IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 221 OF 2015

BETWEEN

MACKENZIE MOULDING MOGERE ……..……..... 1ST APPELLANT

JOHNSON MURIGU NDORIA ……..……..…..... 2ND APPELLANT

AND

THE TRUSTEES OF TELPOSTA PENSION SCHEME ..... 1ST RESPONDENT

THE ATTORNEY GENERAL …….....…..……. 2ND RESPONDENT

RETIREMENT BENEFITS AUTHORITY …….....…..…… 3RD RESPONDENT

TELKOM (K) LIMITED ……..….....…….…….. 4TH RESPONDENT

POSTAL CORPORATION OF KENYA STAFF PENSION SCHEME ……5TH RESPONDENT

*(An appeal from the Judgment and Decree of the Industrial Court of Kenya at Nairobi (Mathew N. Nduma, J) dated 21st November, 2014**in Industrial Court Petition No. 16 of 2013***

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JUDGMENT OF THE COURT

1. The appeal before us arises from the decision of the Industrial Court (now the Employment & Labour Relations Court - **ELRC**) **(Nderi Nduma, J.)** sitting as a constitutional court. The petition was filed by the Trustees of Telposta Pension Scheme **(Telposta),** the 1st respondent, at the Constitutional Division of the High Court, **(Majanja, J.)** on 24th April, 2013 but the court was of the view that it was within the jurisdiction of the Industrial Court and transferred it to that court.

The court also issued an *ex parte* seven-day conservatory order pending the transfer.

2. For proper understanding of the appeal, it is necessary to define the parties, explain the interplay between them and the genesis of the dispute. The 1st appellant **(Mogere)** and the 2nd appellant **(Ndoria)** were management level employees of Telkom Kenya Ltd **(Telkom),** the 4th respondent. They retired on

the 11th July, 2003 and 30th June, 2003, respectively, after working for many years. The two were members of **Telposta** a scheme sponsored by Telkom to cater for retirement benefits of all cadre of its employees, which was run by trustees under a Trust Deed executed on 1st July, 1997. Upon the retirement of Mogere and Ndoria, Telposta applied the provisions of the Trust Deed, as it understood it, and paid them their pension dues on the basis of their basic salary as defined in the Trust Deed.

3. The two objected to the payment but Telposta rejected the objection. They filed a complaint with the Retirement Benefits Authority **(RBA)**, the 2nd respondent, which was also dismissed by the Executive Officer. In accordance with the Retirement Benefits Act, Cap 197, **(the Act)** they appealed to the Retirement Benefits Appeals Tribunal **(the Tribunal),** which is the dispute resolution institution of RBA set up under ***section 47*** of the Act, in Appeal Nos. 2 of 2009 and 3 of 2009. Their contention throughout was that Telkom had reviewed the terms and conditions of service for its management employees by delinking them from the unionizable staff in May 2000. Amongst other terms and conditions reviewed was the salary which abolished all allowances and consolidated them with the basic pay to form one consolidated figure of basic salary. By a further personnel circular issued on 1st July, 2002, Telkom implemented the policy and deductions of 7.5% of the basic salary were made thenceforth and forwarded to Telposta. For pension purposes, they asserted, the employer had determined that the consolidated salary was the "basic pensionable salary". The tribunal agreed with those arguments and allowed the appeal. RBA complied and ordered Telposta to pay Mogere and Ndoria accordingly at the pain of execution process.

4. Aggrieved by that decision, Telposta went to the High Court **(Onyancha, J.)** to challenge it but the appeal was struck out on the basis that there was no provision in the Act for the High Court to review or sit on appeal against the decision of the Tribunal. The court found that the Tribunal was not a subordinate court since decisions of RBA officials and institutions are regarded as decrees of the subordinate court exercising original jurisdiction. An appeal to the Tribunal from such decrees would thus be equivalent to an appeal to the High Court and therefore no appeal can lie to the High Court from the Tribunal.

5. That turn of events made Telposta feel exposed and unprotected despite constitutional guarantees for equality and protection of the law. It seemed to it that there was no legal avenue for redress. In its view, ***sections 49 (1)*** of the Act equated the Tribunal to a subordinate court but at the same time appeared to elevate it to the status of the High Court under ***section 49 (4)*** and ***50 (2).*** Those were contradictory provisions which required the interpretation of the court. There were also some contradictory decisions of the High Court on whether the High Court had jurisdiction to hear appeals from the Tribunal, it was claimed. Telposta further foresaw its immediate collapse if it was forced to pay all retired employees on the basis of their consolidated salaries in addition to the existing burden of paying phenomenal pensions based on 'basic salaries' of thousands of members of the former Kenya Posts and Telecommunications in accordance with the Trust Deed. In all this, Telposta was supported by Telkom which further contended that on the advice of its actuaries, it had reversed the circular dated 1st July, 2002 by issuing another one dated 22nd July, 2003, reverting to the basic salary as the final pensionable salary and backdated it to 1st July, 2002. The Postal Corporation of Kenya Staff Pension Scheme **(Postal Pension Scheme),** the 5th respondent, sponsored by the Postal Corporation of Kenya also supported Telposta but took no active part in the proceedings.

6. It was in those circumstances that Telposta filed the petition which gave rise to this appeal. The petition sought the following orders:

> ***"(a) A declaration do issue that, in so far as the Retirement Benefits Act, Cap 197 is silent as to whether a party aggrieved by the decision of Retirement Benefits Appeals Tribunal can appeal or seek review in the High court, is unconstitutional.***
>
> ***b. A declaration do issue that in so far as Retirement Benefits Act, Cap 197 under sections 49 (4) and 50 (2) or any other section purports to give the Retirement Benefits Appeals Tribunal the status of a High Court is unconstitutional.***

c. A declaration do issue that in so far as Retirement Benefits Appeals Tribunal decisions purported to direct for the recalculation of the Retirement Benefits for the interested parties and other parties using a consolidated salary instead of a basic salary is fragrant breach of Article 19, 20 and 21 of the Constitution in respect of social economic rights and is discriminatory.

d. An order do issue allowing the High Court to hear and determine appeals emanating from decisions of Retirement Benefits Appeals Tribunal.

e. The Honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice."

7. Mogere and Ndoria strongly opposed the petition as misconceived and an abuse of court process since the High Court, in exercise of its Judicial Review jurisdiction, was always available to any litigant who seeks to quash the decision of an inferior tribunal. Telposta had legal recourse and was not as helpless as purported. In fact, they pointed out, Telposta was guilty of non-disclosure as it had already filed a Judicial Review application **(No. 331/2012)** before the High Court. They also contended that Telposta had no basis for creating fears that it would be rendered bankrupt if it complied with the orders of the Tribunal, since the order of the Tribunal related to two retirees only. As for the belated reversal of the policy which was backdated, they contended that it was a nullity; first, because they had already retired, and secondly, because on the authority of the case of ***The Director of Pensions vs A. M. Cockar [2000] 1E A 38***, retrospectivity of the reversal was unlawful.

8. The Attorney-General **(AG)** opposed the petition on the grounds that the Tribunal was exercising special powers under ***sections 49*** and ***51*** of the Act and was the final arbiter in such matters. In its appellate jurisdiction, the Tribunal had the powers of the High Court and therefore no appeal could go to the High Court from its decisions. In the AG's view, there was nothing unconstitutional about the provisions of the Act.

9. RBA opposed the petition too on the basis that ***Article 165 (6)*** of the Constitution *(supervisory jurisdiction of the High Court)* was available to Telposta. It defended its parent Act and the provisions thereunder for settlement of disputes which have finality. As for declaring various provisions unconstitutional, RBA contended that only Parliament had the legislative authority to change the law.

10. When the matter fell before Nderi Nduma, J. for hearing and determination, he framed three issues as follows:-

"a. Whether the provisions of section 49 (4) and 50 (2) (sic) of the Act are unconstitutional;

b. Whether the 2nd Respondent's (tribunal's) ***decision was unlawful and/or unconstitutional; and***

c. What remedy, if any, is available to the Petitioner."

11. On the first issue, the court found that there was nothing unconstitutional about the provisions of the Act, and specifically ***sections 49 (4)*** and ***50 (2)*** (sic). We may observe in passing that the latter section does not exist and is probably a reference to ***section 51 (2).*** The court stated that there was nothing wrong, in principle, in creating a specialized appellate tribunal and clothing it with powers of finality in the interests of expeditious settlement of disputes. Nevertheless, the court found, the Tribunal was a subordinate court which was amenable to the supervisory jurisdiction of the High Court/ELRC through Judicial Review, which jurisdiction Telposta had already invoked but failed to disclose to the court. A constitutional petition was also an available remedy.

12. On the second issue, the court found that the pension scheme of Telposta was governed by the Trust Deed dated 1st July, 1997 which was never amended; that the pension scheme covered all staff of Telposta whether in management or not; that the Trust Deed defined *"Pensionable salary"* as *"a member's annual basic salary";* that the *'basic salary'* is defined as the basic rate of pay determined by the

employer exclusive of allowances; that the circular dated 8th May, 2000 introduced a consolidated pay package comprising basic salary and allowances, for management staff only, but maintained the same rate of contribution (7.5%) towards the pension scheme; and that the term "consolidated salary" introduced in the circular was alien to the Trust Deed.

13. On the basis of those findings, the court held as follows:-

> **"It is the Court's considered view that, by awarding a pension, much higher than that provided in the founding documents aforesaid, the Retirement Benefits Authority did not act lawfully, reasonably and in terms of a fair procedure contrary to Article 47** ***(1) of the Constitution. The Court finds that it has been demonstrated that the Petitioner did not receive extra contributions from the 1st and 2nd Interested Parties based on consolidated salary to warrant a review of the pension payable to them. The Tribunal exercised powers it did not have and its decision was tainted with illegality and the same was discriminatory to all those retirees whose pension had been calculated and paid out in terms of the Trust Deed and Scheme Rules. The Court also finds that the Petitioner's right to protection of the law was infringed by the unlawful, unreasonable and procedurally unfair decision by the 2nd Respondent contrary to Article 27 of the Constitution."***

14. In its disposition of the matter, the court declared the decision of the Tribunal unlawful, unreasonable and in violation of the Trust Deed and the Rules of Telposta pension scheme. It declined to consider the rest of the prayers made in the petition, and ordered the AG, RBA, Mogere and Ndoria to bear the costs of the petition, jointly and severally.

15. Only Mogere and Ndoria were aggrieved by those findings and raised 14 grounds in their memorandum of appeal as follows:-

> ***"1.The Industrial Court of Kenya had no jurisdiction to entertain the petition which was a constitutional petition and not a labour or industrial relations matter.***
>
> ***2. The Industrial Court of Kenya's decision made on 21st November, 2014 was unconstitutional null and void.***
>
> ***The learned Judge erred in fact and law in:-***
>
> ***3. declaring that the Retirement Benefits Appeals Tribunal be directed for the recalculation of the Retirement benefits for the 1st and end interested parties and other parties using a consolidated salary instead of basic salary.***
>
> ***4. holding that the 'rest of the prayers by the petitioner were declined' except that the 1st and 2nd respondents and the 1st and 2nd interested parties are jointly and severally held liable to pay costs of the petition. Costs ought to follow the events.***
>
> **5. finding that there was any requirement or necessity for the amendment of the Trust Deed.**
>
> ***6. finding that the Retirement Benefits Appeals Tribunal acted unreasonably.***
>
> ***7. falsely accusing the Retirement Benefits Authority for*** *(sic)* ***violating the constitution.***
>
> ***8. finding that it had been demonstrated that the petitioner failed to receive extra contributions from the 1st and 2nd interested parties based on consolidated salary to warrant a review of the pension benefits payable to them.***
>
> ***9. finding that the Tribunal acted in excess of its powers.***

10. stating that the petitioner was aggrieved by the decision of the 2*nd* *Respondent the Retirement Benefits Authority to award management staff a pension package calculated on the basis of consolidated salary instead of basic salary.*

11. making serious mistakes as to the background of the case.

12. failing to appreciate that the case of Tanui -v- Telkom Kenya Ltd. Industrial Court Case No. 254 of 2010 was distinguishable on facts and law from this case and the decision therefore inapplicable and irrelevant.

13. failing to consider, at all, the case of Cocker -v- Director of Pensions CACA no. 50 of 1999 was in fours with this case and which decided that the reversal of pension scheme cannot be made to apply retrospectively.

14. giving no or no adequate consideration to the contents of the 1st and 2nd appellants' pleadings and submissions."

16. Those grounds were not urged *seriatim*. Instead learned counsel for the appellants, **Mr. Odero** instructed by M/s Meshack Odero & Company Advocates urged them globally, but emphasized three grounds which, in our view, are dispositive of the appeal.

17. The first ground is on jurisdiction, which we must determine *in limine* since jurisdiction is everything and the court cannot move a single step without it. Counsel pointed out, and correctly so, that the issue had been raised by the appellants in pleadings and submissions before the trial court. In his view, the High Court had no jurisdiction to transfer the constitutional petition to the ELRC and ELRC had no jurisdiction to hear and determine the matter. That is because, under ***Article 165 (3)*** of the Constitution, only the High Court is clothed with jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been violated or threatened, and also to deal with the interpretation of the Constitution. On the other hand, under ***Article 162 (2),*** the ELRC has exclusive and appellate jurisdiction to hear and determine disputes relating to or arising from employment between an employer and an employee. According to Mr. Odero, the real dispute in the petition did not relate to or arise out of employment between an employer and an employee. It was between Telposta and the two appellants, none of whom was an employer or employee of the other. Similarly, before the tribunal, the dispute was between the appellants and RBA which was not their employer. In his view therefore, the matter fell outside ***section 12*** of the Employment and Labour Relations Act and the Court acted illegally in handling it.

18. Furthermore, urged counsel, it was wrong for the High Court to determine on its own without hearing the parties, that it had no jurisdiction in the matter and yet issue an *ex parte* order pending the transfer of the matter to the Industrial Court. That was contrary to previous decisions of the same court in the case of ***Prof. Daniel N. Mugendi vs Kenyatta University & 3 Others*** ***CACA No. 6 of 2012*** where the court heard the parties before transferring the matter. The ELRC also made no effort to consider whether it had jurisdiction or not but simply proceeded to hear the case. According to counsel, all this was illegal. The legal forum for a party aggrieved by the decision of the RBA was the Retirements Benefits Appeals Tribunal which under ***section 48*** of the Act has exclusive jurisdiction even to determine constitutional issues. Finally, counsel submitted that the court had no jurisdiction to hear the constitutional petition because there was already in existence a Judicial Review application filed in the same matter and both were mutually exclusive.

19. Responding to the issue of jurisdiction, Telposta, through learned counsel **Mrs. P. K. Mbaabu** instructed by M/s P. K. Mbaabu & Company Advocates, contended that the issue was not raised at the earliest opportunity and therefore the appellants had submitted to the jurisdiction of the court. They are precluded from denying the jurisdiction of the court. Secondly, urged counsel, Telposta was the agent of Telkom, the employer, in the administration of the pension scheme installed for the benefit of its workers and is defined under the Labour Institutions Act, No. 12 of 2007 as the employer. So, clearly, submitted counsel, the dispute arose out of the labour relations between the employer and its two employees. The

petition also raised constitutional issues which, as correctly held by the trial court, were amenable to consideration by the court.

20. For its part, Telkom, through learned counsel, **Mr. Chrysostom Akhaabi**, instructed by M/s Iseme, Kamau & Maema, Advocates, submitted, firstly, that the High Court under ***Article 165,*** and the ELRC under ***Article 162*** of the Constitution, have supervisory jurisdiction over subordinate courts and tribunals. The High Court, however, is precluded under ***Article 165 (6)*** from exercising jurisdiction over matters within the jurisdiction of courts established under ***Article 162 (2)*** which include the ELRC. Nevertheless, observed counsel, the Court of Appeal, in the case of ***Prof. Daniel N. Mugendi vs Kenyatta University & Others [2013] eKLR***, affirmed that there can be inter transfer of cases between the High Court and courts of equal status since those courts are constitutionally mandated to hear such cases. It was therefore lawful and appropriate for the petition to be transferred to the ELRC by virtue of ***Article 165 (5).***

21. Secondly, counsel submitted, retirement benefits in their very nature arise from employment and labour relations. They cannot be removed from labour relations as they are a direct result of an employment relationship and fall squarely under ***section 12 (1) (a)*** of the ELRC Act. He cited the case of ***Albert Chaurembo Mumba & 7 Others vs Maurice M. Munyao & 148 Others [2015] eKLR*** in support of that submission. Thirdly, it was submitted, the constitutional petition was challenging the fairness of the administrative decision of the tribunal pursuant to the principle of *"non-exclusive approach to a challenge of an administrative action"* as provided for under the Constitution and the **Fair Administration Act, 2015.** Counsel cited the case of ***Abdullahi Ali Mohammed vs Kenya Ports Authority & Another [2016] eKLR***, a dispute between a retired employee and his pension scheme, where the court held that pension matters are at the core of the ELRC mandate. He added that the ELRC had jurisdiction to hear and determine disputes relating to queries on terminal benefits, staff retirement benefits, and rules of a retirement benefits scheme between an employer and former employees. In sum, he concluded, both the High Court in transferring the case and the ELRC in receiving and hearing it acted within the law and the objection to jurisdiction was baseless.

22. As for RBA, it was submitted through learned counsel **Ms. Mwika** instructed by M/s Ochieng, Onyango, Kibet & Ohaga, Advocates that the jurisdiction of the two courts is provided for in ***Articles 162*** and ***165*** of the Constitution and also in Acts of Parliament. The parties to an employment contract are the employer and employee while the parties to the Trust Deed are the employer and the trustees of the scheme put in place by the employer. The employment relationship is thus the basis of all the consequential arrangements. As for the jurisdiction of the ELRC to hear and determine questions involving redress of violations of or threats to fundamental rights and freedoms in the Bill of Rights, counsel submitted that the issue has already been settled in the affirmative by the courts and she cited the cases of ***Judicial Service Commission vs Gladys Boss Shollei & Another [2014] eKLR*** and ***United States International University (USIU) vs Attorney General & 2 Others [2012] eKLR*** for confirmation. The ELRC therefore has jurisdiction to hear and determine matters related to the retirement benefits dispute, to enforce fundamental rights ancillary to and incidental to the employment relationship and to interpret constitutional questions in respect of retirement benefits.

23. Finally, the AG supported RBA, not only in stating that the matter was within the remit of the ELRC under ***section 12*** of the ELRC Act, but also that the ELRC has jurisdiction to interpret the Constitution in such matters. The ***United States International University*** (supra) and ***Prof. Daniel N. Mugendi vs Kenyatta University & Others (***supra) cases were reiterated in support.

24. We have considered the issue of jurisdiction and, ultimately, we agree with the respondents that the High Court made no error in transferring the constitutional petition to the ELRC and the ELRC made no error in law in hearing and determining it. It is not a novel issue and we are content to follow the decision of this Court in the case of ***Nellie Wanjala Opembe vs Fibi Usita Aura & Another [2016] eKLR*** where similar objections were raised. This Court stated:-

> "In ***The matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011*** *(unreported)* The Supreme Court succinctly addressed the question of jurisdiction thus,

> **‘29.** ***Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution; by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel “Lilian S’ vs. Caltex Oil (Kenya) Limited (1989) KLR 1, which bears the following passage (Nyarangi, JA at page 14):-***
>
> *“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.”*
>
> ***“30. The Lilian ‘S’ case establishes that jurisdiction flows from the law, and the recipient – Court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”***

This Court has pronounced itself in similar instances, on the question of whether the Employment and Labour Court has jurisdiction to consider constitutional issues. In the case of ***County Assembly of Kisumu & 2 Others vs Kisumu County Assembly Service Board & 6 Others [2015] eKLR*** it was posited that the Constitution does not establish a stand-alone constitutional court with exclusive jurisdiction to adjudicate upon constitutional issues. Similarly, in the case of ***Prof. Daniel N. Mugendi vs Kenyatta University & Others [2013] eKLR***, which was concerned with the question of whether or not the Industrial Court had jurisdiction to determine issues concerned with the of violation of constitutional rights, this Court cited with approval the decision of Majanja, J. in ***United States International University (USIU) vs The Attorney General & Others [2013] eKLR*** where the learned judge in adopting the position of the ***Gcaba vs Minister of Safety and Security & Others CCT 64/08(2009) ZACC 26*** observed thus;

> ***“Since the court is of the same status of the High Court, it must have jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within the matter before it.”***

In furtherance of this position, with which we are in agreement, the same court in the case of ***Prof. Daniel N. Mugendi vs Kenyatta University & 3 Others (supra)*** observed thus;

> ***“In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.”***

25. To that learning, we may add another decision of this Court in ***Judicial Service Commission vs Gladys Boss Shollei & Another [2014] eKLR*** where it was held:-

> ***"[40] Article 23 (1)&Article 165 (3) (b) of the Constitution grants the High Court powers to hear and determine questions involving redress of violations or infringement or threatened violations of fundamental rights and freedoms in the Bill of Rights. However, Article 23 (2) provides for legislation giving original jurisdiction to subordinate courts to hear and determine disputes for enforcement of fundamental rights and freedom. In addition, Article 23 (3) does not limit jurisdiction in the granting of relief in proceedings for enforcement of fundamental rights to the High Court only, but empowers “a court” to grant appropriate relief including orders of Judicial***

Review in the enforcement of rights and fundamental freedoms under the Bill of Rights. Also of note is Article 20 (3) that places an obligation on "any court" in applying a provision of the Bill of Rights to develop the law and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. These provisions confirm that the Constitution does not give exclusive jurisdiction in the enforcement of the Bill of Rights to the High Court, but anticipates the enforcement of the Bill of Rights by other Courts."

26. It is beyond argument in this case that the issues that arose for determination in the Trust Deed related to the employment of the two appellants and are so interwoven that we cannot talk about one without reference to the other. Simply put, they concern employment and labour relations which is the remit of the ELRC under ***Article 162 (2) (a)*** of the Constitution and ***section 12*** of the ELRC Act, enacted pursuant to ***Article 162 (3)***. Furthermore, the dispute took a constitutional trajectory as there was alleged non-compliance with the right to fair administrative action and the legality of provisions for resolution of disputes in the RBA Act. That alone would entitle the court to consider and determine the dispute.

27. As for the submission by the appellants that the constitutional petition was untenable due to the availability of other avenues of review through the Retirement Benefits Appeals Tribunal or the common law remedy of Judicial Review, we think the submission is bereft of merit. As **Ojwang, J.** (as he then was) stated in the case of ***Kenya Transport Association vs Municipal Council of Mombasa & Another [2011] eKLR,*** stated on available options:

"… Although counsel for the Respondents urged that the petitioners should have sought a redress by invoking the administrative processes provided for under the Public Procurement and Disposal Act, such a position is not to be upheld, where constitutional rights have been, as in this case, infringed, and the aggrieved persons have opted for enforcement by Court process."

28. Indeed, as recently as 20th July, 2017, a 5-Judge bench of this Court in the case of ***Independent Electoral and Boundaries Commission (IEBC) vs The National Super Alliance (NASA) & 7 Others, Civil Appeal No. 224 of 2017 (UR)*** found that the source of power of any judicial review is now found in the Constitution.

The Court, after extensive review of authorities, stated thus:-

"92. 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."

29. For the reasons stated above, we find no impropriety in pursuing the constitutional petition and we reject the first ground of appeal. It would, of course, be an abuse of court process to pursue the same remedies in different courts.

30. The second ground of appeal relates to the constitutionality of the decision of the Tribunal. The thrust of the constitutional challenge mounted by Telposta was in respect of the Retirement Benefits Act, which purportedly gave finality to the decisions of the tribunal. That is why prayers (a), (b) and (d) of the petition above sought declarations that those provisions were unconstitutional since they did not give further remedy to an aggrieved party. As we have seen, the trial court made no analysis of those prayers, choosing instead to simply decline to deal with them. In view of the finding made by the court that the Tribunal was subject to the supervisory jurisdiction of the ELRC, a view we must say was well grounded

in law, it followed that there was a remedy and therefore the declarations sought were not available to Telposta. The petition ought to have been dismissed in respect of those three prayers.

31. But the trial court took a different trajectory and considered the decision-making process and the merits of the decision of the tribunal which it found *"unlawful, unreasonable, and procedurally unfair"* and therefore in violation of ***Articles 27*** and ***47 (1)*** of the Constitution. Article 27 relates to *'equality and freedom from discrimination'* while 47 (1) is on *'Fair administrative action'*. They were not cited anywhere in the pleadings but were invoked by the trial court. The language adopted by the trial court and the findings made also mirror the decision of **Majanja, J.** in the Judicial Review case of ***Republic vs Retirement Benefits Appeals Tribunal & 5 Others, Ex-parte Willy Jeremiah Ombese [2014] eKLR*** delivered on **18th July, 2014** while the decision in the constitutional petition was delivered on **21st November, 2014**. All the parties in the petition were involved in the Judicial Review application and the issues discussed and findings made were also discussed and made in the constitutional petition. Was it proper for the trial court to discuss the same issue twice over, albeit in different courts whose jurisdiction is coterminous? We think not.

32. We may reproduce **prayer (c)** above which appears to have invited the trial court to the trajectory of examining the decision making process and the merits of the tribunal's decision:

> ***c. A declaration do issue that in so far as Retirement Benefits Appeals Tribunal decisions purported to direct for the recalculation of the Retirement Benefits for the interested parties and other parties using a consolidated salary instead of a basic salary is fragrant breach of Article 19, 20 and 21 of the Constitution in respect of social economic rights and is discriminatory.***
>
> ***Article 19*** relates to the *'Rights and Fundamental Freedoms'*; ***Article 20*** to *'Application of the Bill of Rights'*; and ***21*** to *'Implementation of rights and fundamental freedoms'*, respectively. They appear to have been thrown into the prayer to give it constitutional flavour.

33. In the Judicial Review matter, the applicant sought the following orders:-

> *"1. An order of certiorari to remove to this Honourable Court to be quashed the decision of the Retirement Benefits Appeals Tribunal made on the 23rd February 2012 purporting to direct that the Retirement Benefits of given pensioners be calculated on their consolidated salaries.*
>
> *2. Further and in the alternative to prayer one above, an order of mandamus compelling the Retirement Benefits Appeals Tribunal to review the decision made on 23rd February 2012 in light of the interests of the pensioners who directly benefit from the Scheme and were not at the Senior level management level."*

34. The common denominator in both matters is the *'calculation of retirement benefits using a consolidated salary instead of a basic salary.'* The High Court discussed the issue at length and considered the same submissions which were rehashed in the constitutional petition and made the following conclusion:

> ***"51. In light of what I have stated above, the RBAT clearly failed to take into account and appreciate relevant matters particularly the obligation of the Scheme Trustees to calculate and pay the pension in accordance with the Trust Deed and Rules, the Retirement Benefits Act and the Regulations thereunder. The basis for calculation of the pension was the basic salary which was defined under the Trust Deed and Rules and that the same could not be varied except by an amendment to the Trust Deed. The decision of the RBAT directing the Trustees of the Scheme to make payments otherwise than in accordance with the Trust Deed and the Rules and is in therefore irrational and unreasonable and must therefore be quashed."***

35. That was the same conclusion reached by the ELRC four months later. Any party dissatisfied with the conclusions of the Judicial Review court had the option of an appeal. With respect, we think the ELRC was not entitled to consider a prayer that was patently *res judicata* and which has the potential of eading

to an absurdity if higher courts made contradictory findings in the twomatters.

Attention was drawn to the trial court about the existence of the Judicial Review application and the court found indeed that the application was filed earlier than the petition but the petitioner had failed to disclose that fact. That alone was an abuse of court process. Prayer (c) in the petition ought to have been struck out and we so hold.

36. Having so held, and having found that the rest of the prayers were for dismissal, we find that the constitutional petition had no other legs to stand on for the grant of the amorphous prayer (e) above. For the foregoing reasons, we allow this appeal and set aside the decision and orders of the Employment and Labour Relations Court made on 21st November, 2014. We substitute therefor an order dismissing the petition dated 24th April, 2013. The appellants shall have the costs of the appeal and of the dismissed petition.

Dated and delivered at Nairobi this 22nd day of September, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR