IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 161 OF 2016

BETWEEN

WILFRED NZIOKA MUTUA……………...…...…APPELLANT

VERSUS

BARCLAYS BANK OF KENYA LTD……..1ST RESPONDENT

BARCLAYS BANK OF KENYA

STAFF PENSION FUND…………………2ND RESPONDENT

(Being an appeal from the judgment and orders of the High Court of Kenya at Nairobi by (Sergon J.), delivered on 1st April, 2016

in

Civil Case No 239 of 2014)

****

JUDGMENT OF THE COURT

[1] The undisputed facts in this appeal are that the appellant, Wilfred Nzioka Mutua was an employee of Barclays Bank of Kenya from April, 1975 to 1st June, 2002 when he retired after working for a period of twenty seven (27) years under an early leaver's scheme. The letter that offered the appellant early retirement indicated that he would be paid a monthly pension of Kshs 45,799.60 and a lump sum of Kshs 2,796,338/= . The appellant was at first agreeable to the offer and indeed after taking the early retirement, he and other employees who were members of the 2nd respondent appear to have raised complaints with the calculations of their pensions.

[2] It would appear from correspondence in the record there was some back and forth communication with the bank regarding the calculations. The appellant together with other employees filed suit before the High Court being HCCC No 669 of 2009, which seems to have been referred to the Retirement Benefits Authority (RBA) for hearing and adjudication. It would have seemed along the way as though the appellant and other employees' complaints were addressed because by a letter dated 2nd April, 2012 written to the appellant by the director of the Banks' Trust Fund, the appellant was informed that the Trustees had reviewed the terms under which he left the Bank's service and retroactively waived the

reduction of his benefits. The gross monthly pension was increased to Kshs 95,379 with effect from April, 2012 and arrears amounting to Kshs 4,817,378. The appellant informed the trial court that he was finally paid a lumpsum of Kshs. 6,493,397 as withheld pensions.

[3] Nonetheless the appellant was not satisfied with the said calculation and on 28th August, 2012 he filed suit before the High Court claiming a sum of Kshs 58,000,000/= with interests at court rates until payment and general and punitive damages for breach of a fiduciary duty to the appellant by the defendants. In particular the appellant claimed that he owned a company by the name **Wileum Enterprises Limited** that was dealing with printing large volumes and supply of promotional items but the business suffered between December, 2003 and 2nd April, 2012. His company could not fulfil its obligations in the contracts he had entered into due to lack of financial input and capital which he attributed to wrongful calculations of his pension by the respondents.

[4] The respondents denied the pensions were wrongly calculated or there was an underpayment; there was however an upward review of the appellants retirement benefits, which review retroactively waived the reduction of the appellant's benefits in accordance with applicable rules from the date he attained the retirement age; the appellant was paid his retirement benefits in arrears including interest. The respondents also contended that the appellant had lodged parallel claims before the Retirement Benefits Tribunal (RBAT) which was an abuse of the court process. The appellant has filed HCCC No. 669 of 2009 and he was listed as 3rd plaintiff seeking the same remedies. This suit was referred before the Retirement Benefits Tribunal.

[5] The matter fell for hearing before **Sergon J.,** with the appellant and a representative of the respondents giving evidence. Upon evaluation and consideration of the said evidence the learned trial Judge dismissed the appellant's suit in its entirety and in doing so, the learned Judge agreed with the evidence by the respondents that appellant had filed a similar claim in the High Court that was referred to the Retirement Benefits Authority Tribunal (RBA) which claim was dismissed as RBA found the appellants benefits as indeed other employees who left under the same scheme were computed as per the terms applicable when they exited. **RBA** acknowledged the respondents' decision to increase the members' pensions was due to the reversal of the actuarial reduction of their benefits which was better than what was in the Trust Deed Rules. The suit before the court was not different from the claim before **RBA** and the appellant was less than candid by failing to disclose those findings.

[6] The learned Judge further found the claim for loss of business by the appellants' company known was **Wileum Enterprises Ltd**, was far-fetched and the company being a separate legal entity was not a party to the suit nor was it a member of the respondents' pension scheme. Regarding the claim for damages of Kshs. 58 million, the appellant had relied on a report by a firm of certified public accountants known as **Ngumumu & Associates.** However the said firm did not give evidence on how they arrived at their calculations, similarly this claim was not supported by detailed evidence, of how the appellant incurred general damages thus the Judge concluded the claim was not proved to the required standard and the whole suit was dismissed with costs.

[7] Unrelenting, the appellant has filed the instant appeal challenging the aforesaid judgment on the grounds that there was sufficient evidence that the appellant was not paid his pensions promptly as required by the law; there was a delay from 2004 to 2012; failing to differentiate the claim for pension and lost opportunity costs by delayed pension; not awarding general and punitive damages.

[8] During the plenary hearing, Ms Savini, learned counsel for the appellant, relied on her written submissions and made some oral highlights to elaborate on the aforesaid grounds of appeal. According to counsel, the appellant proved his case of general damages for financial loss due to delayed payment of pension; there was sufficient evidence to show a miscalculation which was rectified after the appellant was unrelenting in pursuing the respondents; failure to call a witness to support the audit report from the audit firm of Ngumunu & Associates was not fatal; the court should have invoked the provisions of **section 35 (2)** of the Evidence Act and allowed the report.

[9] Counsel for the appellant made reference to several authorities key among them, the case **of <u>Miller v.</u>**

Minister of Pensions [1974] 2ALL ER to support the argument that the appellant had discharged the burden of prove as was defined in that case; *'more probable than not'*. The case of **Bank of Baroda (Kenya) Ltd v Timwood Products Ltd** CA No. 132 of 2001 was relied on also to drive home the point that due to late payment and underpayment, the appellant suffered oppressive and arbitrariness by the respondents and therefore his claim for exemplary damages was justified. Counsel for the appellant urged us to allow the appeal as prayed.

[10] On the part of the respondents, Mr. Mongere, their learned counsel, also relied on his written submissions. In his oral highlights, counsel was emphatic that the appellant failed to make material disclosure that a similar suit was filed in the High Court being **HCCC No 669 of 2009,** it was referred to **RBA** who found the employees' benefits were correctly calculated and any exceptions were addressed. The appellant filed an appeal before the **RBA** Tribunal who found the appeal devoid of merit; thus this was not an appeal from the Tribunal but a new suit that was instituted to re agitate the same issues without full disclosure. On the claim for Kshs. 58 million, this failed because of its remoteness to the respondents; it was speculative that if the appellant had invested the pension in **Wileum Enterprises** he could have made that kind of profit; there was no evidence to support that kind of claim; the company was not a party to the suit and the person who prepared the report was not a witness in court. Counsel for the respondents urged to dismiss the appeal.

[11] As demonstrated by the above summary, we have taken time to appreciate the background facts, the impugned judgment, submissions by counsel and the entire record of appeal. This being a first appeal, this Court is enjoined by law to proceed by way of re-appraising all the evidence and re-examine the same in a fresh and exhaustive way before arriving at its own independent conclusions. See **Rule 29** of the **Court of Appeal Rules**. The approach taken ought to recognize this Court's limitations and its deference to the factual findings by the trial Judge who had the advantage of hearing and seeing the witnesses as they testified. The parameters of interference therefore are as aptly summed up in the case of **Selle v. Associates Motor Boat & Co.** [1968] EA 123; where the predecessor of this

Court put it thus:

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan [1955], 22 E.A.C.A.270)."**

[12] Upon our review of the record, grounds of appeal, respective submissions and authorities cited, we think three issues turn for determination; whether the appellant proved his case to the required standard that he was underpaid his pensions from 2004-2009; whether the learned Judge misapprehended the claim by the appellant which was for late payment of the correct retirement benefits by terming it a claim for general damages and whether the appellant was entitled to damages. This takes us to the appellant's claim which was as pleaded in the plaint as follows;

> **a) "Kshs 58,000,000.**
>
> **b) Interest on (a) above at court rates from its due date until payment in full.**
>
> **c) General and punitive damages be awarded to the plaintiff as against the defendants for breach of its fiduciary duty to the plaintiff by the defendant.**
>
> **d) Costs of this suit together with interest thereon at such rate and for such period of time as this honourable court may deem fit to grant.**

e) Any such other or further relief as this honourable court may deem appropriate”.

[13] The learned trial Judge interrogated the issue of whether the appellant’s pension dues were wrongly assessed. This is what the Judge postulated in a pertinent paragraph of the impugned judgement;-

> **“The defendant tendered evidence showing that the plaintiff filed a complaint before the Retirement Benefits Authority complaining that his pension dues were not properly calculated and that he was underpaid. The complaint was heard and determined against the plaintiff on 20th November, 2012 where RBA ruled that the plaintiff’s benefits were computed as per the terms that were applicable when he exited employment. <u>It is also apparent from documentary evidence presented that RBA acknowledged that the defendants’ decision to increase the plaintiff’s pension dues was due to the reversal of the actuarial reduction of their benefits which was better than the Trust Deed and Rules allowed for.</u> The defendant further tendered evidence showing that the plaintiff challenged RBA’s decision before the Retirement Benefits Appeals Tribunal (RBAT). RBAT heard the appeal and had the same dismissed. The aforesaid decisions were never disclosed to this court by the plaintiff nor by his legal advisers.**
>
> **DWI clearly stated that the defendants’ good intentions in upwardly reviewing the pension benefits played a serious role. The plaintiff did not however disclose the adverse findings of RBA and RBAT. The defendant’ witness tendered evidence showing that RBA was seized of the fact that the defendants had reviewed the pension benefits of their members including that of the plaintiff as per the applicable terms. RBA also found that the higher pensions following the review resulted in the members being in a better position than the Trust Deed and Rules allowed for. The plaintiff purported to distinguish the dispute before the RBA/RBAT and that before this court. He claimed that the dispute before RBA/RBAT related to pension benefits while that before this court is in respect of damages suffered for loss of use and opportunity when the defendants allegedly wrongly withheld his money for 9 years. The distinction in my view does not make sense because the claim before this court is predicated on the allegation that the defendants miscalculated and underpaid the plaintiff’s pension benefits. The two issues cannot be logically separable. I am satisfied by the evidence tendered by the defence that the plaintiff’s pension dues were correctly calculated hence the claims before this court cannot be maintained.”** (Underlined emphasize supplied).

[14] We have to revisit the issue of whether the appellant was underpaid his pension due to wrong calculation of his pension by also considering the decision by RBA Tribunal which carried out a thorough analysis of the data relating to members of staff of the respondents who had exited the bank between the years of 2001 and 2003 in regard to the category under which the appellant fell. This is what the Tribunal posited in regard to the appellant:

> **“The checks carried out on the data provided for the members falling under this category indicates that these members’ benefits were computed as per the terms that were applicable when they exited.**
>
> **In addition, the sponsor of the scheme has indicated that the above members’ pensions were increased due to a decision (post exit) to reverse the actuarial reduction of their benefit. The trustees have commenced paying higher pensions from April 2012 going forward. These members are therefore in a better position than the TD&R allows for.”**

[15] The appellant’s burden was to prove that his pension was based on a wrong calculation and not that the increment was based on the respondent’s decision to reverse the actuarial reduction. Apart from the fact that the appellant did not adduce any evidence to support the claim of underpayment, the same issue was not pleaded. Looking at the claim by the appellant as reproduced above, he did not plead the issue of delay or failure by the respondents to pay his pension. It would appear the claim on late payment developed in the cause of the proceedings before the High Court and it is now covered quite prominently under the grounds of appeal. Counsel for the respondent submitted that in the absence of a specific pleading, this issue was irregularly introduced in the appeal as the appellant was not pursuing a claim for

miscalculated benefits but for damages suffered as a result of lost opportunities. Although we agree this issue was not specifically pleaded and indeed parties should abide by their pleadings by disclosing the width and breath of the case each party is facing, there are exceptional circumstances when an issue, though not pleaded, becomes central in the cause of the hearing and submissions and the court is thereby required to make a determination thereto. We think this is what in this case, in our view fit squarely within the ambit of the holding in the case of;- ***ODD JOBS V MUBIA,*** 1970 EA Page 476, where it held:

> **"*(i)* A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;**
>
> ***(ii)* On the facts, the issue had been left for decision by the court as the advocates for the appellant led evidence and addressed the court on it."**

[16] The problem however is the fact that even if we were to ignore the pleadings, the appellant did not adduce any evidence either orally or through documents to demonstrate how he was underpaid. All the documents he produced were analysed by RBA who concluded that the enhanced payment was due to a reversal of the actuarial reduction which was better than what was contained in the Trust Deed and more than what was allowed in the Rules. The appellant therefore failed to displace that finding by RBA and this ground of appeal fails.

[17] This takes us to the claim for special damages for Kshs 58 million and general damages for lost opportunities. According to counsel for the appellant, the learned Judge should have admitted the report by a firm of certified public accountants known as Ngumumu & Associates under the provisions of **Section 35 (2)** of the Evidence Act which states as follows;-

> **"In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made admit such a statement in evidence**
>
> **(a) notwithstanding that the maker of the statement is available but is not called as witness."**

The said report stated that when the appellant was retired at the age of 50 years, he set up a company by the name Wileun Enterprises. He bought one printing machine although he needed to have bought two machines which he could not as he was paid a sump sum of Kshs 2,796,338/ = as pension. This one machine could not coup with the demand for printing the work and to deliver quality work. Further the monthly pension of Kshs 45,799 per month could not service his loan. As a result of poor performance by the company, the statement of account showed the company suffered losses to the tune of Kshs 58 million which he claimed as special damages.

[18] It is trite law and it has been repeated times without number that special damages must not only be specifically pleaded, but strictly proved with as much particularity as circumstances permit. The appellant relied on a report by a firm of certified public accountants known as Ngumumu & Associates who did not tender any evidence to support their report regarding the alleged losses incurred by the appellant's company called Wileun Enterprises Ltd. How were the so called losses caused by the respondents? The appellant had a duty to show how the setting up of the business and the consequential loss; which particular losses were caused by the respondents. Needless to state that there is our view a very remote connection between the appellants' claim for alleged wrong calculation of pension and business losses incurred by his company. We agree with the learned Judge this claim was merely speculative as the company, which is a separate entity with its own separate legal personality, was not even a party in the proceedings.

[19] We agree there was no legal basis to award the appellant damages suffered by a company. A company that is duly incorporated under the Companies Act (Cap 486, Laws of Kenya), is a Corporate Body with its own personality and capacity to transact, sue and be sued in its own name. Any claim for or

against a company must be pursued in the name of the company. The appellant's claim for loss of profit suffered by the company which was not privy to the employment contract was misplaced.

[20] We have said enough to demonstrate that this appeal lacks merit and it is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 1st Day of December, 2017.

ALNASHIR VISRAM

…………………………

JUDGE OF APPEAL

W. KARANJA

………………………

JUDGE OF APPEAL

M.K. KOOME

……………………

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR