



**Republic v Retirement Benefits Appeals Tribunal; Kakwu (Exparte Applicant) (Judicial Review Application E068 of 2024) [2025] KEELRC 1187 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1187 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
JUDICIAL REVIEW APPLICATION E068 OF 2024**

**HS WASILWA, J  
APRIL 24, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE RETIREMENT BENEFITS APPEALS TRIBUNAL ..... RESPONDENT**

**AND**

**CAROLYNE KALIMI KAKWU ..... EXPARTE APPLICANT**

**JUDGMENT**

1. Pursuant to Order 53 Rule 1(1) and 2 of the Civil Procedure Rules, the ex-parte Applicant filed a Statutory Statement dated 13<sup>th</sup> December 2024 seeking reliefs That: -
  1. An order of certiorari be issued removing into this Honourable Court for purposes of being quashed the decision in Retirement Benefits Appeals Tribunal Cause Number 3 of 2023; Susan Kathenya & 4 Others v C.E.O Retirement Benefits Authority & 3 Others.
  2. A declaration do issue that the decision by the Respondent made on 4<sup>th</sup> July 2024 violated the applicants rights to a fair hearing and the principles of Fair Administrative Action as provided for under Articles 47 and 50 of *the Constitution* of Kenya, 2010 by deciding on issues that were not before it and implying the existence of evidence when there was none to support its conclusions.
  3. A declaration do issue that the decision of the Respondent in the Retirement Benefits Appeals Tribunal Cause Number 3 of 2023; Susan Kathenya & 4 Others v C.E.O Retirement Benefits Authority & 3 Others dated 4<sup>th</sup> July 2024 violated the principles of procedural fairness and is therefore void and of no effect.



4. An order of mandamus be and is hereby issued to the Respondent compelling to hear and determine according to law the Retirement Benefits Appeals Tribunal Cause Number 3 of 2023; Susan Kathenya & 4 Others v C.E.O Retirement Benefits Authority & 3 Others.
5. The Respondents be condemned to bear the costs of these proceedings.

### **Ex-parte Applicant's Case**

2. The ex-parte Applicant avers that she was the wife to the late Prof. Jasper Imungi Kathenya and the nominee of his retirement benefits from the Milele Income Drawdown Fund.
3. The ex-parte Applicant avers that the late Prof. Jasper Imungi Kathenya died on 4<sup>th</sup> August 2021 and by virtue of her nomination, she wrote to the fund trustees Enwealth Financial Services Limited to devolve the benefits.
4. The ex-parte Applicant avers that the trustees determined she was the rightful beneficiary but the decision was appealed to the C.E.O of the Retirement Benefits Authority by the deceased's children alleging she was not a rightful beneficiary. The C.E.O upheld she was the rightful beneficiary and they proceeded to appeal to the Respondent vide Retirement Benefits Appeals Tribunal Cause Number 3 of 2023; Susan Kathenya & 4 Others v C.E.O Retirement Benefits Authority & 3 Others where it was determined she is not the rightful beneficiary.
5. It is the ex-parte Applicant's case that the Respondent's decision in Retirement Benefits Appeals Tribunal Cause Number 3 of 2023; Susan Kathenya & 4 Others v C.E.O Retirement Benefits Authority & 3 Others had aspects of procedural unfairness and errors of law.
6. The ex-parte Applicant avers that the Respondent determined issues without evidence on record placed before it and there exists no cogent reasons in its judgment how the Tribunal arrived to its decision that the deceased's children were the rightful dependants on account of the rules of the benefits scheme and in the alleged absence of a valid nominee. Further, it decided on extraneous issues that were not pleaded and were not subject of the proceedings.
7. The ex-parte Applicant avers that the Tribunal's pronouncement that she was not 'fully dependant on the deceased' yet it arrived on the decision that she was not entitled to the deceased retirement benefits amounts to procedural unfairness and an error of law

### **Respondents' Case**

8. Despite the Respondent being served with the pleadings herein, it failed to enter appearance: The Court directed on 27<sup>th</sup> January 2025 that the application proceeds ex-parte by way of written submissions.

### **Ex-parte Applicant's Submissions**

9. The ex-parte Applicant submitted on whether this Court should issue an order quashing the decision by the Retirement Benefits Appeals Tribunal in Retirement Benefits Appeals Tribunal Cause Number 3 of 2023; Susan Kathenya & 4 Others v C.E.O Retirement Benefits Authority & 3 Others issued on 4<sup>th</sup> July 2024.
10. The ex-parte Applicant submitted that Article 47 of *the Constitution* gives the instant proceedings the proper underpinning as it states that: - (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom



of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

11. The ex-parte Applicant further submitted that judicial review proceedings are exclusive to the process leading to the decision and not the merits of the decision as adopted in Municipal Council of Mombasa Petition No. 185 of 2001 Mombasa CA where it was stated: -

“Judicial review is concerned with the decision -making process, not with the merits of the decision itself. The court would only be concerned with the process leading to the making of the decision... In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

12. The ex-parte Applicant submitted that Rule 10 (i) of the Retirement Benefits (Tribunal) Rules provided that at the hearing of an appeal, the Tribunal shall consider and reach its decision according to law which decision it shall read to the parties of the appeal. In deciding the impugned appeal, the Tribunal held in paragraph 50 that: -

“it is also clear that the 3<sup>rd</sup> Respondent was involved in tampering with the nomination form with the sole intention of benefiting with the retirement benefits of the deceased to the exclusion of everyone else.”

13. It is the ex-parte Applicant’s submission that the Tribunal’s aforesaid decision was in violation of procedure set out in Rule 10 (i) of the Retirement Benefits (Tribunal) Rules; as evidence was placed before the Tribunal of the ex-parte Applicant’s relationship with the deceased and it failed to consider all evidence thus deciding erroneously.

14. The ex-parte Applicant submitted that the Tribunal’s pronouncement that she was a business partner and not a dependant begs the the question what legal principle was relied upon to derive this. It is submitted that procedural fairness dictates that all questions of law and facts be answered and failure to render itself in a proper manner on that question constitutes a flawed decision-making process.

15. The ex-parte Applicant submitted that the question who was the deceased wife for purposes of devolving the retirement benefits was outside the Hon. Tribunal’s jurisdiction. The Tribunal is only qualified to determine the question of dependency according to the scheme rules as provided under Rules 23 and 24 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations which states: -

“ 23. Payments of benefits to a nominated beneficiary

The scheme rules shall provide that on the death of a member the benefits payable from the scheme shall be paid to the nominated beneficiary and if the deceased member had not named beneficiary then the trustees shall exercise their discretion in the distribution of the benefits to the dependants of the deceased member:

Provided that the trustees may refuse to pay the nominated beneficiary and the reasons for such refusal shall be recorded.



24. Discretionary powers of trustees in payment of benefits
- (1) The scheme rules may authorize the trustees to exercise their discretion in the following—
    - (a) the amount of retirement benefits payable to a nominated beneficiary;
    - (b) the amount of retirement benefits payable to the children of a member;
    - (c) the apportionment of a lumpsum benefit amongst all dependants;
    - (d) the apportionment of a retirement benefit amongst surviving spouses and children;
    - (e) the reinstatement of a surviving spouses retirement benefit that had ceased on re-marriage.
  - (2) Trustees shall not increase any retirement benefit unless such increase has been recommended and certified by an actuary.”
16. It is the Applicant’s submission that the Tribunal’s departure from the guiding legal provisions was erroneous and an improper procedure in decision making.
17. I have examined all the averments and submissions before me. I note this is a matter emanating from the decision of the Retirement Benefits Appeals Tribunal (RBAT). The RBAT is established under the *Retirement Benefits Act* No. 3 of 1997 under section 47 of the said Act. Section 48 of the Act states as follows:
- (1) Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made thereunder may appeal to the Tribunal within thirty days of the receipt of the decision.
  - (2) Where any dispute arises between any person and the Authority as to the exercise of the powers conferred upon the Authority by this Act, either party may appeal to the Tribunal in such manner as may be prescribed.
18. Section 52 of the RBA on the other hand states that the Chief Justice shall be responsible for making the rules for appeal to the appeals tribunal. The act remains silence on the manner of appeals beyond the Appeals Tribunal.
19. The Supreme Court of Kenya in the Kenya Tea Growers Association and 2 *Others vs the National Social Security Fund Board of Trustees and 13 Others (Petition No. E004 and E002 of 2023)* consolidated [2024] KESC 3(KLR) case determined that the Employment and Labour Relations Court (ELRC) has jurisdiction to determine matters that did not emanate from employer-employee disputes but whose application would lead to employer-employee disputes.
20. The current application relates to a matter determined by the Retirement Benefits Appeals Tribunal which matter was determining the beneficiary of a pension scheme. The issue is whether the Court has jurisdiction to handle this matter as an employment benefit.
21. From the evidence adduced at Retirement Benefits Appeals Tribunal, the deceased employee had nominated certain people as his beneficiaries and the applicant avers that she too was a beneficiary. This



fact was found without any basis and Retirement Benefits Appeals Tribunal found instances of forgery in the nomination forms produced by the applicant.

22. It is on this basis that the tribunal found the applicant not to be fit person as a nominee especially after admitting that she wrote portions of the nomination process. This Court deals with employer-employee relations. This Court does not handle pension matters or even advice who is to be paid out of pension funds. The Retirement Benefits Appeals Tribunal has the sole mandate to determine the beneficiaries of any pension fund. The respondents have explained how they arrived at their findings in their judgment.
23. The application before this court is a judicial review application which basically determines processes and not results of a process. This court cannot therefore reopen the matter and order a re-evaluation of the beneficiaries of a fund. The courts' jurisdiction in this application is only to consider whether the rightful process was used by the Retirement Benefits Appeals Tribunal. This court cannot fault the Retirement Benefits Appeals Tribunal findings. In considering the process applied by the Retirement Benefits Appeals Tribunal, I do find that the RBAT heard witnesses and considered expert evidence on the hand writing used to determine the credibility of the nomination form. I have not found any flaw in this process which this court can now be called upon to quash on review.
24. In the circumstances, I find that the application before me lacks merit and I dismiss it accordingly. There will be no order of costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> OF APRIL, 2025.**

**HELLEN WASILWA**

**JUDGE**

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