



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJ.A) CIVIL APPEAL NO. 162 OF 2016
BETWEEN

SARAH WAHU NJOROGE & 88 OTHERS..... APPELLANTS

AND

THE RETIREMENT BENEFITS APPEALS TRIBUNAL.....1ST RESPONDENT

THE RETIREMENT BENEFITS AUTHORITY.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

(Being an appeal from a judgment of High Court of Kenya at Nairobi (Korir, J.) dated 5th November, 2015 in H.C.C.C.JR. No. 110 of 2015

JUDGMENT OF THE COURT

The Trustee of Barclays Bank of Kenya Pensions Fund (the then 1st applicant) and Barclays Bank of Kenya (the then 2nd applicant) filed a Chamber Summons dated 2nd April, 2015 predicated under **O.53 Rule 1** of the **Civil Procedure, Rules, Sections 8 and 9** of the Law Reform Act and **Section 3** of the **Civil Procedure Act**. The Retirement Benefits Appeal Tribunal (the 1st respondent herein), The Retirement Benefits Authority (the 2nd Respondent herein) and the Attorney General (the 3rd Respondent herein) were named as the 1st, 2nd and 3rd respondents respectively while Sarah Wahu Njoroge & 88 others (now the appellants) were named as the Interested Parties. In the motion the then 1st and 2nd applicant sought an order, inter alia, that;-

“ii. Leave be granted to the Applicants to apply for Judicial Review Orders of certiorari to quash the Orders of the 1st Respondent dated 14th November, 2014 in RBATC No. 1 of 2012 – Njoroge Serah Wahu & others v. the Trustees, Barclays Bank of Kenya Pension Fund.”

A brief background to the Chamber Summons heard by Korir, J. is that the appellant’s are former employees of Barclays Bank of Kenya. Upon leaving service, they were paid pension which they disputed and lodged a complaint with the 2nd respondent. The 2nd respondent’s ruling was not in their favour and they lodged an appeal to the 1st respondent. On 28th September, 2012 the matter was before the 1st respondent. The 1st respondent ordered that the matter be referred to the 2nd respondent for reconsideration. It is this order that led to the filing of the Judicial Review Application heard and determined by Korir, J. who in a judgment dated 5th November, 2015 rendered himself as follows:-

“In the circumstances of this case, I am satisfied the applicants have met the conditions for grant of judicial review orders. An order of certiorari will therefore issue calling into this

court and quashing the Tribunal's ruling dated 14th November, 2014 in

RBATC No. 1 of 2012 – Njoroge Serah Wahu & others v the Trustees Barclays Bank of Kenya Staff Pension Fund. An order of prohibition will also issue prohibiting the Tribunal from hearing or entertaining any further proceedings in RBATC No. 1 of 2012-Njoroge Serah Wahu & Others v The Trustees, Barclays Bank of Kenya Staff Pension Fund or any other matter between the parties concerning the same facts which gave rise to the said appeal. There will be no orders as to costs.”

The appellants being dissatisfied with the orders of Korir, J. filed this appeal and listed 16 grounds of appeal. These can be summarized as follows: that the learned judge erred in granting the orders of prohibition and certiorari in a case not deserving of the orders; that the order remitting the matter to the 2nd respondent for consideration by the 1st respondent was not a final order; that Korir, J. erred in finding that the 1st respondent was *functus officio*; that the 2nd respondent in complying with the 1st respondent's orders in reconsidering the matter acted within the law and finally that the report compiled on 27th November, 2013 by the 2nd respondent and which was presented to the 1st respondent and referred to as an unnumbered appeal did not constitute a new appeal.

On 24th May, 2017 the appeal came before us for hearing. Miss Maina learned counsel for the appellants urged the appeal whilst Miss Mwika for the 2nd respondent and Miss Ngige for Barclays Bank of Kenya Ltd opposed the appeal, the appellant having filed its submissions on 21st April 2012 and its list of authorities on 21st April, 2012. On the other hand the 2nd respondent filed its submissions on 24th May, 2017 and its list of authorities on 23rd May, 2017 whilst Ms Barclays Bank had filed its submissions and its list of authorities on 24th May, 2017. There was no appearance for the 1st and 3rd respondents in spite of service of the hearing notice on 4th April, 2017.

In urging the appeal Miss Maina faulted the High Court Judge for finding that the 1st respondent erred in remitting the matter to the 2nd respondent for reconsideration; in finding that the 1st respondent was *functus officio*; in failing to find that the order of the 1st respondent made on 28th September 2012 was not a final order as there was a mention date after a compilation of the report by the 2nd respondent; that the said report was compiled by the 2nd respondent on 27th November, 2013; that **S.47** of the Retirement Benefits Act gave the 1st respondent power to revoke the decision of the 2nd respondent and which power included calling for fresh and additional evidence; that the filing of the report of 27th November, 2013 did not constitute the filing of a new appeal and that justice of the case demanded that the 2nd respondents calculate individual entitlements. Learned counsel cited **Article 159(2)** of the Constitution of Kenya, 2010 for the proposition that justice shall be administered without undue regard to technicalities. Further, learned counsel cited the Supreme Court decision in **S. C. No. 7 of 2014, ZACHARIA OKOTH OBADO VS EDWARD AKONGO OYUGI & OTHERS** to the effect that-

“... a court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties”

Finally, it was counsel's contention that the respondents had not demonstrated that orders of the 1st respondent were-

“Tainted with illegality irrationality and procedural impropriety” (See **EMFIL LTD. VS. REGISTRAR OF TITLES C.A. NO. 312 OF 2012**).

On behalf of the 2nd respondent, it was urged that the 1st respondent wrongly determined the matter by its orders of 28th September, 2012; that consequently the 1st respondent was *functus officio* as it had delivered a final and conclusive judgment; that the reconsideration as directed by the 1st respondent was outside the ambit of **S. 49** of the **RBATC** which gives the Tribunal power to summon witnesses, take evidence and call for production of documents; that the 1st respondent had no power to merge the appeal filed in 2012 with the unnumbered appeal filed in 2014 and thus arrogating itself a power it did not have. Finally reliance was placed on this court's decision of **TELCOM KENYA LIMITED VS. JOHN OCHANDA** (suing on his own behalf and on behalf of **996 FORMER EMPLOYEES OF TELKON**

KENYA LIMITED [2014] eKLR to the effect that a court is deterred from reconsideration of a merit based decision once a trial judgment has been entered.

On its part M/s Barclays Bank of Kenya Ltd submitted that the decision issued by the 1st respondent on 28th September, 2012 remitting the matter for fresh consideration to the 2nd respondent was final and thus rendered the 1st respondent *funtus officio*; that the fact that the 1st respondent set down the matter for mention on 19th October, 2012 did not mean that the 1st respondent had not become *funtus officio*, that the 1st respondent erred in merging a new unnumbered appeal filed out of time with an already determined appeal; and finally that the appeal before the 1st respondent was *res judicata*.

We have considered the record, the oral and written submissions of the counsel, the authorities cited and the law. The facts of this appeal are fairly straight forward. The appellants were former employees of Barclays Bank of Kenya and members of Barclays Bank of Kenya Staff Pension. They were aggrieved by the decision of the 2nd respondent in dismissing their complaint regarding the calculation of their retirement benefits by the Trustee of Barclays Bank Pension Fund and filed an appeal before the 1st respondent on 4th January, 2012 (Appeal No. 1 of 2012). On 28th September 2012 the 1st respondent remitted the matter to the 2nd respondent in its judgment in which it rendered itself as follows:

“Having considered all this matter, we have come to a conclusion on the weight of the evidence before us that the grounds of appeal submitted by the Appellants are fully merited. Consequently, we are of the view that any judgement (sic) which is devoid of a fair hearing does not amount to a proper decision.

The decision of the 1st respondent contained in a letter dated 6th December, 2011 leads us to conclude that this is not a proper decision and was not made as required under the Retirement Benefits Act.

The Tribunal has therefore unanimously agreed that the matter be referred back to the Authority for fresh consideration, taking into account all the matters that were not individually considered and all the subsequent documents correspondence and admissions subsequently made.

Orders are made accordingly mention on 19th October, 2012.”

The 2nd respondent reconsidered the matter, compiled its report dated 27th November, 2013 and rendered itself as follows:-

“In view of the foregoing, we find that the benefits for all the complainants were correctly computed by the trustees (particularly the application for early payment) and where variances were found these have been indicated for the trustees’ action. The variances that we have noted are either negative (showing overpayment by trustees) or positive (showing an underpayment). However, the positive variances are not substantial.”

The appellants were aggrieved by the said outcome and filed a memorandum of appeal on 8th July, 2014 challenging the 2nd Respondent’s decision of 27th November, 2013 in which they stated they would rely wholly on the grounds set out in Appeal No. 1 of 2012. The 1st respondent merged appeal No 1 of 2012 with the report of the 2nd respondent dated 27th November 2013. It is this action by the 1st respondent that precipitated the filing of Judicial Review application that was determined by Korir, J. The learned judge painstakingly went through the record of the proceedings before the 1st respondent and came to the conclusion that-

“Any bystander reading the proceedings and the order of the Tribunal will come to the quick conclusion that the appellants’ appeal against the decision made by the RBA on 6th December, 2011 was heard on 28th September, 2012. The proceedings will also reveal that the appeal was allowed, the decision of the RBA set aside and the matter referred back to the RBA for fresh hearing. That is the conclusion I have reached.”

We too have come to the irresistible conclusion that appeal No. 1 of 2012 was heard and concluded on 28th September, 2012. Having concluded Appeal No. 1 of 2012 on 28th September, 2012 the 1st respondent became *functus officio*. It was therefore wrong to merge the unnumbered Appeal with Appeal No. 1 of 2012. In **JAMES MWASHORI MWAKIO V. KENYA COMMERCIAL BANK LTD, CA CIVIL APPLICATION NO NAI. 59 OF 1998** this court rendered itself as follows:

“...this court has no jurisdiction to re-write an already delivered judgment in any other manner. Once this court had delivered its judgment it brings it to finality that particular litigation between the parties, save for the limited application of the slip rule.”

The appellants’ further contention was that S. 49 of the **RBATC** permitted the reconsideration of the matter by the 2nd respondent. Section 49 thereof provides as follows:

“49 (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.

(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.”

In our considered view **section 49** of the **Retirement Benefits Act** gives the 1st respondent the power to summon witnesses, take evidence and call for production of documents. In the appeal before us the 2nd respondent was asked to **“reconsider”** the matter. This was clearly outside the ambit of **S. 49** of the **RBATC**. The appellants also made heavy weather that the 1st respondent had directed that there was to be a **“mention on 19th October, 2012”** hence the matter had not been concluded. Again, nothing much turns on this. In our view the filing of a mention date could not confer the status of a determined appeal to that of a non-determined one. We think that in fixing the matter for mention, the 1st respondent was exercising its supervisory powers to see that its orders are acted upon.

In his ruling the learned Judge found that **“...even the conduct of the parties ... shows ... that they all knew that the Appeal No. 1 of 2012 had been heard and concluded by the Tribunal”** and further the evidence of the fact that the matter had been heard and determined by the 1st respondent is found in the letter of the 1st respondent addressed to the 2nd respondent on 20th November, 2012. The learned Judge reproduced the letter whose effect and import was that:-

“RE RBATCA Number 1 of 2012

Sarah Njoroge & Others –vs– Retirement Benefits Authority & Another

On 28th September, 2012 the Tribunal referred the above matter to you for further consideration and determination. At its meeting yesterday, the tribunal noted that your decision had not been given to the parties.

Kindly advise by return mail, the progress so far made in finalizing the matter”.

The learned Judge summed up his findings as follows:

“Again the language is very clear that the matter had been referred to the RBA for hearing and determination. Upon conclusion, the outcome was to be communicated to the parties. There is no mention that the matter was to be referred back to the Tribunal for further action.”

On our part, we are in agreement with the learned Judge’s conclusion that the RBATC No. 1 of 2012 had been determined by the 1st respondent and the 1st respondent had become *functus officio*.

There was also the contention by the appellants that **Article 159(2)** of the Constitution decrees that justice ought to be administered without undue regard to procedural technicalities. The appeal filed in 2014 was filed outside the 30 days period prescribed by **S.49(1)** of the **RBATC**. As to whether the appellant can call to aid the provisions of **Article 159(2) (d)** of the Constitution, we wish to state no more than reiterate this courts pronouncement in **TELCOM KENYA LIMITED VS. JOHN OCHANDA** (suing on his own behalf and on behalf of 996 **FORMER EMPLOYEES OF TELKON KENYA LIMITED [2014]** (supra) as follows.

“The Respondents are seeking umbrage under Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities. It does not avail them. We are content to state that the constitutional provision is not meant to whitewash every procedural failing and it is not meant to place procedural rules at naught. In fact, what has befallen the respondents is proof, if any were needed, that there is great utility in complying with the rules of procedure. Such compliance is neither anathema nor antithetical to the attainment of substantive justice. As has been said before, the rules serve as handmaidens of the lady justice.”

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 19th day of October, 2017.

G.B.M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR