



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OUKO, M’INOTI & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 38 OF 2014

BETWEEN

ALBERT CHAUREMBO MUMBA & 7 OTHERS

(sued on their own behalf and on behalf of predecessors

*and or successors in title in their capacities as the **Registered***

Trustees of Kenya Ports Authority Pensions

Scheme.....APPELLANTS

AND MAURICE M. MUNYAO & 148 OTHERS

*(Suing on their own behalf and on behalf of the plaintiffs and other members/ beneficiaries of the **Kenya Ports Authority***

Pension Scheme RESPONDENTS

(An appeal from the Judgment of the Employment and Labour Relations Court at Mombasa (O. N. Makau, J.) dated 14th February 2014

in

Mombasa Ind. Cause No. 116 of 2013)

JUDGMENT OF THE COURT

1. The appellants are the Registered Trustees of the **Kenya Ports Authority Pension Scheme** that was established by an original Trust Deed in 1998. The respondents were employees of **Kenya Ports Authority (KPA)** and retired on diverse dates between 2004 and 2011. At all material times the respondents were members and or beneficiaries of the **Kenya Ports Authority Pension Scheme** (hereinafter referred to as “the Pension Scheme”).

2. The respondents filed suit against the appellants at the High Court of Kenya in Mombasa by a plaint dated 27th November 2007. The plaint was subsequently re-re-amended on 2nd January 2012. The dispute

between the respondents and appellants relate to the validity and lawfulness of the 2002 amendments to the original 1998 Trust Deed and Rules that established the Pension Scheme.

3. By a Trust Deed made on 1st April 1998 between Kenya Ports Authority (sponsor) and the Trustees, an irrevocable trust in the form of Retirement Benefits Scheme called the **Kenya Ports Authority Pension Scheme** was established for the benefit of the members/beneficiaries as defined in the Trust Deed. The main purpose of the Scheme is provision of pensions and other periodical payments to members upon their retirement at the specified age and provision of pensions and other benefits for dependants of deceased members.

4. **Section 6 (a)** of the **1998 Trust Deed** gives the Trustees the general power and exclusive mandate to manage and administer the Scheme. **Section 6 (b)** gives the Trustees the power to determine whether and to what extent any person is entitled from time to time to any benefit from the Scheme.

5. **Section 15 (c)** of the **1998 Trust Deed** is the heart of dispute between the parties hereto and we reproduce the section verbatim.

“Section 15: The Trustees may at any time and from time to time with the approval of the Employer amend, revoke or modify by deed any of the provisions of this Deed and with the approval of the Employer the Trustees may by resolution in writing passed at a meeting duly called and constituted and signed by all of them amend any of the provisions of the Rules

PROVIDED THAT no such alterations or modifications

shall be made which:

(a)

(b)

c. **Reduce the benefit of a pensioner or dependent or affect the accrued benefit of any member except with the consent of such pensioner or dependent or member.”**

(Emphasis ours)

6. Several words and phrases are defined in the **1998 Trust Deed Rules** that are relevant to appreciating the context of the dispute between the parties. The 1998 Rules of the Scheme define “final pensionable salary” to mean pensionable salary in the last year of pensionable service. “Pensionable salary” means the sum of a member’s annual basic salary and annual housing allowance. “Pensionable service” means the period of continuous services during which the member is classified by the employer as being of pensionable status. “Pensioner” means a retired member in receipt of a pension from the scheme.

7. In exercise of their power to amend, the appellants as Trustees of the Scheme amended the **1998 Trust Deed** and certain definitions in the Rules of the Scheme. There were **four amendments** that are relevant to this appeal as follows:

a. *A First Deed of Amendment dated 1st December 2002 deleted in entirety the Original Trust Deed dated 1st January 1998 and the Rules thereunder and replaced it with a Second Deed of Amended.*

b. *The definition of “final pensionable salary” was deleted and replaced with a new definition of “final pensionable salary” to mean “the average of the Member’s pensionable salary during the last three (3) years preceding the date of leaving service, retirement or death.”*

c. *A Second Deed of Amendment is dated 7th January 2005. However, the effective date is backdated. The amendment in the definition of final pensionable salary is effective from 1st July*

2004 and all other amendments shall be deemed to have come into force on 1st July 2003.

d. The **PROVISO** in Section 15 in the 1998 Trust Deed was replaced by Section 24 in the Second Deed of Amendment creating the new Trust Deed in which there is no **PROVISO** reserving any powers of amendment to be subject to consent of the pensioner, member or dependent beneficiaries of the Scheme. In the new Section 24, it is the consent of the Commissioner and the Retirement Benefits Authority that is required to effect any alteration, variation or amendment to the Trust Deed and not the consent of the pensioner, members or dependent.

8. The suit and claim of the respondents as pleaded in the re-re-amended plaint is founded on the four amendments identified above. The claim in paragraph 5 C of the re-re-amended plaint is that the appellants and or their successors as Trustees of the Pension Scheme, in breach of the mandatory provisions of the Constitution of Kenya and in violation of **Section 15 (c)** of the **1998 Trust Deed** illegally, fraudulently and or wrongfully amended the **1998 Trust Deed** by the Deed of Amendment made on 1st July 2002 and subsequent amendments thereto and effectively reduced the benefits payable and or paid to the respondents and also affected the accrued benefits to the respondents **without their consent**. It is claimed that the appellants by varying and amending the definition of “final pensionable salary” **without consent** of the respondents reduced the benefits payable and or paid to the respondents and affected the accrued benefits **without consent** of the respondents as required by the **PROVISO** in **Section 15 (c)** of the **1998 Trust Deed and Rules**.

9. The respondents at paragraphs 7 and 8 of the re-re-amended claim contend that the amendments undertaken by the appellants to the 1998 Trust Deed were contrary to **Section 75** of the then Constitution of Kenya which protected the right to private property it being alleged that the respondents constitutional rights in the property benefits of the scheme were violated; that the amendments were in clear breach of **Section c 14 (c)** of the **Kenya Ports Authority Revised Regulations 2002** and the **1998 Trust Deed and Rules**.

10. The respondents averred that the amendments effected were illegal and fraudulent in that the appellants did not disclose that the sponsor of the Scheme, Kenya Ports Authority, had failed to remit a sum of Ksh. 6,857,627,602/= as at 31st December 2003 and Ksh. 6,982,340,602/= as at 31st December 2004 and the Scheme was in deficit of the said amounts. It is the respondents’ contention that in order to conceal the deficit, the appellants fraudulently and in collusion with the Sponsor (KPA) amended the definition of “final pensionable salary” in order to reduce the pension benefits payable to members. Particulars of fraud pleaded in the re-re-amended plaint are *inter alia* that the amendment to the definition of “final pensionable salary” was made fraudulently and in collusion with the Sponsor to the benefit of the Sponsor and detriment of the pensioners; that there was fraudulent non-disclosure that the Sponsor was in deficit in remitting the sums of Ksh. 6,857,627,602/= as at 31st December 2003 and Ksh. 6,982,340,602/= as at 31st December 2004; that fraud was committed in taking action or making a decision to the detriment of the members without seeking their consent; that there was a fraudulent taking away of benefits vested in the respondents in gross abuse of the **1998 Trust Deed** and **Section 75** of the then Constitution of Kenya ; that there was fraud in failing to independently run the Scheme and allowing the Sponsor to meddle into the affairs of the Scheme and to treat the Scheme as one of its departments.

11. At paragraph 10 A of the re-re-amended plaint, it is stated that though the appellants and their successors in title had the right under **Rule 15** of the Trust Deed to amend, revoke or modify the Trust Deed and Rules at any time, the proviso in paragraph 15 (c) was explicit that no such modification would be made to reduce the benefit of a pensioner or dependent or affect the accrued benefits of any member except with the consent of such pensioner or dependent member. It is contended that the conduct of the appellants in implementing a “remedial plan” that altered the definition of “final pensionable salary” had the effect of reducing the respondents’ benefits without their consent and the remedial plan was fraudulent, illegal and unlawful.

12. In liquidated terms, the respondents claim against the appellants a grand total sum of Ksh. 202,199,424/50 being loss and damage suffered jointly and severally by virtue of the unconstitutional,

fraudulent and unlawful Trust Deed amendments that led to reduction in pensionable benefits accrued and payable to them. The respondents also claim interest at commercial rate of 20 % per annum from the due date to each of them and further interest at court rates from date of filing suit until payment in full. The respondents further claim that their monthly pension be adjusted and paid together with the applicable annual increments in respect thereof.

13. The appellants filed defence on 11th January 2007. No amended statement of defence was filed to the re-re-amended pleadings. The defence raised the following issues:

- a. *That the respondents were not at any time employees of the appellants;*
- b. *That the suit was incompetent, misconceived, frivolous and abuse of process of court as it relates to various persons contrary to the mandatory provisions of Order VII of the Civil Procedure Rules in that the Pleadings did not contain the names, descriptions and place of residence of the Plaintiffs and there was no verifying affidavit;*
- c. *That the appellants had the right, duty, obligation, power and capacity to amend the rules governing the Pension Scheme and that the amendments were done properly, lawfully and were valid;*
- d. *That the Scheme is governed by the rules contained in the Trust Deed as amended and not by the Kenya Ports Authority 2002 Revised Regulations;*
- e. *That the amount claimed by way of special damages by other unnamed plaintiffs are not pleaded and the pleadings do not state the precise amount claimed by the unnamed plaintiffs and the pleadings did not state the particulars of the alleged breach of trust;*
- f. *That the appellants calculated the respondents pensions under the rules governing the Scheme and there was no scope for challenging those calculations under the existing rules;*
- g. *That the amendments complained of were duly approved by the Retirements Benefit Authority;*
- h. *That the High Court had no jurisdiction to interfere with or amend the rules governing the Scheme or to vary, alter, enhance, improve or reverse the effect that those rules have on the pension payable to the respondents and other members of the scheme.”*

14. Upon hearing the parties, the trial judge entered judgment against the appellants in favour of the respondents. The court ordered that the *status quo* under the **1998 Trust Deed and Rules** be restored in relation to the definition of “pensionable salary” and the claimants’ entitlement to both lump sum and monthly pension. The decree extracted from the judgment of the trial court is in the following terms:

- “(a) That the 2002 Deed of Amendment and Rules plus the subsequent remedial pension plan be and is hereby declared to be fraudulent, wrongful, illegal and unconstitutional and consequently null and void ab initio in so far as the same decreased the pension benefits of the members of the KPA Pension Scheme including the claimants without their consent;*
2. *That the appellants and or their successors pay the claimants from the KPA Pension the following:*
 - a. *Ksh.201,981,424/50 being the aggregate pension arrears to all the claimants as at July 2012 plus further accruals till payment in full which were occasioned by the impugned remedial pension plan.*
 - b. *Lump sum and monthly pension arrears for Ms Kiara Kiarie, Appollo Agwambo, Michael N. Rai, Christine Mbuja Oloo and Jacob Kaburu Kiaria occasioned by the error of failure to apply the correct salary after salary increment to them on 1st July 2007.*

3. *The claimants to be paid costs and interest thereon at court rates from the date of this judgment till payment in full.*”

15. Aggrieved by the judgment, the appellants have lodged this first appeal based on the following grounds:

“(a) The learned judge erred in law by failing or refusing to decide whether he had jurisdiction or not and he erred in hearing and determining the suit when he had no jurisdiction; he erred in failing to hold that the proper forum for the determination of the dispute was the forum provided for in the Retirement Benefits Act;

b. The learned judge erred in law and fact when he delivered an irrational, unreasonable and contradictory judgment;

c. The trial court erred by failing to properly and correctly interpret and apply the Trust Deed and Rules governing the Scheme;

d. That having held the respondents were not employees of the appellants, the judge ought to have found that the Industrial Court had no jurisdiction in the absence of an employer/employee relationship between the parties;

e. The court erred by allowing claims that were not pleaded thereby denying the appellant the opportunity to be heard and prepare for hearing on the un-pleaded claims;

f. Having declared the 2002 Deed of Amendment and Rules and the subsequent remedial plan as fraudulent, wrongful, illegal and unconstitutional and null and void ab initio, the trial judge erred in law and fact in making awards based on the said Deed of Amendments and Rules as well as the Remedial Plan;

g. The court erred in law by reaching conclusions on fraud without any evidence; the court erred in failing to hold that based on totality of the evidence on record, the appellants had not committed any fraud;

h. The learned judge erred by attributing the defaults of KPA as the Sponsor of the Pension Scheme to the appellants;

i. The appellants urged this Court to set aside the judgment by the trial court and declare the same to be a nullity, strike out the re-re-amended plaint and award costs of the suit both at the Employment and Labour Relations Court and in this Court to be paid by the respondents jointly and severally.”

16. The respondents in a cross appeal urge that the learned judge erred in failing to award interest on the decretal sum at court rates from the date of filing suit and further erred in failing to award interest at commercial rate of 20% per annum; that the court erred in failing to make an order that the respondents monthly pension be adjusted and paid as detailed at paragraph 12 of the re-re-amended Plaint together with the annual increments in respect thereof.

17. At the hearing of this appeal, learned counsel Mr. P. M. Gachuki appeared for the appellants while learned counsel Mr. R. M. Tindika appeared for the respondents. Both counsel filed written submissions and list of authorities in support of their respective cases.

18. The original suit between the parties was filed at the High Court in Mombasa. The suit was later transferred to the Employment and Labour Relations Court which delivered judgment on 14th February 2014 the subject of this appeal. The central issue in this appeal is to ascertain the proper forum with original jurisdiction to hear and determine the dispute between the parties. There are three forums urged by the parties. Is the proper forum the High Court of Kenya or the Employment and Labour Relations

Court or the Chief Executive Officer of the Retirement Benefits Authority?

19. It is the appellants' case that the proper forum with original jurisdiction is the **Chief Executive Officer of the Retirement Benefits Authority** under **Section 46 (1)** of the **Retirement Benefits Act** while the **Retirement Benefits Appeals Tribunal** established under **Section 48** of the said Act has appellate jurisdiction. It is the appellants' contention that both the High Court and the Employment and Labour Relations Court had no jurisdiction to hear and determine the dispute between the parties.

20. Conversely, the respondents contend that the proper forum with original jurisdiction at the time of filing suit was the High Court pursuant to **Section 60** of the repealed Constitution and now jurisdiction lies with the Employment and Labour Relations Court by virtue of **Article 162 (2) (a)** of the 2010 Constitution.

21. The appellant submitted that the original suit was filed at the High Court of Kenya in Mombasa which court had no jurisdiction to hear the dispute between the parties; that on 26th June 2013, the parties by consent transferred the suit to the Employment and Labour Relations Court where the trial judge (Makau, J.) heard and determined the matter; that the consent to transfer the suit to the Employment and Labour Relations Court was null and void because the Employment Court has no original jurisdiction to hear and determine disputes between a pensioner and Trustees of a Pension Scheme. Citing the decision in **Kagenyi -v- Musiramo & Another (1968) EA 43**, the appellant submitted that an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. The appellant emphasized counsel or parties cannot by consent confer jurisdiction to a court where none exists in law.

22. The appellant submitted that just as the High Court did not have jurisdiction to hear and determine the dispute between the parties, the Employment and Labour Relations Court had no jurisdiction to hear and determine the matter for the following reasons: First, a suit filed in a court without jurisdiction cannot lawfully be transferred to another court; second, the Employment and Labour Relations Court in itself had no jurisdiction because there was no employer-employee relationship between the parties; third, **Section 46** of the **Retirement Benefit Act** vests original jurisdiction upon the CEO of RBA; fourth, if the respondents had any claim, it is against their former employer, Kenya Ports Authority, who is not a party to this suit; fifth that neither **Article 162 (2)** of the Constitution nor **Section 12** of the **Industrial and Labour Relations Court Act** confer any jurisdiction upon the Employment and Labour Relations Court to hear and determine disputes between pensioners and the Trustees of a Pension Scheme; sixth, that prior to the promulgation of the 2010 Constitution, this Court in **Kenya Ports Authority -v- Industrial Court of Kenya & 2 Others Civil Appeal No. 236 of 2012** held that pension disputes are not included within the definition of a trade dispute consequently the then Industrial Court did not have jurisdiction to hear and determine pension disputes.

23. The appellants urged this Court not to discharge its duty as a first appellate court to re-appraise the evidence on record for reason that because the trial court did not have jurisdiction, this Court likewise lacks jurisdiction to re-evaluate the evidence; that in the event that this Court held that the trial court had no jurisdiction, this Court should exercise restraint and not delve into re-evaluation of the evidence because the Court may well refer the dispute to the proper forum which is the CEO of the Retirement Benefits Authority (RBA) and re-appraisal of evidence by this Court shall pre-empt the findings by the CEO of RBA.

24. On the factual merits of appeal, the appellant submitted that under Clause 15 of the Original **1998 Trust Deed**, the appellants as Trustees had power at any time to amend the Trust Deed with approval of the Employer (not the respondents); that **Clause 6 (b)** of the **1998 Trust Deed** empowered the Trustees to determine whether and to what extent any person was entitled to any benefit from the Scheme; that the respondents did not adduce any evidence in support of the allegations that the appellants acted unlawfully, fraudulently or illegally to their detriment; that the respondents did not produce any actuarial reports to challenge the pension calculations done by the appellants; that there was no professional advice to support the allegation that the appellants had run the Scheme recklessly and unprofessionally; that the Remedial Plan implemented by the appellants was a Statutory Remedial Plan made and approved

pursuant to the provisions of the Retirement Benefits (Minimum Funding Level and Winding Up of Schemes) Regulations 2000 made under the RB Act and like any other legislation, the Regulations prevail over the provisions of any Pension Scheme Trust Deed and Rules; that the learned judge erred in failing to find that the Remedial Plan was a Statutory Remedial Plan that must prevail over the Trust Deed; that the court erred in failing to find that the Remedial Plan did not require consent of the members of the Scheme; that the judge erred and failed to find that the 2002 amendment to the Trust Deed and the Remedial Plan was for the benefit of all members of the Scheme; that the judge fell into serious error when he made a finding that the 2002 Trust Deed amendment and the Remedial Plan were a well thought out scheme with the intention of reducing the members benefits and was done without the respondents consent and was a violation of the **1998 Trust Deed**; that the judge erred when he held that the appellant and the Sponsor (KPA) had failed to disclose to the RBA and the Commissioner of Income Tax that the Sponsor had failed to remit Ksh. 6.8 billion to the Scheme when in fact the deficit was the very reason for the Statutory Remedial Plan; that the judge erred in finding that the 2002 Trust Deed Amendment and Remedial Plan were fraudulent and that the trial court further erred in granting the reliefs sought by the respondents.

25. On the cross-appeal, the appellant urged this Court to dismiss the same noting that award of interest is at the court's discretion and it had not been shown that the trial court erred in making an order for interest to be paid at court rates from the date of judgment.

26. The respondents in opposing the appeal emphasized that suit as filed was premised on violation of the right to property under **Section 75** of the repealed Constitution and breach of the mandatory provisions of **Section 15**

(c) of the **1998 Trust Deed** that stipulated no amendment to the Trust Deed could be made that would reduce the benefit of a pensioner or dependent or affect the accrued benefit of any member **except with the consent** of such pensioner, dependent or member.

27. The respondents reiterated that the 2002 amendments to the **1998 Trust Deed** were fraudulent, illegal, unlawful and had the effect of reducing the benefits payable and or paid to the respondents and it affected the accrued benefits of the respondents without their consent; that there was fraudulent and unlawful concealment and or failure to disclose that KPA as the Sponsor of the Scheme had not remitted and or was in deficit of Ksh. 6,857,627,602/= as at 31st December 2003 and Ksh. 6,982,340,602/= as at 31st December 2004, which sums if paid could have met the alleged deficit or any shortfall in the Pension Scheme; that due to the deficit, the Remedial Plan was prepared in collusion with KPA to amend the definition of the "final pensionable salary" to be an average of three (3) years which had the effect of reducing the benefits payable to the respondents; that the amendments to the **1998 Trust Deed and Rules** was an endeavor to justify the Remedial Plan; that the Remedial Plan was in breach of **Section C 14 (c)** of the **Kenya Ports Authority Revised Regulations 2002**; that the amended Trust Deed and Rules was contrary to **Section 75** of the Constitution as it breached the respondents constitutional rights to property benefits under the Pension Scheme.

28. The respondents submitted that under **Rule 10** of the **1998 Trust Deed**, each member's benefits derived from his/her contribution vested immediately in the member while retirement benefits from membership fully vested in the member, as a mandatory, during the pensionable service; that there was no right given to the Trustees to decrease any benefit being paid or payable to any member of the Scheme; that no consent of the respondents or other members of the Scheme was sought or obtained to effect the amendments to the **1998 Trust Deed**; that all members and beneficiaries of the Scheme were being paid their lump sum and monthly pension based on their salary and house allowance during the last year of service and that this changed with effect from 1st July 2004 with the onset of the Remedial Plan. Counsel submitted that the benefits payable to the respondents and Scheme members was protected and could not be taken away without the respondents' consent under the proviso to **Section 15 (c)** of the **1998 Trust Deed**; that there was no alleged meeting conducted to approve the Remedial Plan; that the appellant through its witness **Mr. Patrick Kibor Kitur** testified that had the appellant remitted the sum of Kshs.6.8 billion deficit to the Pension Scheme, the Remedial Plan would not have been necessary; that it was the responsibility of the appellant Trustees to collect the deficit/arrears in contribution from KPA; that though

the Remedial Plan was to last till 2012, it continues to operate despite the increase in retirement age from 55 years to 60 years which effectively reduced cases of retirement.

29. On jurisdiction, the respondents submitted that both the High Court and the Employment and Labour Relations Court had jurisdiction to hear and determine the dispute; that the respondents case is premised on violation of **Section 75** of the then Constitution; that **Section 60** of the then Constitution established the High Court as a constitutional court with unlimited civil jurisdiction; that **Section 75 (2)** provided that every person having an interest or right over property which is compulsorily taken possession of or compulsorily acquired shall have a right of direct access to the High Court; that only the High Court had jurisdiction to hear and determine the matter at the time of filing of the suit in 2007 because all the pension benefits to the respondents were their properties which were protected by the Constitution and that none of the forum or mechanisms under the Retirement Benefits Authority Act has jurisdiction to determine breach of fundamental rights and freedoms under the Constitution. It was submitted that the appellant having participated throughout in the proceedings at the High Court and before the Employment and Labour Relations Court could not at this late hour raise the issue of jurisdiction.

30. Pertaining to the jurisdictional competence of the Employment and Labour Relations Court, the respondents contend that under **Article 162 (2)** of the 2010 Constitution, the Labour Court has jurisdiction to hear and determine disputes relating to employment and labour relations; that **Section 12** of the **Industrial Court Act** extends jurisdiction of the Labour Court to all disputes relating to employment and labour relations. Citing the decision of this Court in **Daniel N. Mugendi -v- Kenyatta University & 3 Others (2013) e KLR** it was submitted that the Employment and Labour Relations Court has jurisdiction to hear claims of violation of rights and breach of contract of employment; that when the Employment and Labour Relations Court was established, all matters pending in the High Court could be heard and determined by the Labour Court; that the Constitution under **Article 162**

2. **(a)** and **Section 12** of the **Industrial Court Act** vests jurisdiction upon the Employment and Labour Relations Court to hear and determine the dispute between the parties.

31. In support of the consent order by the parties to transfer the suit from the High Court to the Employment and Labour Relations Court, the respondents cited the decision in **Beatrice Achieng Osir -v- Board of Trustees Teleposta Pension Scheme (2012) e KLR** where it was observed that the High Court did not have jurisdiction in respect of matters falling within the jurisdiction of the Industrial Court (as the Employment and Labour Relations Court was then known) as established under **Article 162 (2) (a)** as read with **Article 165 (5) (b)** and **Section 12 (1) and (2)** of the **Industrial Court Act**. It was submitted that the cause of action in the present suit arose out of a labour and employment relations between the parties since all respondents were employees of KPA and their pension payments arose from the said employment relationship with the result that the Industrial Court is the court with jurisdiction to hear and determine the dispute.

32. Responding to the ground of appeal that the trial court heard and determined an un-pleaded issue, the respondent submitted that the trial court did not err because the issue was raised during trial and the appellants were given an opportunity to respond and their witness RW1 chose not to address the merits of the issue but to invite the affected respondent claimants to go to his office for correction of the errors on the final basic salary to reflect the salary increment of 1st July 2007. It was submitted that the appellants' right to be heard was observed.

33. In support of the cross-appeal, the respondents submitted that interest is always awarded from the date of filing suit and the trial court erred in awarding interest from the date of judgment; that the court further erred in failing to award interest at commercial rate of 20% from the date upon which the liquidated sums accrued and became due and payable to the respondents.

34. In its judgment, the trial court considered **Section 15 (c)** of the **1998 Trust Deed** to determine whether the appellants and or their predecessors in title had absolute power to amend the Trust Deed. The court held that the Trustees power to amend the **1998 Trust Deed** was not absolute in light of the proviso in **Section 15 (c)**; that consent of the members including the respondents was required whenever an

amendment or modification of the provisions of the Trust Deed and Rules had the effect of decreasing the accrued benefits of a member in the pension scheme; that the word “shall” in **Section 15(c)** was mandatory and that the Trustees were bound to seek the consent of the claimants before amending the **1998 Trust Deed**. The trial court held that the **2002 Deed of Amendment** plus the subsequent introduction of the Remedial Pension Plan had the effect of diminishing the benefits to pensionable members including the respondents. The court concluded that the 2002 Deed of Amendment and the Remedial Pension Plan violated **Clause 15 (c)** of the **1998 Trust Deed**.

35. In arriving at the decision that the 2002 Amendment and the Remedial Pension Plan diminished the benefits of the Pension Scheme Members, the trial court stated that firstly, the amendments changed the definition of pensionable salary by averaging the basis salary over the three (3) years preceding retirement; secondly, it froze the housing allowance applicable to the amount payable as at 30th June 2003 and from these two aspects and the evidence adduced and calculations demonstrated by the respondents’ witnesses, the Remedial Pension Plan had the effect of diminishing both the lump sum and monthly pension for the members including the claimants.

36. In interpreting **Section 15 (c)** of the **1998 Trust Deed**, the trial court made a finding that the Pension Scheme Members had a veto power to stop any amendment which decreased their benefits; that **Section 15 (c)** of the **1998 Trust Deed** which was replaced by **Clause 24** of the **2002 Deed of Amendment** and the subsequent Remedial Pension Plan was amended without consent of the members including the claimants and as such, the 2002 Amendment was unlawful as it violated the said **Section 15 (c)** and that had the 2002 Deed of Amendment been consented to by the members including the respondents, **Clause 24** thereof would have been lawful and the Remedial Pension Plan would also be valid.

37. The trial court considered whether the 2002 Amendment and the Remedial Pension Plan were fraudulent as pleaded in the re-re-amended plaint. The court observed that according to CW1 (**Moris Mutie Munyao**), CW2 (**Apolo Okelo Ogwabo**) and RW1 (**Patrick Kibor Kitur**), the unremitted pension by KPA had accrued to Ksh. 6,857,627,602/= as at 31st December 2003 and Ksh 6,982,340,602/= as at 31st December 2004; that according to all these witnesses, had KPA remitted the over Ksh. 6.8 billion to the Pension Scheme, there would never have been any solvency problem and the Remedial Pension Plan would not have been necessary.

38. The trial court held that the appellants’ conduct in introducing the 2002 Deed of Amendment and the Remedial Pension Plan was nothing but fraudulent because the remedial pension plan would not have been introduced had KPA remitted 6 – 8 billion to the Scheme and had the appellants appointed an independent actuary to the Scheme without interference from KPA; that the appellants never disclosed to RBA and the Income Tax Commissioner that KPA had failed to remit over Kshs. 6.8 billion to the Scheme and that had they disclosed this fact, the RBA and Commissioner of Income Tax would not have approved the Remedial Pension Plan. The trial court further observed that the Remedial Plan was a far sighted fraudulent scheme which started by the appellants amending **Section 15 (c)** of the **1998 Trust Deed** to curtail the respondents veto power after which the appellants colluded with KPA as the Sponsor of the Scheme to conceal from RBA and the Commissioner of Income Tax non-remittance of over Kshs. 6.8 billion; and that the appellants condoned KPA’s interference and micromanagement of the Scheme by appointing an Actuary who concealed KPA’s indebtedness to the Scheme and misadvised the RBA and the Commissioner of Income Tax towards the introduction of the Remedial Pension Plan. The trial court concluded and held that the appellants concealment of KPA’s indebtedness to the Scheme in order to gain approval and reduce the respondents benefits was fraudulent, unlawful and illegal and that by taking away the respondents’ accrued benefits, the appellants conduct was unconstitutional and a violation of **Sections 70 and 75** of the then Constitution. The trial court noted that **Rule 10** of the **1998 Trust Deed** and **Rule 5** of the 2002 Amendment vested the contributions of members immediately and retirement benefits accrued during pensionable service.

39. Regarding the complaint that it had heard and determined an unpleaded issue, the trial judge in making a determination on un-pleaded issues. The trial judge expressed himself as follows:

“This court was invited to make a decision on un-pleaded matters which were canvassed during

the hearing of evidence. The witnesses raised them and were cross-examined by counsel. The issue concerns a matter which came to the knowledge of CW 2 when the matter was pending hearing and RW 1 did not contest it. It is about salary increment effective 1st July 2007 that was granted to five claimants who were of management cadre. RW 1 invited the affected claimants to go to his office for correction of the errors on the final basic salary to reflect the increment of 1st July 2007. The court does not see any reason why the claimants should go elsewhere to start proving his claim afresh. The court finds that it is well seized of the power to make a decision on all matters raised during the hearing whether pleaded or not. Consequently, any matter raised during trial formed part of the dispute and they have to be resolved in order to give the case a final determination. The court therefore directs and orders the respondents to correct the error in respect of the monthly pensions for Karia Kiarie, CW 2 Michael N. Rai, Christine Mbuja Oloo and Jacob Kaburu Kiara to reflect the salary increment to them by KPAs letter dated 6th July 2007. Once the error of the pensionable salary is corrected, the respondents will pay to the said claimants their entire accrued pension caused by the said error in addition to what has been awarded above under the aggregate award.”

ANALYSIS

40. We have considered the grounds of appeal and submissions by counsel. Subsequent to the **Statute Law (Miscellaneous) Amendment Act No. 18 of 2014**, appeals from the Employment and Labour Relations Court to this Court lie on matters of fact and law. In the exercise of its appellate jurisdiction this Court must reconsider the evidence, evaluate it and draw its own conclusions and is not bound to follow the trial judge’s findings of fact if it appears that the trial court failed to take into account particular circumstances or if its decision is inconsistent with the evidence on record. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123** and **Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270**).

JURISDICTION

41. The appellant contends that the trial court erred in law in not considering the issue of jurisdiction that had been pleaded in the defence. Paragraph 23 of the Defence filed on 11th January 2007 states that the High Court had no jurisdiction on the matter. The judgment of the trial court dated 14th February 2010 does not consider and determine the issue of jurisdiction as pleaded in the defence.

42. It is our considered view that jurisdiction having been pleaded it was incumbent upon the trial court to first determine the issue before delving into the merits of the case.

43. The respondents contend that the issue of jurisdiction has been raised too late in the day and for the first time in this appeal. We disagree. Jurisdiction was pleaded and made an issue on 11th January 2007 when the defence was filed. Even if jurisdiction were raised for the first time in this appeal, this Court has stated in **Kenindia Assurance Company Limited -v- Otiende (1989) 2 KAR 162**, that it has power to entertain a point raised for the first time on the appeal if such point goes to jurisdiction.

44. It is our finding that the trial court erred in law in failing to consider and determine the issue of jurisdiction that had been raised in the defence. In our view, the question of jurisdiction was not concluded and determined by consent of the parties to transfer of the suit from the High Court to the Employment and Labour Relations Court. It was the duty of the trial court to consider and determine whether jurisdiction to hear the dispute between the parties lay with the CEO of the Retirement Benefits Authority (RBA) or the Employment and Labour Relations Court.

45. At the risk of repetition, a central issue in this appeal is the right forum with original jurisdiction to hear and determine the dispute between the parties. The Supreme Court in **Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others S.C. Application No. 2 of 2012; [2012] eKLR**, held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the Constitution, statute law, and judicial precedent; that a court’s jurisdiction flows from either the

Constitution or legislation or both and a court may not arrogate to itself jurisdiction through the craft of interpretation.

46. The appellant contends that pursuant to **Section 46 (1)** of the RB Act, the CEO of RBA is the correct forum with original jurisdiction to hear the dispute between the parties with appeals lying to the Appeals Tribunal established under the Act. **Sections 46 (1)** and **48 (1)** of the **Retirement Benefits Act** provides as follows:

“46 (1) Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established.....”

48 (1) Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulation made thereunder may appeal to the Tribunal within 30 days of the receipt of the decision.”

47. The appellants contend that the 2002 Amendment to the Trust Deed was a decision made by the Trustees pursuant to **Section 46 (1)** of the RB Act; that if the respondents were aggrieved by the Trustees decision to amend, vary or modify the **1998 Trust Deed**, the proper forum to lodge a complaint and challenge the decision was for the respondents to request the CEO of RBA to review the decision and determine if the amendment was within the Trust Deed or Scheme Rules. It was submitted that the respondents’ failure to invoke or activate the provisions of **Section 46 (1)** of the **RB Act** implies that the 2002 Amendment is valid as it has not been challenged before the CEO of RBA. The appellants submit that guided by **Section 46 (1)** of the RB Act, the trial judge erred in law by failing to appreciate that both the High Court and the Employment and Labour Relations Court had no original jurisdiction to hear, consider and determine the dispute between the parties.

48. To the appellant, the correct procedure is as was followed in the persuasive High Court case of **The Trustees of Teleposta Pension Scheme -v-Mackenzie M. Mogere, Nairobi HC Civil Appeal No. 141 of 2012**. In this case, Mr. Mackenzie complained that the appellant had calculated and paid him a retirement benefit using a wrong pension method, period or formula which led to a lower pension sum being offered to him. Mr. Mackenzie complained to the CEO of RBA who dismissed the complaint and he appealed to the Appeals Tribunal which found merit in his complaint. Relying on this decision, the appellant submitted that whenever a member is dissatisfied with a decision of the Trustees, the procedure to be followed is as was done in the ***Trustees of Teleposta Pension Scheme vs. Mackenzie M. Mogere case (supra)*** and there is no right of direct access to the High Court or Employment and Labour Relations Court in the first instance.

49. The appellant also cited the case of **Narok County Council -v- Transmara County Council, (2001) EA 157**, in support of submission that though Section 60 of the repealed Constitution gave the High Court unlimited jurisdiction, it did not clothe it with jurisdiction to deal with matters that Statute had directed should be done by another body. Citing the decision in **Wilkinson -v- Barking Corporation (1948) 1 KB 721**, the appellant submitted that where Parliament has appointed a specific tribunal for dealing with the rights and liabilities of the employees, no act of the parties could create in the court jurisdiction which Parliament has vested in another body.

50. The appellant urged this Court to find that **Section 46 (1)** of the **RB Act** vested jurisdiction to consider complaints against decisions of Trustees upon the CEO of RBA and not the High Court or the Employment and Labour Relations Court. The appellant further cited the decision in **Kenya Ports Authority -v- Industrial Court of Kenya & 2 others, Civil Appeal No. 236 of 2012** where this Court held that pension disputes are not trade disputes and the Labour Court has no jurisdiction to hear pension disputes which is a jurisdiction reserved for RBA.

51. The respondent contend that the High Court established under the repealed **Section 60** of the

Constitution was the constitutional court with original and unlimited jurisdiction in civil matters to hear and determine the dispute between the parties; that the provisions of **Section 46 (1)** of the RBA did not oust the jurisdiction of the High Court; that the High Court having had jurisdiction, the same High Court had power to transfer the suit to be heard by the Employment and Labour Relations Court; that pursuant to the transitional provisions in the Sixth Schedule to the 2010 Constitution, the present suit was a suit pending before the High Court and it was proper in law for the case to be transferred to the specialized Employment and Labour Relations Court.

52. The respondents urged that disputes relating to violation of constitutional rights (and in this case violation of respondents' property rights under **Section 75** of the then Constitution) could only be litigated before the High Court or Employment and Labour Relations Court and not before the CEO of the RBA or the RBA Appeals Tribunal. The respondents cited the case of **Rashid Odhiambo Aloggoh & 245 Others -v- Haco Industries, Civil Appeal No. 110 of 2001** to support submission that availability of other lawful causes of action is not a bar to a party who alleges a contravention of his constitutional rights.

53. On the issue whether it is only the High Court that has jurisdiction to hear and determine questions of violation of fundamental rights and freedoms, this Court in **Judicial Service Commission -v- Gladys Boss Shollei & Another, Civil Appeal No. 50 of 2014** expressed itself as follows:

“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.(Emphasis ours).

54. **Article 20 (4)** provides that in interpreting the Bill of Rights, a court, tribunal or other authority shall *inter alia* promote the spirit, purport and objects of the Bill of Rights. The inference from this provision is that there is no exclusive jurisdiction vested upon the High Court to interpret the Bill of Rights - a tribunal can interpret the Bill of Rights.

55. The Supreme Court in **Communication Commission of Kenya & 5 Others -v- Royal Media Services Limited & 5 Others (Petition No. 14 as consolidated with Petition Nos. 14 A, 14 B and 14 C)** expressed itself as follows at paragraph 341 of its judgment on the issue whether a Tribunal can hear and consider contentions relating to violation of constitutional rights:

“341. Although the 1st, 2nd and 3rd respondents have argued that a party cannot reasonably be expected to raise constitutional claims before the Public Procurement Administrative Review Tribunal, and therefore a petition in the High Court regarding their constitutional rights was in order, we find nothing to suggest that the matters raised in the High Court could not have accompanied the fundamentals of the grievance the very item before the Tribunal. The Public Procurement and Disposal Act, indeed, does not preclude parties from raising constitutional issues touching on their complaint. We note, besides, that administrative bodies, such as the Tribunal in question, are bound by the Constitution.”

56. Guided by the above quoted Supreme Court dictum and the cited Constitutional Articles, it is our considered view that the respondents' contention that neither the CEO of RBA nor the RBA Appeals Tribunal could hear and determine questions relating to violation of constitutional rights enshrined in the

Bill of Rights has no merit. The Retirement Benefits Authority Act does not preclude parties from raising constitutional issues touching on their complaint. **Section 58** of the **RB Act** explicitly provides that the Constitution supersedes the provisions of the Act and where there is conflict between the RB Act and any other written law, the provisions of the RB Act prevails. Further, under **Article 3** of the **Constitution**, every person has an obligation to respect, uphold and defend the Constitution while **Article 10 (1)** provides that national values and principles of governance bind all public officers whenever they interpret the Constitution or make public policy decisions. The CEO of RBA and the Appeals Tribunal are public officers and or state organs and are bound to implement the Constitution. We are of the considered view that the jurisdiction of the High Court and or the Employment and Labour Relations Court to hear and determine the present dispute between the parties cannot be premised on the contention that the respondents' claim raises issues of violation of the constitutional right to property and consequently the CEO and Appeals Tribunal have no jurisdiction to consider constitutional violation of rights. It is our view that violation of constitutional rights can be raised in any forum that is competent to hear and determine a dispute between parties and such forum is bound by the Constitution in its interpretation and application of constitutional provisions and individual rights.

NATURAL JUSTICE, OPTIONAL JURISDICTION AND SECTION 46 (1) OF THE RBA ACT

57. At the risk of repetition, **Section 46 (1)** of RB Act stipulates that “Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme **may request**, in writing, that such decision be reviewed by the Chief Executive Officer...” In the instant case, who made the decision to amend the 1998 Trust Deed and who made the decision to approve the Remedial Plan of the Pension Scheme? The preamble to the 2002 Amendment states that Trustees made the amendment pursuant to the powers conferred upon them by **Clause 15** of the **1998 Trust Deed** and that the consent of the Founder (Sponsor/KPA) to the alterations and amendments is signified by the execution of the Deed of Amendment. The decision to amend the 1998 Trust Deed was made by the Trustees with consent of the KPA as the Sponsor/Founder of the Scheme. By letter dated 1^{9th} December 2003, the Retirement Benefits Authority approved

the Remedial Plan. The relevant part of the letter reads as follows:

“(i).....

(ii).....

(iii)That the amendment of the scheme rules with respect to the definition of the pensionable salary, including the house allowance as part of the pensionable emoluments, as proposed in the remedial plan be implemented immediately without further delay.”

58. The core dispute is the 2002 Trust Deed Amendment and the Remedial Plan which was approved by RBA as stated above. The amendment and immediate implementation of the Scheme rules with respect to definition of pensionable salary, including the house allowance as part of the pensionable emoluments, as proposed in the Remedial Plan was approved by RBA. A significant issue is whether a dispute relating to amendment of the definition of pensionable emoluments could be referred to the CEO of RBA for review when it was the same RBA that approved implementation of the new definition.

59. Natural justice dictates that a person cannot be a judge in his or her own case

–nemo iudex in re causa sua. RBA having given approval to the implementation of the Remedial Plan, natural justice would debar the CEO of RBA to hear a review relating to RBA's own approval and decisions. RBA played an active role in approval of the Remedial Plan and any review by the CEO of RBA would be a violation of the rules of natural justice. On the specific facts of this case and guided by the principles of natural justice and noting the role played by RBA in approving implementation of the Remedial Plan, it is our view that the CEO of RBA could not validly review, consider or determine the dispute between the parties. The provisions of **Section 46 (1)** of the RBA Act are to be invoked when there is no conflict of interest and any active or

perceived role by RBA in relation to the decision that is subject to review.

60. Analysis of recent judicial decisions of the High Court and Employment and Labour Relations Court support show that despite existence of **Section 46** of the RBA Act, both the High Court and now the Employment and Labour Relations Court have heard and determined pension disputes involving retired employees.

61. In **Director of Pensions -v- Cockar (2000) 1 EA 37**, a pension dispute arose between the appellant and respondent; a suit was filed at the High Court and a subsequent appeal was heard and determined by this Court. In **Teachers Service Commission -v- Simon P. Kamau & 19 Others, Civil Appeal No. 300 of 2009**, the respondents were retired teachers and the High Court and Court of Appeal heard and determined a pension dispute between the parties (See **TSC -v- Simon P. Kamau, Nakuru HCCC No. 65 of 2006**). We note that in these cases, jurisdiction was not an issue in direct contention and the Pension Scheme was not a party to the proceedings.

62. We have further considered the rival submissions on the issue of an alternative remedy. We must at the outset point out that the provisions of **Article 47** of the **Constitution** and the **Fair Administrative Action Act of 2015** are relevant and applicable to this appeal. The provisions of the **Fair Administrative Action Act** are retroactive and apply to all proceedings pending in court. **Section 14 (1)** of the Act provides:

“14. (1) In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of this Act, the provisions of this Act shall apply, but without prejudice to the validity of anything previously done.”

63. Pursuant to **Section 12** of the **Fair Administrative Action Act**, the general principles of common law and rules of natural justice continue to apply in review of administrative actions. The Section provides that the Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice. This means that the common law principles on judicial review of administrative action under the heads of illegality, irrationality, procedural impropriety and proportionality are relevant and applicable in Kenya. (See the common law principles as expounded by Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374**). See also the principle of reasonableness as stated in the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223.**)

64. The appellant’s submission that constitutional issues cannot be raised in judicial review proceedings was law prior to the **2010 Constitution**. The law has now changed and the provisions of **Article 22 (3)** and **22 (4)** of the **Constitution** as read with **Article 47** of the **Constitution** and **Sections 5 (2) (b)** and **(c)** and **Section 7 (1) (a)** and **(2)** of the **Fair Administrative Action Act** suggests that violation of fundamental rights and freedoms can be entertained by way of statutory judicial review in an action commenced by Petition under the Rules made pursuant to **Article 22 (3)** of the **Constitution**. (See **Legal Notice No. 117/2103 Protection of Rights and Fundamental Freedoms - Practice and Procedure Rules, 2013**).

65. Of significance is **Section 5 (2)** of the **Fair Administrative Action Act** which stipulates that:

“(2) Nothing in this section shall limit the power of any person to -

(a).....

b. apply for review of an administrative action or decision by a court of competent jurisdiction in exercise of his or her right under the Constitution or any written law or

c. institute such legal proceedings for such remedies as may be available under any written law.”

66. The provisions of **Section 5 (2)** of the **Fair Administrative Action Act** establishes a non-exclusive

approach to challenge of administrative action. The section permits bifurcation or a split approach for remedies. One approach is by way of statutory judicial review under the Act; the other is through proceedings for any other remedies as may be available under the Constitution or any written law. Subject to **Section 9 (2), (3) and (4)** of the **Fair Administrative Action Act**, the two approaches are not mutually exclusive. The bifurcated and non-exclusive nature of proceedings for remedies must be read in the context of **Article 47** of the **Constitution** and **Section 12** of the **Fair Administrative Action Act**. The common law principles of administrative review have now been subsumed under **Article 47** Constitution and **Section 7** of the **Fair Administrative Action Act**. In this regard, there are no two systems of law regulating administrative action the common law and the Constitution - but only one system grounded in the Constitution. The courts' power to statutorily review administrative action no longer flows directly from the common law, but *inter alia* from the constitutionally mandated **Fair Administrative Action Act** and **Article 47** of the Constitution.

REMEDIAL PLAN APPROVED BY THE RETIREMENT BENEFITS AUTHORITY

67. The appellants in their written submissions at paragraphs 66 and 68 contend that the amendments to the KPA Pension Scheme were made pursuant to a Remedial Plan approved by the RBA; that the remedial plan was a statutory Remedial Plan made pursuant to the provisions of the **Retirement Benefits (Minimum Funding Level and Winding Up of Schemes) Regulations 2000 – Legal Notice No. 120 of 2000**; that the Regulations made under the RB Act like any other legislation prevail over the provisions of a Scheme's Trust Deed and Rules; that pursuant to **Section 58** of the RB Act, any conflict between the RB Act and any other written law, the RB Act prevails; that the learned judge erred and failed to appreciate that the Remedial Plan was a statutory plan and it was mandatory for the Trustees to implement the same.

68. Regulation 4 (2) of the RBA (Minimum Funding Level and Winding Up of Schemes, 2000) stipulates that where the Authority is of the opinion that a Scheme fund is below the minimum funding level, the Authority shall direct such Scheme to submit a remedial plan setting out the arrangements intended to eliminate the deficiency in the scheme fund. **Regulation 4 (3)** permits the Authority to approve the remedial plan if it is satisfied that the arrangements set out therein shall raise the funding levels of the scheme.

69. Regulation 3 of the **Minimum Funding Levels and Winding Up of Schemes** defines "court" to mean the High Court of Kenya and in the context of the Regulations, the jurisdiction of the High Court relates to winding up of a pension scheme.

70. We have considered the appellants contention that the remedial plan was statutory and the Trustees were under an obligation to implement the same. This may be so. However, we concur with the trial court that the remedial plan submitted by the Trustees to RBA was premised on the amendments to the Trust Deed which amendments were not in accordance with **Article 15 (c)** of the **1998 Trust Deed Rules**. Due to the un-procedural unlawful amendment of the **1998 Trust Deed Rules** where consent of members was not sought and obtained, the said remedial plan is null and void. A statutory remedial plan or any statutory provision cannot take away vested or acquired property rights without following the due process of law. Likewise, no statutory remedial plan can lawfully authorize the taking away of vested contractual property rights without following the due process in the contractual instrument.

FRAUD AND NON-DISCLOSURE OF DEFICIT IN KPA CONTRIBUTION TO THE PENSION SCHEME

71. The respondents' contend that the appellants were fraudulent in not disclosing to the RBA that the Scheme's Sponsors (KPA) was in arrears of Ksh. 6.8 billion in contribution to the Scheme and if the arrears had been contributed, there would be no need for the remedial plan.

72. Conversely, the appellants contend that disclosure of the arrears/deficit in contribution was made and the disclosure was the very reason for the Statutory Remedial Plan; that the disclosure of the deficit was stated in the Special Actuarial Investigation report of 30th June 2002 at page 1105 of the record where at

paragraph 3.4 (i) it is stated that the actuarial deficit as at 30th June 2002 was estimated at Ksh. 7.8 billion.

73. We have analysed the Revised Statutory Remedial Plan of November 2003 submitted to RBA for approval. At paragraph 3.5 of the Plan, the reasons for the Scheme's deficit are stated to be delays in implementing the recommended contribution rate increases; that the rate of increases of pensionable salaries had been significantly higher than had been allowed; that there had been low returns on the Scheme assets; that the overall return on the Schemes assets in the last three years had been negative; that there had been a 25% reduction in value placed on the Scheme's property assets by the Scheme Actuary.

74. Although the Revised Statutory Remedial Plan is dated November 2003, nowhere in the Remedial Plan is it indicated that the Sponsor of the Scheme had failed to remit the sum of Ksh. 6,857,627,602/= as at 31st December 2003 or proportionate part thereof as at November 2003. What is disclosed at paragraph 3.4 (i) of the Remedial Plan is that the Scheme was in deficit. It is not disclosed that the cause of the deficit is that the Sponsor had not been making contributions. It is also not disclosed that the Sponsor as Employer was in violation of **Article 4 (b)** of the **1998 Trust Deed** by failing to pay contribution to the Trustees; the Remedial Plan does not disclose that the appellants were in violation of their obligation under **Section 40 (d)** of the Retirement Benefits Act in that they failed to report that contributions into the Scheme fund remained due for a period of more than thirty days.

75. We note that the Remedial Plan proposed specific actions particularly that the definition of "final pensionable salary" was to be amended to be average salary over three years preceding retirement. How this specific action plan would translate into figures and improve the Schemes Minimum Level Funding is not indicated in the Remedial Plan. This is the concealed mischief that reduces the pensionable sum due and owing to members of the Pension Scheme. Due to failure to specifically disclose that the Sponsor was in arrears in its contribution, we have no hesitation to uphold the finding by the trial court that the real cause of the deficit in the Scheme was not disclosed in the Plan. The disclosure was material to enable RBA to make an informed decision as to whether or not to approve the Remedial Plan. Failure to make the material disclosure lead us to find that when RBA gave its approval of the remedial plan, it acted on insufficient information. We however disagree with the trial court in the finding that the non-disclosure was fraudulent. There is no evidence on a balance of probability to prove that the non-disclosure was fraudulent, intentional or motivated by malice - the specific non-disclosure could have been an oversight, negligent or in advertent.

BACKDATING THE 2002 DEED OF AMENDMENT OF THE TRUST DEED

76. The Second Deed of Amendment dated 7th January 2005 amended the original **1998 Trust Deed**. The effective date of the amendments is **backdated**. The amendment in the definition of "final pensionable salary" is effective from 1st July 2004 and all other amendments are effective from 1st July 2003. The respondents' contend that the amendment had the effect taking away their property rights as guaranteed under **Section 75** of the repealed Constitution as it decreased and or reduced their accrued, vested and payable pension benefits. In **Director of Pensions -v- Cockar (2000) 1 EA 37 at 47**, the word "property" in **Section 70** of the repealed Constitution was interpreted to include "pension". Shah, JA expressed that property includes pension and no person who is eligible for pension can be deprived of his pension arbitrarily.

77. In law, there is a general presumption against retroactivity and the law frowns on retrospectivity in contract unless it is by consent of the parties. The 2002 Amendment Deed backdated the effective date of the definition of "final pensionable salary" to 1st July 2004.

78. In the instant case, there is a finding that there was no consent by the respondents to amend the Trust Deed and Rules as required by the proviso to Clause 15 (c) of the 1998 Trust Deed. In the case of **Samuel Kamau Macharia & Another (supra)** the Supreme Court at paragraph 61 expressed itself as follows on retrospectivity *albeit* in statute law:

“A retroactive law is not unconstitutional unless it:

- i. is in the nature of a bill of attainder;**
- ii. impairs the obligation under contracts;**
- iii. divests vested rights; or**
- iv. is constitutionally forbidden.”**

79. Using the analogy of statute law, what is in issue is whether the backdating of the effective date of the 2nd Deed of Amendment is constitutionally and contractually valid. Prior to the 2002 amendment to the Trust Deed, the contractual and vested right of the respondents and other members of the Pension Scheme under **Clause 15 (c)** was to give their consent in any amendment or variation of the Trust Deed or Rules whose effect was to decrease the benefits payable to the members or retired pensioners.

80. It is the respondents’ contention that by backdating the effective date of the 2nd Amendment Deed, the appellants decreased the pensionable benefits of members. The legal effect of backdating the effective date of the amendment was nullification and impairment of accrued pension benefits that had vested and was payable to the respondents and other members of Scheme. Guided by the *dictum* in **Samuel Kamau Macharia & Another (supra)**, the backdating of the effective date of amendment was unconstitutional as it impaired the rights of the respondents and the obligations of the appellant under contractual **1998 Trust Deed**; the backdating divested the respondents their contractual benefits; this was tantamount to a taking of property contrary to **Section 75** of the repealed Constitution. It is our finding that the backdating of the effective date of the Deed of Amendment was unconstitutional and contractually null and void because there was no consent of the respondents and other members of the Pension Scheme as required and protected under the proviso in **Clause 15 (c)** of the **1998 Trust Deed**.

LUMP SUM MONTHLY PENSION ARREARS

81. The appellants further contend that the trial court erred in ordering that the lump sum and monthly pension arrears for Kiarie Kiarie, Appollo O. Ogwambo, Michael N. Rai, Christine Mbuja Oloo and Jacob Kaburu Kiaria be adjusted and the salary to be applied in calculating their pension benefits is the salary increment of 1st July 2007. This Court in **Teachers Service Commission (supra)** was faced with a similar situation where salary increment had been awarded to the respondents prior to retirement but their pension was calculated based on existing salary prior to increment. It was held that the respondents had a contractual right to have the additional salary reflected in their final salary; that it was the responsibility of the employer to reflect the increment as the last pay and the increment should have been reflected as the last salary to achieve fairness.

CROSS APPEAL

82. The respondents in cross appeal urged us to find that the trial judge erred in not awarding interest at commercial rate of 20% and in ordering that interest be at court rates from the date of judgment rather than from the date of filing suit. Section 26 of the Civil Procedure Act stipulates that award of interest is at the discretion of the court. In **Omega Enterprises Kenya Limited -v-Sirikwa Hotel Limited & Others CA No. 235 of 2001**, this Court while considering among others the date from which interest ought to be awarded observed that the question of interest as regards the date from which it should be paid, the rates thereof as well as whether the same should be compounded or simple basis, is essentially a matter for the discretion of the court and unless the discretion is exercised wrongly an appellate court would not interfere with the decision of the trial court.

83. The respondent in cross appeal has not demonstrated to our satisfaction that the trial court erred in the exercise of its discretion to award interest at court rates from the date of judgment. Accordingly, we find that the cross-appeal has no merit and fails. Further, the respondent has not demonstrated to our satisfaction how the trial court erred in not taking into account the adjusted claims in paragraph 12 of the

re-re-amended plaint. In awarding the aggregate liquidated sum of Ksh. 201,981,424/50 the trial court expressly stated that the award was pursuant to paragraph 12 of the re-re-amended plaint.

84. As regards the ground of appeal on un-pleaded issue, this Court has in several decisions made it clear that a court has no power to grant a relief that has not been specifically prayed for. (See **Malindi Air Services & Another -v- Halima A. Hassan- Civil Appeal No. 69 of 2000**). However, in **Odd Jobs - v- Mubia (1970) EA 476** and in **Nkalubo -v- Kibirige (1973) EA 102** it was held that a court may base a decision on an un-pleaded issue if it appears from the course followed at the trial that the issue had been left to the court for decision. On our part we are satisfied with the trial court’s reason given for making a determination on the un-pleaded issue. We make this finding because the appellant was given an opportunity to address the issue and no prejudice has been demonstrated. The course of proceedings before the trial court leads us to conclude that the un-pleaded issue had been made part of the record; and that the issue required consideration and determination. In our view, the trial court was not obliged to follow the advice of RW1 that the respondent claimants should visit RW1’s office for correction of the error and re-calculation of the pension amounts.

85. The totality of our re-evaluation of the evidence and the relevant law is that the appeal and the cross appeal have no merit and are hereby dismissed. Each party to bear its own costs before the Employment and Labour Relations Court and in this appeal.

Dated and delivered at Mombasa this 26th day of February, 2016.

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR