not, however, apply to a purely Order 53 judicial review, then the High Court is precluded from conducting a merit review as was made clear by the Supreme Court in the Dandecase (supra) the relevant excerpt of which we cited earlier in the judgment.

60. Given that state of the law, which has in any event been the case for the longest time, we think that the criticism directed at the learned judge for not embarking on a merit review of the matter before him was misconceived, and we hold, unhesitatingly, that the learned judge's exercise of discretion in this regard cannot be interfered with.

61. The final issue is somewhat related to the earlier analysis on jurisdiction and we need not spend too much time on it. It is whether the procedure adopted by the Tribunal violated the *Fair Administrative Action Act*. The appellants contend that the learned judge ought to have found that the Tribunal's decision was for setting aside "for want of compliance with the laws on procedure". They relied on the decision in Smep Retirements Benefits Trustees v Retirement Benefits Authority & Ano.[2017]eKLR that any directive or order to the applicant requiring it to make payments of the retirement benefit otherwise then in accordance with the Trust Deed and Rules as registered would be irrational and unreasonable and illegal." They also relied on R v Retirement Benefits Appeals Tribunal & 5 Others Ex Parte Willy Jeremiah Ombese [2014]eKLR and Kenya Ports Authority v Industrial Court of Kenya & 2others [2014]eKLR.

62. Those assertions are denied by the claimants who contended that the rights the appellants were entitled to under both Article 47 of *the Constitution* and Section 4 of the *Fair Administrative Action Act* with regard to essential procedural fairness were all respected and given effect to and the appellants, who were represented by able learned counsel, not only consented to the directions that were given by the Tribunal, but also acted on them without raising objection. There was conformity with the *Fair Administrative Action Act* and the appellants did not demonstrate any violation thereof, it was asserted. Having subjected the entire record to our own independent and exhaustive analysis and consideration, we are unable to find any basis for the appellants' claim of violation of the provision of the *Fair Administrative Action Act*. Nor was their right to procedurally fair administrative action under *the*

Constitution infringed. We, instead, find as a fact that the proceedings before the Tribunal, taken as a whole, did meet the threshold for procedural fairness.

63. Whereas we agree that as a matter of law any orders made by the Tribunal regarding payment of retirement benefits in violation of the Act, the Trust Rules and the law would be irrational, unreasonable, illegal, null and void, it has not been demonstrated by the appellants that the orders and directions issued by the Tribunal were in any way ordering payments otherwise than in accordance with the Trust Deed, the Rules or the law. To the contrary, it was the finding of the Tribunal that a proper construction of those documents as well as all the material placed before it required that payments be made in accordance with the direction and orders it gave in effectuation of the Trust Deed, the Rules and the Act. As the appellants herein failed to show to the contrary both at the High Court and before us, we are left with no choice but to find that the learned judge properly exercised his discretion in leaving the judgment of the Tribunal undisturbed.

64. As no abuse of discretion has been demonstrated by way of misapprehension of the facts, consideration of matters irrelevant or failure to consider matters relevant to the case, and without any showing that the learned judge was plainly wrong and as a result made a decision that led to misjustice or prejudice, we, in keeping with the need to be slow to interfere with the exercise of discretion by the first instance judge, find that no case has been made out for our interference.

65. Having come to those findings on the issues we distilled we come to the inescapable conclusion that the entire appeal is unmeritorious and dismiss it with costs.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR