



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & ODEK, J.J.A)

CIVIL APPEAL NO. 284 OF 2013

BETWEEN

LOCAL AUTHORITIES PENSIONS

TRUST (LAPTRUST).....APPELLANT

THE CHAIRMAN RETIREMENT BENEFITS

APPEAL TRIBUNAL1ST RESPONDENT

STEPHEN MUTEITHIA MBOROKI2ND RESPONDENT

CHIEF EXECUTIVE OFFICER

RETIREMENT BENEFITS AUTHORITY..... 3RD RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (G. V. Odunga, J) delivered on 5th July, 2013 in Misc. Appl. No. 403 of 2012)

JUDGMENT OF THE COURT

The immediate trigger for the appeal before us was the refusal by the High Court (**G. V. Odunga, J.**) to quash, by way of *certiorari*, the decision of the 1st respondent (Retirement Benefits Appeals Tribunal) (**the Tribunal**) made on 19th October, 2012. But there is a history behind it which we may relate briefly.

At the centre of the dispute is the 2nd respondent (**Stephen**). He had worked as a civil servant (engineer) for the Central Government of Kenya from 1979 to August 1988 when he was transferred to the Local Authorities. For a period of about 21years, from 1988 to 2009, he was an employee of Nanyuki Municipal Council (**the council**) in various capacities and salary levels, as well as the council's Water and Sewerage Company (**NAWASCO**), as its Managing Director, earning Ksh.150,000 per month. As such employee, he was eligible to join and was admitted to the council's retirement benefits scheme known as the Local Authority Pensions Trust (**LAPTRUST**), which is the appellant before us. During his service with the council and NAWASCO, his pension contributions to LAPTRUST were duly paid until his retirement on 2nd July, 2009.

Upon his retirement, Stephen expected to be paid a lump sum of Ksh.9 million as well as monthly pension thereafter, but, according to him, LAPTRUST paid only Ksh.60,830 and made no other payment. He complained to LAPTRUST to no avail. He escalated the complaint to the Retirement Benefits Authority (**RBA**), which is the 3rd respondent before us, but RBA, without hearing Stephen, agreed with the explanation given by LAPTRUST that Stephen was only entitled to gratuity, and not pension, for the period June 2006 to June 2009 when he worked for NAWASCO. The matter was determined summarily and closed.

Aggrieved by that turn of events, Stephen appealed to the Tribunal in **Civil Appeal No. 5 of 2010**. His contention was that he was in continuous service from 1979 to 2009, a period of 30 years, and was entitled to a lump sum payment of Ksh.6,635,000 and thereafter a monthly pension of Ksh.60,830. On the other hand, LAPTRUST and RBA contended that Stephen had entered into a contractual relationship with NAWASCO for the period 2006 to 2009 and it was that contract which provided for his terminal benefits, to wit, a gratuity, which was paid by NAWASCO. He could not be paid both gratuity and pension as that would be unjust enrichment. According to them, that period was for exclusion from the pensionable period of 1988 to 2006 when he worked for the council. The period he worked for the central government

was also for exclusion. In their calculation, the pensionable service was 213 months and Stephen was only entitled to a lump sum of Ksh.1,113,804.40 and a monthly pension of Ksh.10,017.64, based on his last three monthly salary average of Ksh.20,317.57. LAPTRUST claimed it had made those payments to Stephen but produced no evidence of the payments.

Upon hearing the parties, the Tribunal, in its judgment dated 27th July, 2011, allowed the appeal and found, *inter alia*, that the period Stephen had worked for the Central Government did not count for purposes of his pension calculation; that Stephen was in continuous service of the council when he moved to NAWASCO and the period he worked for NAWASCO between 2006 and 2009 was thus pensionable; that the gratuity paid to Stephen was not contractual and had nothing to do with his retirement benefits as it was a voluntary and gratuitous act of the employer; and that NAWASCO and Stephen had made contributions to LAPTRUST which were lawful and which ought to have been utilized towards the payment of Stephen's pension. The Tribunal nevertheless rejected the calculations put forward by both Stephen and LAPTRUST and made the following orders:

"(a) The Interested Party (LAPTRUST) to calculate the Appellant's (Stephen's) retirement benefits for the period 1st August, 1988 to 30th June, 2009 inclusive in accordance with the Interested Party's Rules;

(b) The Interested Party does give the Appellant a true, full and proper account of all benefits due, paid or payable to him;

(c) Either party has liberty to apply."

There was no challenge to the findings and decision of the Tribunal. On 30th September, 2011, LAPTRUST wrote to Stephen indicating that it had calculated his benefits in compliance with the Tribunal's order. However, the calculations were divided into two periods: **1988 to 2006** and **2006 to 2009**, showing the lump sum due for the first period as Ksh.1,202,123 and the pension payable as Ksh.10,518.58 per month. For the second period it worked out benefits of Ksh.326,049.98 but deducted a sum of Ksh.730,867.36 which it claimed it had earlier paid to Stephen.

Stephen wrote back on 22nd March, 2012 protesting that the orders of the Tribunal were not complied with since the pension was to be calculated on the basis of continuous period of service between **1st August, 1988 to 30th June, 2009**. It would follow that for pension purposes, the average applicable salary was what Stephen was earning in the last three months before retirement, that is Ksh.150,000. There were also no particulars supplied on the payments made to Stephen as ordered by the Tribunal.

When LAPTRUST refused to budge on its stand, Stephen returned to the Tribunal pursuant to the leave granted in the judgment to either party to apply. He took out a motion dated 27th August, 2012, seeking an interpretation of the said judgment and the following orders:

"a.

b. That the Hon. Tribunal be pleased to interpret its judgment delivered on the 27th of July, 2011 and more particularly on the exact lump sum payable and the monthly pension due to the Applicant.

c. That pursuant to the prayer (b) above, the Hon. Tribunal be pleased to adopt the actuarial calculations done by the Mr. Samuel Ngigi, Bsc. Actuarial science.

d. That the Hon. Tribunal be pleased to order the Interested Party to immediately pay the sums due and or in arrears pursuant to prayers (b) and (c) above.

e. That the Appellant/Applicant be awarded costs of the Application."

The application, as well as the supporting affidavit and the report prepared by an Actuary showing that the monthly pension ought to be Ksh.49,157.30/= and the lump sum due upon retirement as Ksh.4,701,500/=, was served on LAPTRUST and RBA but they made no response or opposition to it. The matter came up for hearing on 28th September, 2012 in the presence of counsel for all the parties, but no submissions were made by counsel for LAPTRUST or counsel for RBA. Written submissions had already been filed and served on behalf of Stephen. In the absence of any objections to the application, the Tribunal considered and granted it in its ruling dated 19th October, 2012. It issued final orders on its earlier judgment as follows:

"(a) The Interested Party do pay to the Appellant the balance of Kshs.4, 158, 308.70/= as set out above.

(b) The Interested Party do pay to the Appellant a monthly pension of Kshs.49,157.30/= in accordance with its Rules.

(c) The Interested Party do pay to the Appellant the costs of this Application assessed at Kshs.10,000.00/=."

Those orders aggrieved LAPTRUST but it did not file an appeal to challenge them. Instead, it sought to have them quashed by the High Court through an order of *Certiorari*. Leave was obtained and a notice of motion was filed on 14th November, 2012 in **Judicial Review Misc. Appl. 403 of 2012**. That is the application heard and dismissed by Odunga, J. on 19th October, 2012, leading to the appeal now before us.

In the motion before the High Court, LAPTRUST made several complaints: that the Tribunal acted *ultra vires* its jurisdiction by making

orders that had neither been sought nor determined in its ruling on 27th July, 2011; that the Tribunal erred in relying on the report of the Actuary and not the appellant's calculations which were before the Tribunal; that the Tribunal was *functus officio* unless its judgment was reviewed or set aside; and that the Tribunal did not accord it an opportunity to present its side of the case, which was against the rules of natural justice.

The response made to those complaints was that the Tribunal did not act *ultra vires* because it merely interpreted its judgment dated 27th July, 2011 without adding any new orders; that the Tribunal had made an order granting either party liberty to apply; that, in any event, the Tribunal, like courts, had the jurisdiction to interpret its own judgment to meet the ends of justice, by virtue of **section 3A, 1A and 1B** of the **Civil Procedure Act**; that the Actuary report was not evidential but rather a tool to aid the Tribunal in interpreting its judgment; that there was no opposition made to the report and the Tribunal was at liberty to rely on it; that judicial review deals with the process of decision making and not the merits of the decision; and that there was no breach of the rules of natural justice since LAPTRUST and its advocates were given all the opportunity to respond to the application but never did.

After considering the complaints and submissions of counsel, the learned Judge formulated two issues upon which the decision of the JR rested: firstly, whether the Tribunal acted *ultra vires* its jurisdiction and judgment of 27th July, 2011 by relying on the actuary's calculations to interpret its judgment; secondly, whether LAPTRUST was afforded an opportunity to be heard by the Tribunal.

On the 1st issue, the learned Judge found that the Tribunal did not act *ultra vires* its jurisdiction. It emphasized that a court of law has a residual source of power, which it may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties, to secure a fair trial between them, and to ensure that the orders it issues are not issued in vain. On the 2nd issue, the learned Judge found that LAPTRUST and its legal representatives were given the opportunity of being heard and the Tribunal was therefore not in breach of the rules of natural justice.

Those are the findings that aggrieved the appellant who put forth thirteen grounds of appeal in its memorandum, but in written submissions, which were not highlighted by learned counsel **Mrs. Purity Mbabu**, they were condensed into five issues as follows:

- a. **Whether the appellant was granted a fair hearing by the 1st respondent, in conformity with the rules of natural justice;**
- b. **Whether the 1st respondent was *functus officio* after delivery of the judgment;**
- c. **Whether the actuary report adopted by the 1st respondent herein in interpreting Judgment was factual or evidentiary;**
- d. **Whether the actuary, whose report was adopted by the 1st respondent herein had a necessary qualifications and if his report was in conformity with the guidelines of the rules and regulations of the appellant as had been envisaged by the 1st respondent in its initial Judgment;**
- e. **Whether judicial review is the appropriate remedy for the appellant herein.**

In her submissions, counsel emphasized that the right to be heard is a cardinal principle of justice and the cornerstone of basic and fundamental fairness and constitutionalism. She maintained that LAPTRUST and its counsel were not allowed to file a response or make submissions regarding the actuary's report which prejudiced their right to a fair hearing and a violation of the rules of natural justice. In the alternative, counsel urged that even if counsel for LAPTRUST was in court and waved the right to address the court, that was a mistake which could not be visited on the client. In support of that submission counsel relied on the cases of **Rajesh Rughani vs Fifty Investments Limited & Another [2016] eKLR**; **Philip Keipto Chemwolo & Another vs Augustine Kubende [1986] eKLR** and **Belinda Murai & 9 Others vs Amos Wainaina [1979] eKLR**, generally to the effect that it does not follow that because a mistake has been made, a party, should not be heard on the merits of its case, and that the door of justice is not closed because a mistake has been made by a lawyer who ought to know better.

As regards the admission of the application and the actuary's report by the Tribunal when it was *functus officio*, counsel emphasized the doctrine of finality and the prohibition against reopening decided cases. She referred to the case of **Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR** where the Supreme Court quoted from "*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*," (2005) 122 SALJ 832, by Daniel Malan Pretorius, stating:

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

Citing this Court's decision in **Telkom Kenya Limited vs John Ochanda (Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR**, counsel added that it was only in cases falling under **section 99** of the Civil Procedure Act for correction of clerical and arithmetical errors or accidental slips or omissions that exemption was allowed. In this case, urged counsel, the Tribunal was already *functus officio* when it admitted and relied on the calculations made in the actuary's report which was not part of the original decision, and ignored the appellant's calculations which were on record. According to counsel, the actuary's report was evidential and not merely a tool of interpreting the judgment as contended by the 2nd respondent. It was extraneous evidence prepared by an unqualified person and was therefore inadmissible. For that reason, the High Court was in error when it rejected the objections made by the appellant on that report.

Finally, counsel submitted that the process of judicial review was the most efficacious in this matter rather than an appeal. That is because the appellant had proved that the Tribunal had acted in excess of its powers; had acted *ultra vires*; had acted unfairly; and violated the rules of natural justice. The Uganda case of **Pastoli vs Kabale District Local Government Council and Others [2008] 2 EA 300** was relied on in support of that submission.

In those submissions, **Mrs. Mbaabu** was supported by learned counsel for RBA, **Mr. Kiche** who filed no written submissions or authorities and made no oral submissions beyond the expression of support.

In response to the submissions, learned counsel for Stephen, **Mr. K. M. Mwangi**, filed written submissions and a bundle of authorities which he orally highlighted briefly. He submitted, firstly, that the equivocation by the appellant about whether it was denied a hearing or whether there was a mistake of counsel betrays the lack of any basis for the complaint. Worse still, there are no particulars of the nature of the violation or the nature of mistake committed by counsel, and therefore, in counsel's view, the court has no material upon which to assess the claims. Counsel asserted that the appellant and its counsel were given all the opportunity they required but they took no action. Blaming the court is merely passing the buck.

Secondly, counsel assailed the Judicial Review motion as a disguised attempt to challenge the merits of the decision of the Tribunal when no right of appeal exists. He cited the case of **Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & Another vs Ann Wangui Nguji & 524 others**

[2018] eKLR where this Court, after analyzing at length various conflicting authorities held:

"From the above analysis, we hold that the law does not provide for an appeal from the decision of the Retirements Benefits Tribunal and such right of appeal can neither be implied nor inferred to confer jurisdiction to ELRC or the High Court Jurisdiction to entertain such an appeal. It follows that the appeal filed by the respondents is incompetent."

In counsel's view, the complaints relating to the veracity of the actuary's report, the qualifications of the actuary or the methodology adopted are in the realm of challenging the merits of the decision. Matters of evidence are matters of merit, he stated, and cited the case of **Puhlofer & Anor. vs Hillingdon London Borough Council [1986] 1 AC 484** where it was held that:

"It is not appropriate that judicial review should be made use of to monitor actions of local authorities under the Act, save in exceptional cases. Where the existence or non-existence of fact is left to the discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to who Parliament has entrusted the decision making power save where it is obvious that the public body consciously or unconsciously are acting perversely." [Emphasis added].

On the flipside, counsel emphasized that Judicial Review deals only with the process and the only relevant complaint relating to process was the alleged breach of the rules of natural justice which was found wanting since the Tribunal availed the parties of the opportunity to be heard.

Finally, on whether the Tribunal was *functus officio*, counsel submitted that the Tribunal had left an opportunity for itself, on application by any party, to perfect its judgment. All it did was to compute the figure payable, after the refusal by the appellant to comply with the judgment. He relied on the **Raila Odinga case (supra)** on the residual power of courts to protect the court process even after delivery of the judgment.

We have considered the appeal, the submissions of counsel and the law, in the manner of a retrial in order to arrive at our own conclusions, this being a first appeal. Judicial review, from which the appeal arises, is a discretionary remedy. As a general rule, this Court may not interfere with the exercise of discretion, if it was exercised judiciously, simply on the ground that if it was sitting at first instance, it might have given different weight to that given by the trial judge to the various factors in the case. The Court will only interfere if *"..the judge misdirected himself in law; misapprehended the facts; took account of considerations of which he should not have taken into account; failed to take account of considerations of which he should have taken into account, or that his decision, albeit a discretionary one, is plainly wrong"* -- to paraphrase Madan, JA (as he then was) in **United India Insurance Co. Ltd & 2 Others vs East African Underwriters (Kenya) Ltd [1985] eKLR**.

As regards orders made in Judicial Review, it has been held that:

"Judicial review orders are discretionary. Since they are not guaranteed, a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. Further, as the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised." See **Newton Gikaru Githiomi & Anor vs AG/Public Trustee Nairobi H C JR 472 of 2014:**

Although the appellant framed and urged five issues in the appeal, they really boil down to the two issues framed and decided upon by the trial court, and those are the issues we shall also consider.

The first one is whether the Tribunal complied with the rules of natural justice. In the recent case of **Samuru Gaturo Farmers Co-operative Society Limited vs Chief Magistrate's Court at Thika & 15 Others, Civil Appeal No. 300 of 2010 (UR)**, this Court had this to say on the rules of natural justice:-

"As Kiage JA stated in the case of Law Society of Kenya vs Centre for Human Rights and Democracy & 13 Others [2013] eKLR:

"It has long been settled law that a decision affecting legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority."

In **Kiai Mbaki & 2 Others vs Gichuhi Macharia & Another [2005] eKLR,**

this Court stated thus:

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard. This Court has indeed reiterated that principle on many occasions."

Lastly, to underscore the gravity of the breach, a five-Judge bench of this

Court in **Judicial Service Commission vs Mbalu Mutava & Another [2015] eKLR,** stated as follows:

"..the rules of natural justice, in particular right to fair hearing, (audi alteram partem rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as: (1) the right to be heard by an unbiased Tribunal, (2) the right to have notice of charges of misconduct, (3) the right to be heard in answer to those charges..... The right to fair hearing as a rule of

natural justice, a part of the common law, has in modern times been variously described as "fair play in action", "justice of the common law"; "common fairness" "fairness of procedure" or simply as "duty to act fairly."

The appellant herein complains from one corner of its mouth that it was not given an opportunity to be heard, and from the other corner, that there was an excusable mistake of counsel. Upon examining the same complaint, the trial court made the following findings:

"The Applicant states when it's advocates appeared before the Tribunal on 28th September, 2012 they were not allowed to file submission but the court in disregard of their pleas stood over the matter for ruling on 19th October, 2012. I have perused the Tribunal's proceedings of the said date and nothing could be far from the truth. The said proceedings show that the Applicant who was the Interested Party in that Tribunal application was represented by a Mr. Amadi. Mr. Amadi appeared on instructions to hold brief for Mr. Mbabu the Interested Party's advocate in present application. The Respondent, the 2nd Interested Party herein was represented by Mr. Echesa. Mr. Amadi indicated that he had no instruction to proceed with the hearing of the application but did not say anything about filing of response or submissions. On the other hand, Mr. Echesa informed the court of intention to file submissions within 7 days. Further, from the Tribunal's proceedings and the ruling of 19th October, 2012, it is clear that neither the Applicant nor the 2nd Interested Party herein filed any response or submissions. I believe this court would have viewed its plea differently if the Applicant had filed its submissions even after 28th September, 2012 and the Tribunal ignored the same. The Applicant submitted that it had no problem with the Respondent interpreting its judgement and therefore it needed not file any objection thereof. Nonetheless, it did not expect the Tribunal to use the actuary's report to interpret its judgement. With due respect, this argument is untenable and is unfair to the Tribunal as the 1st Interested Party had served the applicant with the Notice of Motion dated 27th August, 2012 in which the 1st Interested Party sought to have the Tribunal adopt the report of the said actuary for computation of his benefits. It is also my opinion that, for what it would have been worth, the Applicant ought to have filed a relevant reply opposing the use of the said actuary's report rather than wait to challenge the decision of the Tribunal afterwards. The Tribunal in its 27th July, 2011 judgement had already ordered the computation of the 1st Interested Party benefits according to the Applicant's Rules and therefore it was incumbent upon the Applicant to present its computations for the Tribunal to consider. To sit passively and wait for the court to make its finding on the basis of its adversary's arguments robbed the Applicant the right to lament that it was not accorded an opportunity to be heard. The applicant slept on his rights and it is now too late to lament in these (sic) nature of the proceedings as opposed to an appeal."

We have re-examined the record ourselves and affirm that there was a proper basis for making those findings. All that is required of a body exercising judicial authority is to give an opportunity to the parties before it to be heard. There is no further requirement to use coercive powers to open the mouths of the litigants. The litigants are at liberty to decline any hearing and it is apparent in this matter that counsel expressed no wish to oppose the application before the Tribunal. We find nothing remotely suggesting that it was a mistake of counsel, as there is no affidavit on record from counsel to so suggest. The submission in that respect simply hangs in the air. We have no basis to disturb the findings of the trial court on that issue and we reject the invitation to do so.

The second broad issue is jurisdictional. Jurisdiction, as the courts have stated time and again, is the authority which a court has to consider and determine the matter before it, and where such jurisdiction is questioned the issue must be determined forthwith. As summarized above the Tribunal is assailed for reopening a matter when it was *functus officio*; relying on additional evidence which was inadmissible; and arriving at the wrong decision on the merits.

First of all, as correctly submitted by the 2nd respondent, the decision of the Tribunal on the merits of the case is not appealable as no such right is granted by law. See the ***Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme case (supra)***. Secondly, the scope of the *functus officio* doctrine was explained in the ***Raila Odinga & 2 Others case (supra)*** which made the following pronouncement:

"It is a legal and constitutional obligation of any Court, from the basic-level to the highest level, to preserve and protect the adjudicatory forum of governance, and to uphold decorum and integrity in the scheme of justice-delivery. It follows that the Court's jurisdiction, in oversight of the question of conscientious and dignified management of the judicial process, and in safeguarding the scheme of the rendering of justice, will not be exhausted until the Court is satisfied and it declares as much. Even though, therefore, the Court concluded the hearing of the Petition by delivery of judgment, its jurisdiction for upholding the dignity of the judicial process, and in relation to the proceedings of the Petition, remained uncompromised. The Court therefore could, as it did, issue Summons in the cause of its Orders made during the pendency of the main hearing.

This Court in the ***Telkom case (supra)***, explained it further, thus:

"The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *Jersey Evening Post Limited vs A1 Thani [2002] JLR 542 at 550: also cited and applied by the Supreme Court;*

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."

The same issue featured before the trial court in this matter and it disposed of it as follows:

"I find nothing wrong in the Tribunal entertaining the proceedings whose effect was to ensure that its earlier decision was given effect since it had the power to give effect to its decision. No provision of the rules should be so construed as to preclude a court from giving effect to its decision. To the contrary, any court must have the power to give effect to its decisions..... In my view, what the Respondent was doing was to simply give effect to its earlier decision and if it went wrong that would not be a ground for interference. In reaching its determination, it must however, be recognised that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review..... The Applicant argues that the Tribunal did not ascertain whether the actuary had made his calculations in accordance with rule 87(1) of the Local Authority Pension Trust Rules. I have perused the Tribunal's ruling the subject matter herein and I find that indeed the Tribunal scrutinised the report of the actuary for compliance with the rules and found it compliant.....No rule or a decided authority has been cited to show that a Tribunal was wrong in relying on the 1st Interested Party's calculations as done by the actuary. Further, the Applicant has not demonstrated to this court which of its rules was violated by the said actuary's report. Instead, what the Applicant has done in this application is to attack the qualification of the actuary an issue not relevant to a judicial review court since that goes to the merits rather than the decision. I also agree with the 1st Interested Party that the Tribunal relied on the actuary's report not as a factual and evidential report on a contentious matter of fact but as a tool to aid the Tribunal in interpreting its judgement. As such, I find the Tribunal did all that it was expected to do in the circumstances. In so doing, the Tribunal had no option but to rely on the 1st Interested Party's arguments which were guided by the actuary's calculations. For this court to find otherwise it will have to make extraneous considerations regarding rules and methodology of calculations ought to have been used to determine the 1st Interested Party's benefits. This will in effect seek to solve the core dispute between the Applicant and the 1st Interested Party herein against the tenets of judicial review."

In our view, the one order made by the Tribunal that torpedoed the accusation that the Tribunal was *functus officio* is the liberty given to the parties to apply before the same Tribunal in relation to the judgment. Clearly, the Tribunal reserved to itself the power to re-engage with the matter. The final judgment was subject to that order and the re-engagement taken before it was for interpretation of the judgment in relation to the final figures payable to the 2nd respondent. It was not a substantive re-engagement on the merits otherwise the appellant would have made written or oral objections for consideration by the Tribunal. But nothing was filed or submitted by the appellant. Its calculations which were already on record had been rejected in the main judgment and there was no challenge to that finding. The 2nd respondent was simply asking the Tribunal: 'How much is owed to me in accordance with your judgment so that I can execute for it'. It follows that the unquestioned figures placed before the Tribunal by an expert, brought to finality the judgment of the Tribunal. We find no reason to interfere with the reasoning of the trial court on this issue, which we similarly reject.

The upshot is that this appeal has no merits and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 10th day of May, 2019.

P. N. WAKI

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

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

DEPUTY REGISTRAR