



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), NAMBUYE & KOOME, JJ.A)

CIVIL APPEAL NO. 1 OF 2014

BETWEEN

CAPTAIN (RTD) CHARLES MASINDE.....APPELLANT

AND

AUGUSTINE JUMA.....1ST RESPONDENT

FRED O. WASIKE2ND RESPONDENT

MAURINE OKELLO3RD RESPONDENT

CHARLES KARIUKI4TH RESPONDENT

JOSHUA MANYARA.....5TH RESPONDENT

EMMANUEL OGOT.....6TH RESPONDENT

(In their capacity as trustees of General Motors East Africa Staff Retirement Benefit Scheme)

GENERAL MOTORS EAST AFRICA LIMITED.....7TH RESPONDENT

**THE RETIREMENT BENEFITS APPEAL TRIBUNAL..8TH RESPONDENT RETIREMENT
BENEFITS AUTHORITY.....9TH RESPONDENT**

(An appeal from the judgment of the High Court at Nairobi (Majanja, J.) dated 1st November, 2013

in

J.R. Miscellaneous Application No. 205 of 2011)

JUDGMENT OF THE COURT

1. The 1st to the 6th respondents are Trustees of General Motors East Africa Staff Retirement Benefits Scheme (the Scheme) which was established by the 7th respondent on the 1st November, 1977 under an

irrevocable trust. The Scheme was for the benefit of the 7th respondent's employees. It was later registered on the 15th December, 2000 as a retirement benefits scheme under the **Retirement Benefits Act (Act)**.

2. The appellant automatically became a member of the Scheme upon his employment on the 1st February, 1990. After rendering his services for a period of 11 years, the appellant tendered his resignation on the 9th November, 2001 which was accepted by the 7th respondent. The 7th respondent then began the process of calling up the withdrawal and payment of the appellant's retirement benefits under the Scheme. Kabage & Mwirigi Insurance Brokers Ltd., the Scheme's fund manager, computed the appellant's gross retirement benefits under the Scheme at Kshs. 4,525,163.90/=. The said amount was withdrawn from the Scheme's fund and transmitted to the 7th respondent by Barclays Securities Services (Kenya), the fund's custodian. Thereafter, the 7th respondent computed the appellant's gross terminal dues which were inclusive of the retirement benefits transmitted at Kshs. 6,240,903.90/= and made deductions therefrom totaling to Kshs. 5,556,510.60/= which it claimed were the appellant's liabilities. Ultimately, on the 4th December, 2001 the 7th respondent paid the appellant a sum of Kshs. 684, 393.30/= as his final dues.

3. Sometime in August, 2005 the appellant filed suit against the 7th respondent being H.C.C.C No. 975 of 2005 (High Court suit) challenging *inter alia*, the manner in which he alleged was forced to leave employment and the computation of his terminal dues. The trial Judge, Ali-Aroni, J. in her judgment dated the 19th August, 2010 therein ordered the 7th respondent to give proper account of the deductions totaling Kshs. 5,556,510.60/= and further to refund any amount found owing to the appellant.

4. Before the judgment in the High Court suit was delivered, the appellant by a letter dated the 18th May, 2009 demanded payment of what he referred to as deferred benefits from the Scheme. According to him, these were benefits which had been withheld by the Scheme due to the fact that he left employment before his retirement age; he was entitled to payment of the same having attained the retirement age. However, the appellant's demand elicited no response from the Scheme causing the appellant to lodge a complaint with the Chief Executive Officer of the Retirement Benefits Authority on the 4th June, 2009. The basis of his complaint was that he had not been paid his pension benefits.

5. The Chief Executive Officer gave the Trustees an opportunity to respond to the complaint which they did. The Trustees asserted that the Chief Executive Officer lacked jurisdiction to entertain the complaint because firstly, the appellant had ceased being a member of the Scheme by virtue of his resignation and secondly, that one of the issues in the High Court suit was in respect of the appellant's pension benefits. They also maintained that the appellant had been paid all his retirement benefits. Upon considering the complaint and the response by the Trustees, the Chief Executive Officer by a letter dated the 27th November, 2009 found in favour of the appellant and directed the Trustees to pay the appellant his vested benefits thereunder. The letter read in part:

“Your conduct as trustees is, therefore, unsafe and unsound and consequently detrimental to the above scheme. You are hereby DIRECTED to refrain from such conduct and immediately undertake the following remedial steps:-

1. Confirm to Mr. Charles Masinde that he is entitled to his vested benefits in the above scheme in full.

2. Pay the said Mr. Charles Masinde all his vested benefits in the above scheme.....”

6. Dissatisfied with the above mentioned decision, the Trustees lodged an appeal in the Retirement Benefits Appeals Tribunal (the Tribunal). The Tribunal vide a judgment dated the 27th July, 2011 upheld the Chief Executive Officer's decision. In doing so, the Tribunal found that the Trustees had breached their fiduciary duty to the appellant by paying his pension benefits to the 7th respondent. The Tribunal also ordered the Trustees jointly and severally to pay the appellant the sum of Kshs. 4,525,163.89/=.

Convinced that the Tribunal had acted irrationally and in excess of its jurisdiction, the Trustees with leave of the court filed judicial review proceedings seeking an order of *certiorari* to quash the Tribunal's decision. The High Court (Majanja, J.) in a judgment dated the 1st November, 2013 agreed with the Trustees and quashed the Tribunal's decision.

7. The impugned judgment in the judicial review proceedings instigated the present appeal which is predicated on 13 grounds. The appellant mainly faulting the learned Judge for quashing the Tribunal's decision complained that the learned Judge erred in law and fact by-

- *Failing to hold that the payment of the appellant's pension dues by the 1st to the 6th respondents to the 7th respondent was a violation of the Act.*
- *Failing to appreciate that the deductions made from the appellant's pension benefits were against the principles and objects of the Act.*
- *Failing to appreciate that the Scheme had fiduciary duty to its members.*
- *Holding that the issue of the appellant's dues was in issue in the High Court suit.*
- *Holding that the appellant was estopped from demanding further payment from the Scheme having chosen to pursue the same through the High Court suit.*
- *Finding that the 8th respondent lacked jurisdiction to order the 1st to the 6th respondents to pay the appellant his pension dues.*

8. The appeal was disposed of by way of written submissions and oral highlights. Mr. N. Malonza appeared for the appellant, Miss J. Jakaila appeared for the 1st to the 7th respondents, Miss D. Ogama appeared for the 8th respondent and Mr. N. Gichamba appeared for the 9th respondent. The 8th and 9th respondents supported the appellant's appeal while the 1st to 7th respondents opposed the same.

9. Mr. Malonza, submitted that at all material times the appellant was a member of the Scheme and had not ceased being a member at any point in time. Buttressing this line of argument, he relied on **Section 2** of the **Act** which defines a member of a retirement scheme as including-

“... a person entitled to or receiving a benefit under the retirement benefit scheme.”

In his view, this included a person whose benefits under a retirement scheme had become due for payment and which had either not been paid or had not been paid to the person entitled to receive such benefits. Accordingly, he maintained that until the appellant's entire pension benefits are paid directly to him by the Scheme, he continued being a member thereto. He argued that the appellant as a member of the Scheme, was entitled to the treatment prescribed under the Scheme's Rules. Relying on **rule 27** of the Scheme Rules, counsel contended that the appellant was entitled to payment of his pension benefits in full without any deductions and any liabilities owed by the appellant were recoverable separately.

10. He emphasized that neither was the appellant's pension dues an issue in the High Court suit nor did the trial court therein make any determination on the same. Mr. Malonza claimed that the 1st to the 6th respondents being Trustees of the Scheme had breached their fiduciary duty towards the appellant by paying his pension benefits to the 7th respondent. As such, the Tribunal acted within its mandate by ordering the Trustees to pay the appellant his pension benefits. He further faulted the manner in which the learned Judge exercised his discretion in quashing the Tribunal's decision and urged us to allow the appeal.

11. Miss Ogama in support of the appeal, associated herself fully with the submissions made by Mr. Malonza. She reiterated that the 8th respondent acted within its jurisdiction as provided under **Section 48** of the **Act**. Mr. Gichamba also supporting the appeal, argued rather interestingly in the alternative, that if the appellant's retirement benefits was in issue in the High Court suit, the trial court ought to have declined to entertain the same since a party was entitled to first exhaust the dispute resolution mechanisms provided under the **Act** before approaching the High Court.

12. On her part, Miss Jakaila, stated that in judicial review proceedings, the High Court is not concerned

with the merits of the decision in question, but rather with the decision making process. In that regard, she cited this Court decisions in *Municipal Council of Mombasa –vs- Republic & Another* [2002] eKLR and *Peninah Nandako Kiliswa –vs- Independent Elections & Boundaries Commission & 2 others* [2014] eKLR. She submitted that the issue which fell for consideration before the High Court was whether the Tribunal acted within its powers in directing the Trustees to pay the appellants sums that had already been paid to him. Further, whether such a decision was rational and reasonable.

13. Miss Jakaila agreed with the learned Judge’s finding that the 8th and 9th respondents lacked jurisdiction to direct the 1st to the 6th respondents to pay the appellant sums he had already received. Once the High Court pronounced itself on the issue of the appellant’s retirement benefits in the High Court suit, the same became *res judicata*, hence, the Chief Executive Officer of the Retirement Benefits Authority and the Tribunal lacked jurisdiction to entertain the same.

14. She further concurred with the learned Judge’s finding that the Tribunal’s decision to hold the 1st to the 6th respondents jointly and severally liable, was irrational and unreasonable. This is because firstly, the 1st to the 6th respondents were not the Trustees of the Scheme at the time the appellant resigned from employment, hence it was unfair to hold them liable for the actions of other people. Secondly, the same amounted to unjust enrichment of the appellant who had already received his retirement benefits. She urged us to dismiss the appeal.

15. We have considered the record, submissions by counsel as well as the law. Judicial review orders are discretionary orders. Whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, we are guided by the principles enunciated in *Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others* [2014] eKLR. We ought not to interfere with the exercise of such discretion unless we are satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and occasioned injustice.

16. The function of the High Court sitting in judicial review proceedings is not to determine an appeal or otherwise consider the merits of the decision by a public body but rather undertake a consideration of the manner in which the decision was made. This position flows from the holding in *Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR. In *Ransa Company Ltd vs. Manca Francesco & 2 others* [2015] eKLR this Court expressed itself thus:-

“As we all appreciate, a court sitting on Judicial Review exercises a sui genesis jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than the merits of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties.”

Further, Lord Green M.R. in the often cited case of *Associated Provincial Picture House vs. Wednesbury Corporation* [1914] 1 KB 222 remarked as follows:

“Decisions of person or bodies which perform public functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on a relevant law and acting reasonably could have reached that decision.”

See also *Kenya National Examinations Council vs. Republic Exparte Kemunto Regina Ouru* [2010] eKLR,

17. It is therefore important to remember in every case that the purpose of seeking judicial review remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected. It is not part of the court’s mandate to substitute the opinion of the judge for that of the authority constituted by law to decide the matter in question. From our consideration of the judgment, it is quite clear that the learned judge appreciated the nature of the judicial review proceedings before him and

the role of the court in the circumstances.

18. Subject to the rules and regulations of a retirement benefit scheme, an employee is entitled to the benefits vested thereunder upon leaving employment. In this case, **rule 10** of the **Scheme's rules** stipulates that an employee upon resignation is entitled to his/her accrued benefits under the Scheme. It is not in dispute that the appellant approached the Chief Executive officer after the Trustees of the Scheme ignored his demand for payment of what he termed as deferred benefits. He did so under the provisions of **Section 46(1)** of the **Act** which stipulates;

“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.”

His claim was basically that he had not been paid his retirement benefits under the Scheme. To that extent, in our view, he used the proper procedure bearing in mind that one of the principal duties of Trustees, is to administer the Scheme in accordance with the provisions of the Act, and the Regulations made thereunder and Scheme's rules. The appellant was merely asking the Chief Executive Officer to determine whether the Trustees had discharged their duties in accordance with the law.

19. The Chief Executive Officer in dealing with the complaint, through his letter dated the 7th September, 2009 sought the explanation of the Trustees on the complaint and in particular on the circumstances of the appellant's departure from the Scheme; the amount of benefits due, and the date of payment. The Trustees in their response instead introduced the proceedings in the High Court suit which we shall deal with later in this judgment, indicating that the matter was subject of court litigation. Upon perusal of the pleadings as availed by the Trustees, the Chief Executive Officer concluded that the claim for retirement benefits was not in issue in the subject proceedings. He advised the Trustees to pay the appellant's retirement benefits immediately. However, the Trustees did not pay the appellant prompting the Chief Executive Officer to issue directions under **Section 39** of the **Act** vide a letter 27th November, 2009 whose contents were set out hereinabove. We find that the procedure adopted as well as the directives issued by the Chief Executive Officer were in line with the jurisdiction conferred upon him by the **Act**.

20. On appeal to the Tribunal, the position of the 1st to the 7th respondents' was that the Chief Executive Officer lacked jurisdiction to entertain the complaint. Firstly, that the appellant had ceased being a member of the Scheme once his benefits were paid and secondly, that the issue of his retirement benefits was also an issue in the High Court suit. We like the Tribunal find that a person ceases to be a member once all his benefits are paid in accordance with the Scheme rules.

21. As far as the High Court suit was concerned, it is evident that the appellant's pension benefits under the Scheme was not an issue for determination. The suit revolved around the manner in which the appellant left employment and computation of his terminal benefits particularly the deductions made by the 7th respondent. The trial court therein set out the following as issues which fell for its consideration;

1. Did the plaintiff (appellant) voluntarily resign from the employment of the defendant (the 7th respondent)?

2. Did William Lay threaten the plaintiff at the time of signing the alleged resignation letter?

3. Was the threat that the plaintiff would not be paid his terminal benefits unless he signed the so called resignation letter?

4. Why was the plaintiff paid one month's salary in lieu of notice if he is the one who terminated the contract of service?

5. *Did the plaintiff sign the final payment authorization after explanation of its contents and purport?*
6. *Are the computations in paragraph 9 of the defence correct?*
7. *Was the termination of the contract of employment of the plaintiff by the defendant legal or illegal?*
8. *Did the plaintiff demand from the defendant a copy of the alleged report that found his performance wanting?*
9. *Did the plaintiff personally clear with the respective departmental head as the rules of the company demand?*
10. *Was the clearance done on his behalf after forcible removal from the defendant's premises?*
11. *Was forcing the plaintiff to resign designed to camouflage redundancy?*

The trial court also in its judgment did not delve into whether or not the appellant had been paid all his benefits under the Scheme. We set out the relevant extract of the judgment therein thus-

“From the evidence on record the mathematics of the deductions were not clear even to the defence witness. It is only reasonable that the deductions be re-calculated, the discrepancies noted rectified and the same explained to the plaintiff (appellant). In this regard the court is inclined prayer b of the further amended plaint, that a true and proper account of Kshs. 5,556,510.60/= deducted from the plaintiff's dues and benefits be made and any refund due to him be paid forthwith.”

Furthermore, the High Court suit was between the appellant and the 7th respondent. In our view, the issue which formed the basis of the appellant's complaint to the Chief Executive Officer stemmed from deferred benefits which he expected to receive upon attaining the retirement age.

22. Regulation 18 of the Retirement Benefits (Individual Retirement Benefits Schemes) Regulations, 2000 and Rule 16 of the Scheme's rules categorically provide that the benefits under the Scheme cannot be assigned or transferred to any other person. Such benefits are only payable to the member save for where the member is deceased. In this case, the issue before the Chief Executive Officer and the Tribunal was whether the appellant had been paid his benefits under the Scheme and/or whether the Trustees had complied with law as far as payment of the appellant's benefits was concerned. It is not in dispute that the appellant's benefits under the Scheme were transmitted to the 7th respondent without consultation or his approval. Could such conduct amount to payment of the appellant's benefits as contended by the Trustees? We think not. The law and the Scheme's rules are clear that payment of pension benefits which had accrued in favour of the appellant ought to have been made directly to him.

23. Last but not least, the 1st to the 7th respondents argued that the Tribunal's orders directing the Trustees jointly and severally to pay the appellant Kshs. 4,525,163.89/= as pension benefits was irrational and unreasonable. According to them, it was unfair for the Tribunal to hold the 1st to the 6th respondents' liable yet they had not been appointed as Trustees when the appellant's benefits under the Scheme were paid to the 7th respondent. We are not convinced by that line of argument made by the Trustees. The Scheme having been founded by way of an irrevocable trust, the holders of the position of trustees are bound to change from time to time. This change however does not affect the obligations and status of the trust itself which remains in perpetuity, hence we find that acts of trustees bind their successors.

24. We find, just as the Tribunal did, that the transmission of the benefits to the 7th respondent by the Trustees was a clear violation of the Trustees fiduciary duty under **Section 40 (b) of the Act** to ensure the management of the Scheme was carried out in the best interests of the appellant. From the impugned

judgment it is clear that the learned Judge appreciated as much. However, we are at a loss as to why the learned Judge would in the same breath sanction the illegality and find that the appellant's pension benefits had already been paid by the 7th respondent. It is our view that the payment of the benefits to the 7th respondent did not discharge the Trustees of their duties under the Scheme. The Trustees duties could only be discharged in accordance with the law, that is, once all the benefits accruing to the appellant had been paid directly to him.

25. Once the Tribunal found that the Trustees had not discharged their duties under the law, it follows that it had the jurisdiction to issue such orders it deemed appropriate within the confines of the law. As was appreciated by **Professor Wade** in a passage in his treatise on *Administrative Law*, 5th Edition at page 362:

“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.”

On our part, having taken the foregoing into account, we find nothing wrong with the Tribunal directing the Trustees jointly and severally to pay the appellant's benefits. Further, clause 10 of the Scheme's trust deed does not absolve a Trustee from personal liability where he/she breaches the terms of the trust under the Scheme through a willful act or omission.

26. The upshot of the foregoing is that we find that the learned Judge misdirected himself while exercising his judicial discretion. Accordingly, we hereby set aside the judgment of the learned Judge dated the 1st November, 2013 and substitute it with an order dismissing the judicial review proceedings. Consequently, the appeal has merit and is hereby allowed. We grant costs of the judicial review proceedings and this appeal to the appellant, the 8th and 9th respondents respectively.

So ordered.

Dated and delivered at Nairobi this 25th day of November, 2016.

P. KIHARA KARIUKI, PCA

.....

JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR