IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & SICHALE, JJ.A)

CIVIL APPEAL NO. 93 OF 2015

BETWEEN

JOSHUA SEMBEI MUTUA...APPELLANT

AND

THE ATTORNEY GENERAL..1ST RESPONDENT

RETIREMENT BENEFITS APPEAL TRIBUNAL.....2ND RESPONDENT

KENYA AIRPORT AUTHORITY

STAFF RETIREMENT BENEFITS SCHEME...........3RD RESPONDENT

(Being an appeal from the judgment and orders of the High Court of Kenya

at Nairobi (Odunga, J.) dated 23rd February, 2015

in

JUD. REV. MISC. APPL. NO. 381 OF 2013)

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JUDGMENT OF THE COURT

On 23rd February 2015, the High Court **(Odunga, J.)** determined a Judicial Review **(JR)** application taken out by the 3rd respondent, ***Kenya Airports Authority Staff Retirements Benefits Scheme*** **(KAA-SRBS)** and issued an order of *certiorari* against the 2nd respondent, ***Retirement Benefits Appeals Tribunal*** **(RBAT)**, quashing RBAT's decision made on 29th August 2013 in **Appeal Case No. 4 of 2012.** It also issued an order of prohibition restraining RBAT from proceeding any further with the appeal or enforcing its decision. In passing, it seems odd that an order of *prohibition* would issue to stop enforcement of an order that has already been quashed by *certiorari*. Be that as it may, that decision is now being challenged before us by ***Joseph Sembei Mutua*** **(Mutua)** who was a former employee of ***Kenya Airports Authority*** **(KAA)** and consequently a member of **KAA-SRBS**. He had filed the initial complaint before the ***Retirement Benefits Authority*** **(RBA)** about the calculation of his pension, which complaint was dismissed, hence the appeal to **RBAT**.

A short background will contextualize the appeal.

Mutua joined the KAA-SRBS on 1st August 1996 when he started working for KAA and worked thereafter for seven years. It is common ground that he was retrenched together with other employees on 20th April 2004 at the age of 46 years.

Subsequently, on 19th November 2009, at the age of 52.9, ***Mutua*** applied to commute part of his pension into a lump sum and receive the rest on monthly basis. According to KAA-SRBS, although it should have calculated the amounts payable under rule ***4(f)*** of the **KAA Pension Scheme Trust Deed & Rules (TDRs)** as amended in the year 2006, on the basis that ***Mutua*** had been *'retrenched'*, they gratuitously calculated the payments under rule ***4(b)***, on *'early retirement'* which was more beneficial to ***Mutua***. Under rule ***4(f)*** he would not have been entitled to any monthly pension payments. He was paid and accepted the cash lump sum of Ksh.2,686,635 and the monthly pension payments of Ksh. 47, 965 thereafter.

Two years down the line, ***Mutua*** complained that he had been underpaid his pension. According to him, the calculations had been made under the old regime of TDRs before they were amended in 2006. He asserted that his pension ought to have been calculated at not less than 40% of his final pensionable salary and that a 9% reduction factor introduced in the 2006 amendments, which would have given him a higher pension figure, was not considered in the calculations. He sought recalibration of his pension and when KAA-SRBS declined to comply, he filed suit in the High Court which was dismissed. After that he went to the RBA on 21st May 2012 and filed a complaint.

The RBA considered the complaint and found as a fact that KAA-SRBS had calculated the pension benefits under the 2006 amended TDRs and not the old rules as contended by ***Mutua***. There was therefore no need of re-computation of the pension. It dismissed the complaint, leading to the appeal aforesaid before RBAT.

RBAT took up the appeal as a re-hearing of ***Mutua's*** claim. Statements of defence, statements of facts, and written submissions were filed by RBA and KAA-SRBS who were the only parties named in the appeal. Lengthy oral submissions were also made by the respective counsel for the parties. Upon re-considering the matter, RBAT agreed with RBA that the amended TDRs were used to calculate the pension, but held that ***rule 4(a)*** of the rules which relates to *'normal retirement'* should have been applied, in which case the pensionable salary would have been higher and the 9% reduction factor would have applied. It proceeded to allow the appeal, make fresh calculations determining the monthly pension at Ksh.172,130, and ordered KAA-SRBS to recalculate and pay Mutua the pension benefits in accordance with ***rule 4(a).*** That was on 29th August 2013.

KAA-SRBS was aggrieved by that decision and it sought to have it quashed by the High Court on the basis that RBAT had acted *ultra vires* the **Retirement Benefits Act (the Act)** and in excess of its jurisdiction by changing the applicable rules of the pension scheme and ordering that rules which were not applicable to ***Mutua's*** case be applied. It was contended that the decision was irrational and unreasonable as it took irrelevant considerations into account and omitted to consider relevant ones. The motion was opposed by ***Mutua*** on the ground that it was challenging the merits rather than the process of reaching the decision.

According to him the application was a disguised appeal against the decision of RBAT, and not one for judicial review.

After considering the submissions made and the authorities relied on, the High Court found that RBAT proceeded in error as it had no express power granted by the Act which created it, to review the evidence presented before RBA; that RBAT could not invoke any inherent powers beyond those granted under the Act; that the Act does not expressly confer on RBAT the jurisdiction to grant substantive reliefs; and that RBAT did not have the jurisdiction to grant orders outside those conferred on it by ***section 49*** of the Act. As to whether RBAT erred in misconstruing the provision under which the pension was calculable, the court found that the decision was not amenable to judicial review as it was a merit decision amenable to appeal. On the basis of want of jurisdiction, however, the two orders were issued as aforesaid, thus provoking the appeal before us.

A whopping 17 grounds of appeal were filed to challenge the decision. It is not only prolix but the grounds are also repetitive. ***Rule 64*** of the Rules of this Court provide guidelines for drawing up a proper memorandum of appeal and we must draw the attention of appellants and cross appellants to that provision. In the written submissions, learned counsel for the appellant, **Mr. Titus Koceyo**, instructed by M/S Koceyo & Company, Advocates, attempted to rationalize the grounds of appeal into two broad issues, but still ended up being repetitive. There was no oral highlighting of the submissions.

The first broad issue deals with the parameters of Judicial Review while the second deals with jurisdiction of RBAT. On the 1st issue, counsel contended that the issues raised in the JR were never raised before the RBAT. According to him, all the parties were given the latitude required by the rules of natural justice to submit their entire case and they are estopped from faulting RBAT on the decision arrived at on the merits of the appeal. The decision was proper on the law and facts and cannot be challenged through JR. Counsel emphasized that JR was reserved for flaws made in the decision making process, none of which were established in this case. The case of ***Municipal Council of Mombasa vs. Republic & another*** ***[2002] eKLR*** was relied for defining the parameters of JR.

On the second broad issue, counsel submitted that the jurisdiction of RBAT to hear and determine appeals from RBA cannot be questioned. In his view, it is derived from ***Article 169*** of the Constitution which makes RBAT a subordinate court. In addition, the powers are spelt out in ***sections 48*** and ***49*** of the Act which donates review powers without limiting the manner in which those powers may be exercised. He submitted that RBAT has all the powers of a subordinate court of first class to summon witnesses, take evidence or call additional evidence.

Furthermore, ***section 52*** of the Act permits the adoption of the Civil Procedure Rules in dealing with appeals. It would be absurd, therefore, in his view, to give such powers to RBAT and not expect it to arrive at a decision or judgment just like a subordinate court.

Counsel concluded by citing the case of ***Emfil Limited vs. Registrar of Titles Mombasa & 2 others*** ***[2014] eKLR*** where this Court relied on the case of ***Pastoli vs. Kabale District Local Government Council and Others*** ***[2008] 2 EA 300*** to delimit the application of JR, thus:-

> ***"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality".***

According to counsel, none of those transgressions can be attributed to RBAT, and the appeal should be allowed.

In response to those submissions, KAA-SRBS, filed written submissions through M/S Mohamed Muigai, Advocates who were represented at the hearing by **Mr. Wakhisi** holding brief for Mr. Wetang'ula. No oral highlights were made. On the first broad issue, counsel agreed with the proposition in law that the JR process was concerned with the decision making process and not the merits of the decision.

The case of ***Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 others*** ***[2012] eKLR*** was cited for emphasis that '*Unless that restriction on the power of the court is observed, the court will... under the guise of preventing the abuse of power, be itself guilty of usurping power...Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made'.* Counsel observed that the High Court was very conscious about those parameters and was careful in the manner it navigated through them.

As regards the 2nd issue, counsel submitted that the High Court was properly guided in reaching the conclusion that ***section 49*** of the Act did not confer on RBAT the power to grant certain reliefs in its appellate jurisdiction. The court had relied on the ***Kenya Pipeline Company Limited*** **(supra*)*** where this Court followed the principle as laid out by **Lord Reid** in ***Anisminic Ltd vs. Foreign Compensation Commission*** ***[1969] 1 ALL ER 208*** **at p. 213, para H – 214 para A** that:-

> ***"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal has jurisdiction to enter on the inquiry, it has done or failed to do something in the course of inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it has no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued provisions giving it powers to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide rightly."*** [Emphasis added].

According to counsel, a provision giving powers to a statutory tribunal must be express and must be strictly construed. It is not a matter of implication. The case of ***Republic vs. Rent Restriction Tribunal Ex-parte: Mayfair Bakeries Limited & another*** ***[1982] eKLR*** was cited for that principle. Counsel concluded by submitting that a tribunal is a creature of statute and can only exercise such jurisdiction as the creating statute gives, and in this case, no express power was given by the statute to RBAT to recalculate the appellant's benefits and order the KAA-SRBS to pay as calculated. The High Court was right to quash the decision.

In further response to the appellant's submissions, RBA filed written submissions through Prof. Albert Mumma & Company Advocates, which were similarly not orally highlighted as there was no appearance by counsel at the plenary despite service of notice. Counsel first dealt at length with the question of whether RBAT properly decided on the rules applicable in determining the pension payable to the appellant. In our view, that discussion was misplaced because the High Court found and held that RBAT's decision on that aspect was a merit decision and therefore outside the ambit of JR. There is no cross appeal on that finding.

As regards the issue of the jurisdiction of RBAT, counsel agreed with KAA-SRBS that the powers of RBAT emanate from ***section 48*** as read with ***section 49*** of the Act and must be strictly construed. In counsel's view, it was clear that RBAT acted outside those powers when it made its final orders, particularly the order that KAA-SRBS should calculate and pay the appellant's benefits in accordance with the TDRs. Counsel referred to the Supreme Court decision in the case of ***Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others*** ***[2012] eKLR.*** to underscore the legal position that a court's or tribunal's power must be conferred by the Constitution or by the statute establishing it. There was no express power donated to RBAT in this matter.

Referring to ***section 52*** of the Act which the appellant relied on as purportedly giving power to RBAT to adopt the **Civil Procedure Act (CPA)** and Rules **(CPR)** when hearing and determining appeals, counsel submitted that the section was about the Chief Justice making rules governing appeals, court fees, costs and procedure to be followed. Since no rules have been made, the CPA and CPR would apply but nowhere in the CPR is RBAT given the power to make the orders it did on 29th August 2016, he concluded.

There was no appearance or submissions filed for the Attorney General who was on record for RBAT, despite service of hearing notice.

We have considered the appeal and the submissions of counsel fully. The power to grant JR orders is a discretionary one. We must therefore, as always, be slow to disturb the exercise of such discretion unless it is shown that,' *the judge misdirected himself in law; misapprehended the facts; took account of considerations of which he should not have taken account; failed to take account of considerations of which he should have taken account; or the decision, albeit a discretionary one, is plainly wrong.* See Madan, JA (as he then was) in ***United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs. East African Underwriters (Kenya) Ltd*** ***[1985]eKLR.***

In our view, the main issue that falls for our consideration is whether RBAT had the jurisdiction to hear and grant the orders it made on 29th August 2013 in

Appeal Case No. 4 of 2012.

The secondary issue relating to the parameters applicable in considering JR applications is not really contentious. The High Court and all counsel appearing before it alike, as well as counsel who made submissions before us, are agreed on the traditional common law view

exemplified in such cases as the ***Municipal Council of Mombasa case*** **(supra)** that Judicial Review is concerned with the decision making process, not with the merits of the decision itself. They were also conscious of the older cases like ***Pastoli vs. Kabale District Local Government Council and Others*** ***[2008] 2 EA 300*** which focused on the three 'Is' of '*illegality, irrationality and procedural impropriety*' in considering the decision making process.

What they did not discuss was the decision of this Court in the case of ***Child Welfare Society of Kenya vs. Republic & 2 others Ex-parte Child in Family Focus Kenya*** ***[2017] eKLR*** made on **17th November 2017** which extensively examined numerous decisions recording the significant evolution of JR over time to meet the changing conditions and demands affecting administrative decisions. The Court concluded that JR can no longer be confined to the traditional common law approach as it had been elevated to a constitutional level. It followed the Supreme Court in the case of ***Communication Commission of Kenya vs. Royal Media Services & 5 Others*** ***[2014] eKLR*** which held that *"... the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. "* and that *"... the power of judicial review in Kenya is found in the Constitution, as opposed to the principle of the possibility of judicial review of legislation established in Marbury vs. Madison 5 U.S. 137 (1803).*" The Court in the ***Child Welfare Society case*** then concluded as follows:

> ***"This Court, as recently as 20th July, 2017, in the case of Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR was in no doubt about the current place of JR in our system of governance. After extensively reviewing the CCK Supreme Court decision (supra) and other cases, including Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others (2016) eKLR 51,*** and ***Pharmaceutical Manufacturers Association of South Africa in re ex-parte President of the Republic of South Africa & Others 2000 (2) SA 674 (CC) at 33, the five-Judge bench held:***
>
> "*In our considered view presently, judicial review in Kenya has Constitutional underpinning in Articles 22 and 23 as read with Article 47 of the Constitution and as operationalized through the provisions of the Fair Administrative Action Act. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the Civil Procedure Act and Rules is a procedure for applying for remedies under the common law and the Law Reform Act. These common law remedies are now part of the constitutional remedies that the High Court can grant under Article 23 (3) (c) and (f) of the Constitution. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law Order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both..... We hold that Kenya has one and not two mutually exclusive systems for judicial review. The common law and statutory judicial review are complementary and mutually non-exclusive judicial review approaches."* [Emphasis added].

That is still the current view we hold on the parameters of JR applications.

As for the main issue, the High Court held that RBAT had no jurisdiction to grant substantive reliefs or exercise any powers outside those conferred on it under ***section 49*** of the Act. It behooves us, therefore, to examine the Act and ***section 49*** thereof for the proper statutory construction.

RBAT is a creature of the Act which was enacted to establish the Retirement Benefits Authority '*for the regulation, supervision and promotion of retirement benefits schemes, the development of the retirement benefits sector and for connected purposes'.* ***Section 49*** flows from ***section 47*** which established RBAT, spelled out its purpose and specified the membership; and ***section 48*** which allows any person aggrieved by a decision of RBA, or where any dispute arises between any person and RBA as to the exercise of its powers, to appeal to RBAT.

Section 49 then specifies six powers which are at the disposal of RBAT as it exercises its appellate jurisdiction, as follows:

> ***(1) On the hearing of an appeal, the Tribunal shall have all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath or 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 are administered to make a full and true reply to the interrogatories within the time specified by the Tribunal.***
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> ***(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.***
>
> ***(4) The Tribunal shall have power to award the costs of any proceedings before it and to direct that costs shall be paid in accordance with any scale prescribed for suits in the High Court or to award a specific sum as costs.***
>
> ***(5) All summons, notices or other documents issued under the hand of the chairman of the Tribunal shall be deemed to be issued by the Tribunal.***
>
> ***(6) Any interested party may be represented before the Tribunal by an advocate or by any other person whom the Tribunal may, in its discretion, admit to be heard on behalf of the party."***

It is apparent from those powers that the Act does not state what orders RBAT can issue consequent upon hearing an appeal. In that event, the trial Court formed the following view:

> "***It is clear that the section does not expressly confer upon[RBAT] powers to grant certain reliefs in the exercise of its appellate***

jurisdiction apart from the power to *"summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents"; "receive evidence by affidavit and administer interrogatories and require the person to whom the interrogatories are administered to make a full and true reply to the interrogatories"; "take into consideration any evidence which it considers relevant to the subject of an appeal before it"; and "award the costs"****. There is for example no express power to review the evidence presented before [RBA]..... It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly."***

In so holding, the trial court relied on several court decisions among them

Choitram vs. Mystery Model Hair Salon [1972] EA 525;Gullamhussein Sunderji Virji vs. Punja Lila and Another [1959] EA 734;Ex Parte Mayfair

Bakeries Limited vs. Rent Restriction Tribunal and Kiriti Raval Nairobi HCMCC No. 246 of 1981; and ***Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit Raval, Nairobi HCMCC No. 246 of 1981*** all to the effect that powers of a tribunal must be expressly conferred and that:

> "***Testing whether a statute has conferred jurisdiction on an inferior court or a tribunal... the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication and that a Tribunal is a creature of statute and has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration."***
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> The court then concluded thus:-
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> ***"It is therefore not without some regret that I have to reach a conclusion that [RBAT] had no jurisdiction to grant the orders outside those expressly conferred on it by section 49 of the Act. Whereas the effect of this decision is to render the [RBAT's] existence virtually purposeless, this Court cannot countenance a situation where a Tribunal's powers are not circumscribed by the parent statute. To do so would be to create a monster in the name of a statutory Tribunal. It is however hoped that the Attorney General will expeditiously put into motion a process by which the Retirement Benefits Act, Cap 197 Laws of Kenya can be amended in order to expressly confer the necessary powers on [RBAT]."***

We have anxiously considered the construction placed on ***section 49*** by the trial court and we concur that the powers of RBAT consequent upon hearing an appeal, and the orders that it can make, are not expressly stated in that section. We also agree that it is desirable that there ought to be clarity in the applicable legal provisions. Nevertheless, we find ourselves unable to go as far as holding that RBAT had no jurisdiction to make the orders it did. This is why.

It is trite, and the Supreme Court re-emphasized it in the ***Samuel Kamau Macharia case (supra),*** that:

> "***A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."***

As further stated in the ***Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR:***

> ***"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given"***

See **Words and Phrases Legally defined** – Volume 3: I – N Page 113

A five-Judge bench of this Court in the case of ***Law Society of Kenya v Centre for Human Rights and Democracy & 13 others [2013] eKLR*** also stated of jurisdiction thus:

> ***"The scope of the exercise of any court's jurisdiction in Kenya is dictated by Section 3 of the Judicature Act which provides that:***
>
> ***'The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with –***
>
> ***(a) the Constitution; (b) …'***

Black's Law Dictionary, ***8th Edition defines jurisdiction as:***

> *"… the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties … the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."*

Applying those principles, we now examine the jurisdiction of RBAT. As stated earlier, RBAT was created by the Act under **Part VI** and its jurisdiction under that Part is to hear appeals from decisions of RBA, or any dispute arising between any person and RBA as to the exercise of its power. That is ***sections 47*** and ***48*** of the Act. The matter before us relates to an appeal from RBA and therefore it cannot be said that RBAT had no jurisdiction to admit and hear it. By definition, *'an appeal is a proceeding undertaken to have a decision reconsidered by a higher authority, especially the submission of a lower court's or agency's decision to a higher court for review and possible reversal'*. See **Black's Law Dictionary;** Fourth Edition at page 112.

In the course of exercising the jurisdiction above, RBAT is given certain powers listed under ***section 49***, which are akin to the powers of a subordinate court of the first class. But that is not all there is to the authority of RBAT in hearing appeals. ***Section 52*** of the Act, which is also under Part VI, provides for the rules applicable to RBAT. It empowers the Chief Justice to make rules on various matters, including the procedure to be followed, and declares that:

> ***'..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 jurisdiction."***

It is common ground that the Chief justice had not made any rules to govern appeals to RBAT when the matter went before it. The fallback position must therefore be the **CPA** and **CPR.** The CPA in ***section 78*** makes provision for the powers of an appellate court as follows:

> **"78.** ***Powers of appellate court***
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> ***(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power-***
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> ***(a) to determine a case finally;***
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> ***(b) to remand a case;***
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> ***(c) to frame issues and refer them for trial;***
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> ***(d) to take additional evidence or to require the evidence to be taken;***
>
> ***(e) to order a new trial.***
>
> ***(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."***

The Rules then, under ***Order 42***, make further provisions on the process of appeals, including provisions for the orders that may be made in the judgment on appeal, thus:

> ***"What judgment may direct [order 42, rule 31.]***
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> ***The judgment may be for confirming, varying or reversing the decrees from which the appeal is preferred, or if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the court to which the appeal is preferred may pass a decree or make an order accordingly.***
>
> ***32. Power of appellate court on appeal [Order 42, rule 32.]***
>
> ***The court to which the appeal is preferred shall have power to pass any decree and 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, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal."***

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 an 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.

The appeal is meritorious and is allowed. The decision of the ***Retirement Benefits Appeals Tribunal*** is hereby upheld. The respondents shall bear the costs

of the appeal.

We so order.

Dated and delivered at Nairobi this 11th day of October, 2019.

P. N. WAKI

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JUDGE OF APPEAL

ASIKE MAKHANDIA

....

JUDGE OF APPEAL

F. SICHALE

....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR