Murugi & 133 others v Retirement Benefits Authority & 2 others (Judicial Review Miscellaneous Application E118 of 2025) [2025] KEHC 12040 (KLR) (15 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12040 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E118 OF 2025

RE ABURILI, J

AUGUST 15, 2025

(FORMERLY HIGH COURT JUDICIAL REVIEW NO. 85 OF 2017) AND SUBSEQUENTLY FORMERLY NAIROBI ELRC NO. 37 OF 2018

IN THE MATTER OF THE RETIREMENT BENEFITS ACT, 1997

AND

IN THE MATTER OF THE RETIREMENT BENEFITS (TRIBUNAL) RULES 2010

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE RETIREMENT BENEFITS APPEALS TRIBUNAL

AND

IN THE MATTER OF TRIBUNAL APPEAL NO. 8 OF 2010

BETWEEN

ELIAS MAINA MURUGI AND 33 OTHERS & 133 OTHERS & 133 OTHERS & 133 OTHERS ..... APPELLANT

AND

RETIREMENT BENEFITS AUTHORITY ..... 1ST RESPONDENT

NATIONAL BANK OF KENYA STAFF RETIREMENT BENEFITS SCHEME ..... 2ND RESPONDENT

NATIONAL BANK OF KENYA STAFF PENSION FUND REGISTERED TRUSTEES ..... 3RD RESPONDENT

JUDGMENT

1. This matter has been litigated and relitigated upon. Since it was filed in this Court in February, 2017, certified as urgent, heard exparte on the application for leave to apply and leave to operate as stray on 1st March 2017 by none other than myself when I was serving my first term in this Judicial Review Division, it has moved from this Court, between different Judges, all of whom have since been elevated to the Court of Appeal, transferred to the employment and Labour Relations Court by consent, on account of jurisdiction, heard on jurisdiction and merit, the judgment of ELRC by Maureen Onyango J appealed to the Court of Appeal and the file returned to the Employment and Labour Relations Court with an order from the Court of Appeal that the file be returned to its origin, which is this High Court for hearing and determination on merit.

2. The main reason for the matter circulating from this Court to the ELRC and back has been the mystery surrounding jurisdiction to hear and determine the dispute involving members of the Retirement Benefits Scheme and the Scheme Administrators and Sponsors.

3. It is gratifying to know that the Court of Appeal finally settled that issue of jurisdiction. However, the merits of the dispute remains untouched to date, although in the Employment and Labour Relations Court, the learned judge, Maureen Onyango J did make a merit determination which was nonetheless challenged on account of jurisdiction as well as the merits of the decision, but the Court of appeal upon finding that the ELRC had no jurisdiction to hear and determine the dispute, did not make any merit determination of the appeal and returned the matter to the High Court, the Court of origin, to consider the merits thereof.

4. On the part of this Court, as soon as the file was availed, the hearing has been fast-tracked and here is the determination, in less than four months, according with dictates of Articles 47 and 159 of *the Constitution* that justice shall not be delayed.

5. When returning the file to this Court, the Court of Appeal stated as follows:

> "We have carefully read the entire record particularly the pleadings. The dispute between the parties does to arise from an employer/employee relationship. In fact, as at the time the dispute arose, the 2nd to 84th respondents had ceased to be employees of the bank. The dispute involved computation of their benefits under the pension scheme. The issues raised in this case were settled with finality by the Supreme Court in 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 in the Registered Trustees of Kenya Ports Authority Pensions Scheme) vs. Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs

and Other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR, (P.M. Mwilu D.C.J & V-P, Ojwang, Wanjala, Njoki & Lenaola SCJJ) where it held:-

> "[146] In our view, once a member leaves the employment of a Sponsor, by becoming a pensioner, there is no longer a relationship of employer-employee that exists between such a pensioner and the sponsor. The relationship that exists in that case becomes that of trustee and beneficiaries (members) of a trust and that relationship is governed by the *Retirement Benefits Act*, *Trustee Act* Cap 167 of the laws of Kenya and the general common law on the law of trusts. It is important to note that nowhere in the *Employment and Labour Relations Court Act* is there jurisdiction conferred on the Employment and Labour Relations court to resolve issues between trustees of a pension scheme and members of the scheme (pensioners)."
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> The above being the correct interpretation of the law, we are clear in our minds that the ELRC had no jurisdiction to entertain the dispute relating to computation and payment of the 2nd to 84th respondents' claim relating to computation and payment of their pension benefits under their pension scheme.
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> Therefore, the High Court improperly transferred Judicial Review Application No. 85 of 2018 to the ELRC for hearing and determination. It is settled law that jurisdiction cannot be conferred by consent of judicial craft. This position was appreciated by the Supreme Court in Isaac Aluoch Polo Aluochier vs. Independent Electoral and Boundaries Commission & Others & 19 Others [2013] eKLR as follows:
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> > "A court cannot expand its jurisdiction through judicial craft or innovation. See S.K. Macharia and Another v. Kenya Commercial Bank Ltd. & 2 Others, Sup. Ct. Civil Application No. 2 of 2011; [2012] eKLR. Nor can a party confer on a court power it does not have. Similarly, parties cannot by mutual consent confer jurisdiction when there is none."
> >
> > In the premises, we allow this appeal, set aside the judgement of Onyango, J. dated 31st January, 2020 issued in Judicial Review Application No. 37 of 2018 in its entirety. Considering that the matter was not heard on merits and that the parties by consent requested the Court to transfer the case to the ELRC, it is our view that it would be unfair for this Court to allow the respondents to bear the consequence of the transfer, yet it was by consent. Accordingly, we order that the appellants' Judicial Review proceedings be remitted to the High Court, Judicial Review Division, for hearing and determination on merits pursuant to Rule 33 of this

Court's Rules. Costs shall abide by the outcome of the Judicial Review Application."

6. Therefore, although the case number for this matter appears to be a 2025, this case has been in various courts for now over eight years. I trust that with the anticipated merit determination, this Court will find favour in wisdom and be relieved of the oscillation so that the decision that it will render will be acceptable by both parties to the dispute and even if either one of them shall be aggrieved, they will have the opportunity to challenge the merits thereof to the higher court.

7. The facts of this case have been rehashed by both the ELRC and the Court of Appeal and therefore I will not reinvent the wheel. I will reproduce those facts and circumstances giving rise to the dispute as summarized by the two courts and move on to determine the main issues.

8. As restated by the Court of Appeal, the facts which elicited the litigation before this Court are fairly straightforward. Substantially, those facts are not contested. The 2nd to 84th respondents are former employees of the National Bank of Kenya (the Bank). By virtue of their employment, they were members of the National Bank of Kenya Staff Retirement Benefits Scheme (the Scheme). In that capacity, the 2nd to 84th respondents were entitled to their pension benefits as provided in the Trust Deed and Rules of the Scheme.

9. Upon ceasing being employees of the Bank, majority of them by way of redundancy, they were paid their benefits as per the redundancy/retirement letters filed into court. However, they discovered that they had been underpaid and so, they protested that their pension benefits were not calculated in accordance with the Scheme Rules and so, they filed a complaint before the Retirement Benefits Authority (the Authority- 85th respondent) in accordance with Section 46 of the *Retirement Benefits Act*. their complaint was dismissed.

10. Aggrieved by the dismissal of their complaint, they invoked Section 48 of the *Retirement Benefits Act* and appealed to the Retirement Benefits Appeals Tribunal (the 1st respondent herein-the Tribunal) in Tribunal Appeal No. 8 of 2010, seeking to set aside the said decision of the Authority and an order that the calculations prepared by their Actuary be upheld. By a decision dated 23rd February, 2012, the Tribunal allowed their appeal as follows:

    (a) The Appeal be and is hereby allowed;

    (b) The 2nd respondent does within thirty (30) days from today calculate and give to each of the appellants and/or beneficiaries a statement of account showing in detail how the benefits due are arrived at;

    (c) If the full benefit is found not to have been paid by the 2nd respondent to any appellant or beneficiary the same be paid within thirty (30) days from today in accordance with the Scheme Rules of the 2nd respondent;

    (d) In default of the 2nd respondent undertaking the activities stated in (b) and (c) above or any one of them within thirty (30) days from the date hereof, the 1st respondent do appoint an Interim Administrator to undertake the assignment at the cost of the 2nd respondent;

    (e) There shall be liberty on either party to apply.

11. Following several execution applications, the applicants paid some amounts to the 2nd to 84th respondents and this is acknowledged in the proceedings of the Tribunal that indeed, there was no evidence that the recalculated sums had been settled in full. However, the 2nd to 84th respondents maintained that the said payments were not in tandem with the judgment which was in their favour.

They therefore applied to the 85th respondent to appoint an Actuary to compute the amounts. Their application was allowed and a report of the Actuary was adopted vide a ruling delivered on 8th August, 2014 as follows:

(a) The actuarial report be and is hereby adopted as it is in accordance with the orders issued by the Tribunal on 25th June 2012;

(b) Subject to compliance with the *Income Tax Act* and/or any other statutory requirements and the variations in the Actuarial as set out below, the 2nd respondent is hereby directed to settle the appellants' individual claim in the manner set out in appendix 1 and appendix 2 and 5 at pages 21 to 34 inclusive of the Actuarial Report. The variations are: -

1. Benefits Payable under the Rules, dated 4th January 1990-

(i) Voluntary Early Retirement – a commutation of a lump sum not exceeding Kshs.540,000.00 and the remainder be paid as a pension in periodical instalments in accordance with Rule 49 of the Rules less what has so far been paid if any:

(ii) Normal Retirement – a commutation of a lump sum not exceeding Kshs.540,000.00 and the remainder be paid as a pension in periodical instalments in accordance with Rule 49 of the Rules less what has so far been paid if any:

(iii) Medical Retirement – a sum calculated in accordance with Rules 12 and 13 less what has so far been paid, if any;

(iv) Death – a sum calculated in accordance with Rule 15 less what has so far been paid, if any;

(v) Other Terminations (Including Redundancies, Terminations, Resignations and Dismissals on or after 4th January, 1990 - a sum calculated in accordance with Rule 16 less what has so far been paid, if any;

(c) The 2nd respondent within thirty (30) days from the date hereof to furnish each of the appellants with a statement of account showing how the benefits paid or payable were calculated and arrived at:

(d) Paragraphs 14, 15.4, 16.3, 19, 22, 36, 39 and 56 of the Actuarial deleted from the records of the Tribunal;

(e) Each party shall bear its own costs.

10. By an application dated 2nd December, 2014 and amended on 17th September, 2015, the 2nd to 84th respondents applied to the 1st respondent for a decree in the sum of Kshs.136,095,357.00 and warrants of execution. By a ruling delivered on 13th February, 2017, the 1st respondent directed the appellants to pay the 2nd to 84th respondents their unpaid pension in accordance with the Actuarial Valuation of NBC valuers.

12. Dissatisfied by the said ruling, the appellants filed Judicial Review Application No. 85 of 2017, the subject of these proceedings. Leave to apply was granted on 1st March, 2017 and the leave so granted operated as stay of enforcement of the ruling. The 2nd to 84th respondents then filed an application challenging jurisdiction of this Court and seeking that the matter be transferred to the Employment and Labour Relations Court for hearing and final determination. That application was settled by

consent, with all parties conceding to have the matter transferred to the Employment and Labour Relations Court (ELRC).

13. It is at the ELRC that the matter was heard on merit and dismissed by Maureen Onyango J but not without similar objections to jurisdiction being raised on appeal to the Court of Appeal which albeit it considered the matter as a whole, including the submissions on the merits of the appeal, it nonetheless singled out the issue of jurisdiction raised by the applicant herein and upon finding that the ELRC did not have jurisdiction in the matter which was not an employment and labour relations dispute, it directed that the file be returned to this Court for consideration of the merits of the judicial review application.

14. This is where we are, after parties reappeared before me and the court gave directions. There were off course initial challenges owing to the fact that the matter had been handled manually and now the parties were required to file the documents via the Court Case Tracking System yet they could not trace some of their pleadings and documents for uploading.

15. In their judicial review application, the applicants seek the following orders:

    a) An Order of Certiorari to remove to quash the decision made by the Retirement Benefits Appeals Tribunal at Nairobi Civil Appeal No. 8 of 2010, Elias Maina Murigi & 133 Others vs Retirement Benefits Authority, National Bank of Kenya Staff Retirement Benefits Scheme and National Bank of Kenya Staff Pension Fund Registered Trustees to wit:

        i. The 2nd respondent shall pay individually to each of the 83 appellants the sum in the first column set out against their respective names;

        ii. The sum payable to each of the appellants in(i) above be reduced by any sum paid after 8th August, 2014 if any;

        iii. The 2nd respondent does collect all the tax, if any due on such payment;

        iv. The 2nd respondent pays interest on the outstanding balance to each appellant at the rate earned by the scheme in each financial year until payment in full.

        v. The appellants shall have costs of this application abide by the outcome of the judicial review case assessed at Kshs.10,000.00 payable by the respondent.

    b) An order of mandamus directing the Retirement Benefits Appeals Tribunal to terminate further proceedings in Retirement Benefits Appeals Tribunal at Nairobi Civil Appeal Number 8 of 2010, Elias Maina Murigi & 133 Others vs Retirement Benefits Authority, National Bank of Kenya Staff Benefits Scheme and National Bank of Kenya Staff Pension Fund Registered Trustees.

    c) That the costs of the suit be awarded to the ex- parte applicants.

16. The Judicial Review Application is supported by a statutory statement and a verifying affidavit both dated 27th February, 2017 and a supplementary affidavit sworn on 26th April, 2017 by Habil Waswani, the Company Secretary of National Bank, the applicants' sponsor.

17. The 2nd to 84th respondents opposed the applicants' judicial review application through a replying affidavit sworn on their behalf by Jack Leonard Gwalla, the 16th respondent on 5th April, 2019. They maintained that the ruling delivered on 13th February, 2017 was not done in excess of 1st respondent's powers, that the applicants were not challenging the judgment delivered by the Tribunal, but rather its ruling made on applications to give effect to the judgment. They termed the exercise as futile and

accused the applicants of filing the application to delay them from enjoying the fruits of the ruling delivered in their favour, being senior citizens now whose rights are guaranteed under Article 59 of *the Constitution*.

18. The 2nd to 84th respondents maintain that the 1st respondent had jurisdiction to hear and determine disputes by dint of Section 49 of the *Retirement Benefits Act* and that in doing so, it correctly interpreted the law and followed the Rules of natural justice in carrying out its mandate under the said section. They contend that the issues raised by the applicants related to merits of the case, therefore, this application is an appeal disguised as a Judicial Review Application, thus, the application is incompetent and fatally defective.

19. The 85th respondent stated that there being no direct claim against it, it did not file any response to the application. It maintains that it acted in accordance with Sections 46 and 48 of the *Retirement Benefits Act* and that its mandate in the matter automatically ceased.

20. Parties also filed written submissions canvassing the application. Those submissions were aptly captured by Maureen Onyango J in her judgment and I shall therefore reproduce them here with the parties' counsel reiterating the depositions.

Submissions

21. The Applicants contend that the Retirement Benefits Appeals Tribunal acted in excess of its power by delivering its Ruling on 13th February, 2017 without any prior notice to the parties save for the 2nd to 84th Respondents herein and that they had, pursuant to the 1st Respondent's Ruling delivered on 8th August, 2014, furnished the 2nd to 84th Respondents with statements of accounts showing how the benefits paid or payable were arrived at and additionally paid a sum of Kshs.13,668,306 to the said Respondents who were found to have been underpaid.

22. The Applicants further contend that the Tribunal acted ultra vires when it delivered its Ruling on 13th February 2017 as the 2nd to 84th Respondents never sought for the Orders issued in their application dated 15th September 2015. That the 1st Respondent's conduct exhibited bias against the Applicants and the 85th Respondents respectively and that the decision that emanated from the impugned ruling was in gross violation of the *Retirement Benefits Act* and the 2nd Applicant's Trust Deed and Rules and is therefore null and void ad initio.

23. The Applicants further averred that the Institute and Faculty of Actuaries based in the United Kingdom in which Robert Oketch, was a member, had ruled that the Actuarial report prepared by the said Robert on behalf of NBC which was relied upon by the 1st Respondent in making the Orders of 13th February, 2017 was against the Trust Deed and Rules of the Applicants and the Institute proceeded to recommend disciplinary measures against the Actuary and the outcome thereof was awaited.

24. They maintained that since a consent had been recorded, the execution could only have been of the consent which had not been set aside, noting that the application to vary the consent was pending yet the ruling which is impugned tended to vary that consent and that the Tribunal did not even consider the replying affidavit filed by the applicants opposing the amended application.

25. In the circumstances, the Applicants urged this Court to quash the 1st Respondent's decision made on 13th February, 2017 and to further direct the 1st Respondent to terminate its proceedings as the Tribunal is functus officio following the Ruling on 8th August, 2014 and the consent order recorded on 8th April, 2016 which have not been set aside to date.

26. On their part, the 2nd to 84th Respondents contend that the Ruling of the Tribunal delivered on 13th February, 2017 which is the subject of this Judicial Review Application was delivered in open Court and that contrary to the assertion by the Applicants the same was not done in excess of 1st Respondent's powers.

27. The 2nd to 84th Respondents maintain that the Applicants are not challenging the Judgment delivered by the Tribunal in this matter but rather its Ruling made on Applications to give effect to the Judgment. They termed the exercise a futility filed in vain. They accuse the applicants of filing the instant application with the intention to delay them from enjoying the fruits of the Ruling entered in their favour.

28. They aver that the 1st Respondent has jurisdiction to hear and determine disputes by dint of Section 49 of the *Retirement Benefits Act* and that in doing so, it correctly interpreted the law and followed the Rules of Natural Justice in delivering its Ruling.

29. The 2nd and 84th Respondents further contend that the Application raises issues and/or grounds that can only be raised on appeal as they touch on the merits of the case, that the instant Application is an Appeal disguised as a Judicial Review Application and is therefore incompetent and fatally defective.

30. The 2nd to 84th Respondents further contend that the Application is an abuse of judicial process and a waste of judicial time.

31. The 2nd to 84th Respondents submitted that the 1st Respondent followed due procedure while carrying out its mandate as provided for under Section 48 of the *Retirement Benefits Act*. It is further submitted that the Applicants have not proved any illegality, irrationality or procedural impropriety hence their arguments are baseless and ought to be dismissed with costs. In this regard, the 2nd to 84th Respondents relied on the Court's findings in the case of Pastoli Vs Kabale District Local Government Council and Others (2008) 2 EA 300.

32. On the issue of alleged denial of fair hearing, the 2nd to 84th Respondents submitted that from the record of the proceedings, the Tribunal did conduct itself in a fair manner and that the Ruling was delivered in open court. It was further submitted that no party was ambushed in the proceedings before the 1st respondent and therefore the Applicants' argument of bias has no basis and as such ought to be dismissed. The 2nd to 84th Respondents relied on the Court of Appeal decision in the case of David Sironga Ole Tukai Vs Francis Arap Muge & 2 Others (2014) eKLR.

33. The 2nd to 84th Respondents further reiterated that the instant case does not qualify as a matter for Judicial Review as matters of Judicial review only deal with decision making processes and not the merits of the case. The 2nd to 84th Respondents relied on the case of Republic Vs County Government of Mombasa & Another, Ex-parte Clement Muturi Kigani (2018) eKLR.

34. It was further submitted that the Applicants have not met the threshold for granting of the Orders sought in their application as highlighted in the case of Kenya National Examination Council Vs Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR.

35. In conclusion, the 2nd to 84th Respondents urged the Court to dismiss the Application dated 7th March, 2017 with Costs to them as it fails to meet the threshold for Judicial review and is only meant to delay the recalculation and proper payment to the 2nd to 84th Respondents herein.

36. As earlier stated, the 85th Respondent (The Retirement Benefits Authority) submitted that there being no direct claim against it, it did not file any response to the Application. It further submits that it acted in accordance with the provisions of Sections 46 and 48 of the Retirement Benefits Authority

Act while carrying out its mandate as provided therein. It further submitted that once RBA carried out its mandate, its engagement in the matter automatically ceased.

Analysis and determination

37. This Court has considered the applicants' notice of motion, the statutory statement and affidavit depositions. I have also considered the responses by the respondents and the respective parties' rival submissions on the matter.

38. I must acknowledge that I have the advantage of reading both the Court of Appeal and the Judgment which was appealed against by the applicants, following a decision by the ELRC. It would therefore have been very easy for me to simply agree with the learned Judge of ELRC on the merits of the judicial review application since the Court of Appeal only dealt with the jurisdictional question.

39. However, as the Court of Appeal did not determine the merits of the judgment by Maureen Onyango J, it follows that I must independently decide the merits of this matter. That said, as this court is already aware of what the applicant was aggrieved by in the ELRC merit decision, there is no harm in applying those parameters to guide in determining the merits of this matter which as I stated earlier, has oscillated in court for too long without a merit decision.

40. I will therefore begin by listing the questions which arose on appeal for determination on the merits thereof which include:

    i. Whether the 1st respondent had by its determination of 13th February 2017 rewritten its ruling of 8th August 2014 and thereby sat on its own appeal;

    ii. Whether the consent recorded by the parties on 8th April 2016 was overriding the impugned decision of 13th February, 2017;

    iii. Whether the 1st respondent acted in excess of its powers provided under the RBA and RB Tribunal Rules, 2008 and subjected the applicant to double jeopardy by delivering two separate and distinct judgments in the appeal;

    iv. Whether the 1st respondent issued the respondents with orders before hearing the respondents on merit on their application for review of the consent and further issued the orders which were not sought in the application;

    v. Whether the 1st respondent demonstrated bias against the applicant by delivering its ruling with singular notice to the respondents and none to the applicants;

    vi. Whether the 1st respondent demonstrated bias in determining that the applicants had not filed a response to the respondents' application when in fact the applicants' replying affidavit in response thereto was clearly on record and not taken into account;

    vii. Whether the 1st respondent acted without jurisdiction as it was functus officio once the parties had recorded a consent in the matter;

    viii. Whether the 1st respondent relied on an Actuary report that was determined to be in contravention of the Applicant's Trust Deed Rules and therefore invalid.

ix. Whether the judicial review application herein is a disguised appeal as it seeks to challenge the merits of the decision of the 1st respondent;

x. Whether the judicial review orders sought are available to the exparte applicant

xi. What orders should this Court make?

41. I will determine these questions in no particular order since they can be considered in any order either singularly or combined. Commencing with issue ix, which I find runs through the other questions, is that the 2nd to 84th respondents have argued that the applicants have come to this court for judicial review yet it the application challenges the merits of the impugned decision. To this extend, this court must establish the parameters for judicial review within the 2010 constitutional framework and examine the decision which is impugned, whether the application herein challenges the merits or procedural propriety, fairness or legality of the said decision. Determining or resolving this question involves covering most of the questions raised by the applicants before the Court of Appeal on the merits of the application herein.

42. The scope and parameters of judicial review jurisdiction has been addressed in various decisions. The broad grounds for the exercise of judicial review jurisdiction were stated in the often-cited Ugandan case of Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300 at pages 303 to 304 thus:

> "In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also, Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).
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> Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...
>
> Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E".
>
> Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

43. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows:

> " The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? 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."

26. In John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the Supreme Court of Kenya had this to say concerning the judicial review considerations:

> " 11. Article 47 of *the Constitution* and the Fair Administrative Actions Act allowed the courts to consider certain aspects of merit when considering an application for judicial review. The purpose of the remedy of judicial review was concerned with reviewing not the merits of the decision in respect of which the application for judicial review was made, but the decision–making process itself. Though the court in determining a judicial review application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but had to remit the same to the body or office with the power to make that decision.
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> The court, when determining a constitutional petition, was empowered to look beyond the process and not only examine but delve into the merits of a matter or a decision. The essence of merit review was the power to substitute a decision which the court could do when determining a constitutional petition. The court was further empowered to grant not just judicial review orders but any other relief deemed fit to remedy any denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
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> The High Court in determining a judicial review application, exercised only a fraction of the jurisdiction it had to determine a constitutional petition. A determination of a judicial review application could not be termed as a final determination of issues under a constitutional petition. The considerations were different, the orders the court could grant were more expanded under a constitutional petition and therefore the outcomes were different."

44. Further, the Court of Appeal in Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR stated that while Article 47 of *the Constitution* as read with the grounds for review provided by section 7 of the *Fair Administrative Action Act* reveals an implicit shift of judicial review to include aspects of merit review of administrative action, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

45. Applying the above parameters to the matter before me, and to answer the main question of whether the judicial review application is a disguised appeal that seeks to determine the merits of the impugned decision as opposed to the process leading to decision making by the Tribunal, it is important to note that the impugned ruling was pursuant to an amended notice of motion dated 15th September, 2015 where the 2nd to 84th respondents herein were seeking for a decree and warrant of execution against the applicants herein, to settle the tabulated amounts contained in the "withdrawal redundancy appendix" drawn by the 1st respondent herein in its said ruling as impugned and as contained in the last column being balance due after some payments had been made following the judgment of the Tribunal of 23rd February, 2012. .

46. That amended notice of motion application was argued interpartes and the impugned ruling delivered, in which the Tribunal stated that the exparte applicant herein had claimed that it had paid part of the claims. The Tribunal reproduced the orders made in the judgment on appeal as rendered on 23rd February, 2012.

47. At this point, I must mention that the ruling was indeed delivered in the presence of Ms Mwai for the 2nd to 84th respondents and not on notice or via emails as alleged by the applicants herein. Secondly, from the ruling at pages7 to 8 thereof, the Tribunal stated that only the 1st respondent filed a replying affidavit but that the 2nd and 3rd respondents (not clear who the 3rd respondent was since we only had two respondents plus two interested parties in Tribunal Appeal No. 8 of 2010) did not file any replying affidavit but that they filed submissions on 6th April, 2016 and sought to explain how they had complied with the ruling of 8th April 2014, while admitting that some monies due to the appellants who had filed the application under the Tribunal's consideration and others of the original number in the appeal had not been fully paid.

48. The Tribunal then proceeded to reproduce the orders which it had made in the ruling of 23rd February, 2012.

49. Until that moment, it is indeed clear that the Tribunal did not consider the replying affidavit filed by the applicants herein rebutting the depositions by the retirees because according to the Tribunal, there was no such affidavit filed. I have perused the affidavit sworn by Habil Waswani on 27th February 2017 verifying the facts contained in the applicants' statutory statement and at paragraph 15 of the affidavit is annexed a replying affidavit sworn by the same deponent. It is annexture HW 10 and is to be found at pages 329 to 591 of the application subject of these proceedings.

50. There is no contrary evidence attended the replying affidavit was filed but not considered by the Tribunal in its ruling. This, in my view, justifies the applicants' complaint that they were not accorded a fair hearing contrary to Article 50(1) of *the Constitution* and that therefore the impugned decision cannot be said to have adhered to the principles of natural justice that no person shall be condemned unheard.

51. This alone, in my view, is sufficient for this court to find that the application falls within the parameters of judicial review and not a disguised appeal. Such a decision which is one sided whether by inadvertence or deliberately, gives rise to perceived bias which may justify interference by this court exercising judicial review jurisdiction. This is because the doctrine "audi alteram partem," a Latin phrase that means "hear the other side" or "let the other side be heard as well," is a fundamental principle of natural justice and procedural fairness. It means that no person should be condemned, punished, or have their rights affected without being given a fair opportunity to present their case. This principle applies in legal proceedings, administrative actions and disciplinary hearings. The core idea is that no

one should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

52. I further observe, and more significantly, that in the said ruling, the 1st respondent did not refer to the consent order recorded by the parties on 8th April 2016, the date when the respondent's application as amended was due for hearing. the Consent order is very much present on record.

53. It is also not in dispute that the 2nd to 84th respondents herein filed an application dated 15th April, 2016, seeking to vary that consent of 8th April, 2016, which consent as recorded, and from my keen reading of its contents, had the effect of varying the judgment of 23rd February, 2012 and the ruling 8th April 2015; which application was neither withdrawn nor prosecuted. I also observe that none of the respondents has denied these obvious facts which are on record.

54. I have further perused the application for review of the consent and the supporting affidavit of Leonard Gwalla sworn on 15th April 2016. The prayers sought in the said Notice of motion are, material to these proceedings:

    1. .....

    2. THAT the Honourable Tribunal be pleased to vary the Orders made on 8th April 2016 and substitute thereof with the following:

        a) the appellants who are in receipt of monthly pensions to be paid as per the Affidavit sworn by Habil Waswami of 19th November, 2015.

        b) The appellants who are Paid lumpsum amounts and are not in receipt of monthly pensions (Those who were retrenched/terminated) to be paid in accordance with Appendix 2 of the NBC Report as adopted by the Tribunal

55. Among the grounds upon which that application was predicated are:

    a. That the Order which was recorded by consent had the effect of negating the whole of the Judgment delivered by the Tribunal on 23rd February, 2012.

    b. That the said consent is also contrary to both the Tribunal Ruling dated 8th August 2014 and the BNC Actuarial Report which had been adopted by the Tribunal

    c. That the same order also omitted the element of interest payable which was subject discussion between the parties

    d. That the said order was recorded by mistake on the part of counsel holding brief for the applicant counsel who failed to note that there is...different categories of appellants who are in receipt of monthly pension and deserves to be ....

    e. That .....

    f. That .... the effect of the consent would be to reverse the judgment and uphold the respondents' defence

    g. That it would amount to a miscarriage of justice if the appellants wee to suffer prejudice owing to a honest mistake of counsel holding brief for their advocate

    h. That ...

i. That all the relevant annextures are produced in the appellant's amended application for execution dated 15th September, 2015 and judgment of the Tribunal and the NBC Actuary Report

56. The supporting affidavit of Jack Leonard Gwalla is a replica of the grounds reproduced above.

57. Among the annextures to that affidavit is a letter dated 12th April 2016 from Kale, Maina, Bundotich advocates for the applicants herein wherein the advocates for the applicants acknowledged the letter written by the firm of Mr. Koceyo dated 11th April 2015 seeking to have the consent entered on 8th April 2016 varied amicably and in the said letter, the exparte applicant's counsel maintained that the consent order as recorded did not in any way negate the whole of the judgment of the Tribunal delivered on 23rd February, 2012 or at all and or neither was it contrary to the Tribunal's Ruling dated 8th August 2014 and the NBC Actuarial Report adopted by the Tribunal.

58. The letteralso states that the issue of interest was discussed prior to recording the consent and that the Tribunal had clearly pointed out to the parties the correct position on the same.

59. Further, that the consent order was mutual, is not conclusive as the matter was due for mention on 20th May 2016. Counsel for the applicants concluded that his client was not amenable to varying that consent in the manner proposed by Mr. Koceyo.

60. Comparing the consent order, the application for variation of the consent and the impugned ruling, it is clear that the impugned ruling substantially varied the consent order, without subjecting the application for variation of the consent to a substantive hearing. For example, the issue of interest which Mr. Bundotich maintained had been discussed before the recording of the consent, was not in the consent but was included in the impugned ruling as a consequential order, determining a totally different application from the application for varying of the consent.

61. No doubt, the 2nd to 84th respondents were challenging the consent order and had filed a substantive application for consideration on its merit. They had raised issues in their application that the consent had negated the main decision on appeal and that it was prejudicial to them as it omitted interest and the report of the Actualist and NBC Report.

62. It follows that if there was any order to be executed, in the absence of a variation order of the consent, then it was the consent recorded on 8th April 2016. Further, if there was need for clarification of the consent, then parties were at liberty to apply to court to clarify that consent and until an order was made on the application for variation of the consent, the consent remained a valid order of the Tribunal, binding on all the parties to it.

63. In these proceedings, surprisingly, there is open silence on the part of the 2nd to 84th respondents concerning the consent and neither does the 1st respondent in its impugned ruling refer to that consent.

64. To that extent, I find and hold that the 1st respondent's ruling as impugned varied the consent order of 8th April 2016 without first hearing the application seeking to vary or clarify the said consent.

65. That consent in my humble view, was overriding any other order whether made before or after the consent which had not been varied. This finding answers the questions posed in this determination, specifically, the first (i), second (ii), third (iii), and seventh (vii) questions, which touch on the consent of 8th April, 2016.

66. Whereas the Tribunal may have power to review or vary its own orders, such variation or review must be on an application for review or variation or where the review is suo motu, it must meet the legal threshold for such review.

67. In my view, there was need to first address the consent order before making any other orders on record on the amended application for execution which led to a ruling with the effect of varying the consent, which was expected to be executed.

68. To that extent, I find that the Tribunal acted irregularly in by-passing the consent order and in addressing the application for execution which was not based on the consent. That in my view is a matter which is core to these proceedings and is amenable for judicial review, since the complaint is one of procedural impropriety and not the merits of the decision.

69. The reasons for my above findings which effectively settles this long winding matter are first, that, the legal nature of consent orders is well settled in our jurisdiction. Once adopted by a judicial or quasi-judicial body such as a tribunal, a consent order has the effect of a binding judgment, enforceable as such. In Flora N. Wasike v Destimo Wamboko [1988] eKLR, cited in many cases and which decision has remained relevant post 2010 period, the Court of Appeal held, inter alia:

> " It is now settled law that a consent judgment or order has contractual effect and can only be set side on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J M Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983. In Purcell v F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676;
>
> > "It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."
> >
> > Both Lord Denning MR and Buckley LJ appeared to agree with this statement, moreover, that there was very little distinction between interlocutory orders (which was the kind of order there being considered) and final orders in this respect. Lord Denning thought (at 675) that a consent order of a judge would, subject to the Rules, be appealable with leave, and there is express provision for this in S 31 (1) (h) of The Supreme Court of Judicature (Consolidation) Act 1925. There is no similar provision in Kenya. This decision was followed in Chanel Ltd v F W Woolworth & Co Ltd [1981] 1 All ER 745, per Buckley LJ at 751, and in Siebe Gorman & Co v Pneupac [1982] 1 WLR 185, per Lord Denning MR at 189 and Eveleigh LJ at 191.
> >
> > It seems that the position is exactly the same in East Africa. It was set out by Windham J, as he then was, and approved by the Court of Appeal for East Africa, in Hirani v Kassam (1952) 19 EACA 131, at 134, as follows:
> >
> > > "The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contact between the parties. No such ground is alleged here. The

position is clearly set out in Setton on Judgments and Orders (7th edn), vol 1, P 124, as follows:

> "Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."
>
> This passage was followed by the same court in Brooke Bond Liebig Ltd v Mallya [1975] EA 266 at 269 in which Law Ag P said:
>
> > "A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

70. Thus, a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside and unless and until it is lawfully set aside, a consent order remains binding on both the parties and the Tribunal that adopted the consent order. Additionally, a Tribunal becomes functus officio in respect of that consent, unless it first adjudicates the application to vary or set it aside. This finding agrees with the questions posed by the applicants and which I have reproduced in this determination, regarding the place of a consent order and more so, question vii which I find in the affirmative.

71. In this case, the Tribunal failed to determine the application to review the consent but instead proceeded to issue new orders on a totally different application, which orders were in conflict with the consent order. This action had the effect of undermining a valid consent order, without due process. That decision by the Tribunal violated the right to fair administrative action guaranteed under Article 47 of *the Constitution* as implemented by the *Fair Administrative Action Act*, 2015.

72. Under Section 7(2)(a) and (b) of the *Fair Administrative Action Act*, a decision may be reviewed by a court if the administrator acted ultra vires, or in breach of procedural fairness. In Pastoli v Kabale District Local Government Council [2008] 2 EA 300, the court outlined the scope of procedural impropriety to include failure to observe basic rules of natural justice or to act with procedural fairness toward one to be affected by the decision.

73. In Republic v Public Procurement Administrative Review Board and 2 Others [2015] eKLR, the Court stated as follows regarding Judicial Review remedy:

> " The purpose of the remedy of judicial review is now well established. In the House of Lords decision of R v Chief Constable of North Wales, ex p. Evans [1982] UKHL 10 (22 July 1982) it was stated that judicial review is available to prevent excessive exercise of power by administrative bodies or officials; to ensure that an individual is given fair treatment by administrative authorities; to keep administrative excesses in check; and to provide remedy to those aggrieved as a result of excessive exercise of power by administrative bodies.

However, the reach of judicial review is limited to illegality, irrationality/unreasonableness and breach of the rules of natural justice. The purpose of judicial review was aptly captured by Justice Kasule in the Ugandan case of Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300 when he stated that:

> "In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)."

74. Section 7 (2) (a) to (o) of the Fair Administrative Actions Act, 2015 provides that:

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if–

a) the person who made the decision–

i. was not authorized to do so by the empowering provision;

ii. acted in excess of jurisdiction or power conferred under any written law;

iii. acted pursuant to delegated power in contravention of any law prohibiting such delegation;

iv. . was biased or may reasonably be suspected of bias; or

v. denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

c) the action or decision was procedurally unfair;

d)) the action or decision was materially influenced by an error of law;

e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the Applicant;

f) the administrator failed to take into account relevant considerations;

g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

h) the administrative action or decision was made in bad faith;

i) the administrative action or decision is not rationally connected to–

i. the purpose for which it was taken;

ii. the purpose of the empowering provision;

iii. the information before the administrator; or

iv. the reasons given for it by the administrator;

j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

k) the administrative action or decision is unreasonable;

l) the administrative action or decision is not proportionate to the interests or rights affected;

m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

n) the administrative action or decision is unfair; or

o) the administrative action or decision is taken or made in abuse of power. (Emphasis added)

75. In my view, the Tribunal's ruling of 13th February 2017 is procedurally improper leading to procedural impropriety and amenable for judicial intervention by way of review for the reasons given above and the following additional reasons: it was delivered while an application seeking to review the consent order of 8th April,2016 remained pending hearing and determination, yet the consent order, from the record, effectively reviewed the ruling rendered on 8th August, 2014; the impugned ruling neither acknowledged nor disposed of the pending application seeking review of the consent order of 8th April, 2016; the impugned ruling resulted in conflicting procedural outcomes, thereby undermining legal certainty and legitimate expectations-the applicants herein had legitimate expectation that the consent would be the one to be executed by the 2nd to 84th respondents and or that the application to vary the consent would be heard and determined before any execution or other applications or orders could issue, which had the effect of varying the said consent; and finally, the impugned ruling effectively revised the consent order of 8th April 2016 without the legal authority to do so.

76. My further finding is that the issuance of such a ruling amounted to a jurisdictional overreach and a breach of the Applicant's right to a fair administrative action and process guaranteed under Article 47 of *the Constitution* as implemented by the *Fair Administrative Action Act*, 2015.

77. Thirdly, Judicial review exists not to address the merits of a decision, but to ensure that decision-making processes adhere to legal and procedural standards. I am satisfied that in this case, it is not the merits of the decision that the applicants have sought to challenge but the process and that this court has not found reason to even touch the merits of that decision but how it came to be, in view of the circumstances that I have enumerated in this judgment. I am further satisfied that the Tribunal acted outside the scope of its powers and in manner that undermines procedural fairness and as a result, breached the legal rights of the applicants to be heard fairly as guaranteed under Article 50(1) of *the Constitution*, besides the violating of the applicants' legitimate expectations. In such circumstances, judicial review is available as a corrective mechanism.

78. At the risk of repeating myself many times just to emphasize the point, is that in this matter, the impropriety lies in the process, not the merits of the impugned ruling. The Tribunal failed to discharge its procedural obligation to determine the application seeking to vary the consent before giving any other fresh directions, thus exceeding its lawful jurisdiction. In such circumstances, an Appeal is not an adequate remedy because the issue at hand concerns procedural regularity and fairness, not substantive correctness.

79. In the end, I am satisfied that the Tribunal acted with procedural impropriety in issuing its ruling dated 13th February, 2017 thereby contravening Articles 47 and 50(1) of *the Constitution*, and the principles

of administrative justice. I find the exparte applicants' application dated 7th March, 2017 not to be a disguised appeal. It is merited to the extent stated in this judgment.

80. Therefore, the following orders are the appropriate remedies in the circumstances of this case, where it is also clear that the applicants did not fully settle the disputed recalculated pension payable to the 2nd to 84th respondents:

    a. An order of certiorari is hereby issued, removing into this court and quashing the ruling of the Retirement Benefits Appeals Tribunal dated 13th February, 2017 in Retirement Benefits Appeals Tribunal Nairobi Civil Appeal No. 8 of 2010, Elias Maina Murigi & 133 others v Retirement Benefits Authority, National Bank of Kenya Staff Retirement Benefits Scheme and National Bank of Kenya Staff Pension Fund Registered Trustees.

    b. The applicant sought for mandamus to compel the 1st respondent to terminate the proceedings in Civil Appeal No. 8 of 2010. That order is not available for reasons that there are pending proceedings for varying of the consent dated 8th April 2016 and there is no evidence placed before this Court to show with certainty that the entire balance of the recalculated pension was fully settled. The prayer for Mandamus is therefore declined and dismissed.

    c. The Retirement Benefits Tribunal is hereby directed to hear and determine, on a priority basis, the applicationdated 15th April, 2016 filed by the disputant pensioners, comprising the 2nd to 84th respondents herein, seeking to vary the consent order dated 8th April, 2016 and a decision shall be rendered within sixty days from the date of service of this judgment upon the Tribunal.

    d. As the impropriety was on the party of the Tribunal in exercise of its quasi- judicial function, I order that each party shall bear their own costs of these proceedings which have been in court for over eight years, noting that the retirees have been waiting for its determination with the delay being the reasons that I have outlined in the judgment and that some of them may even be dead.

81. This file is closed.

82. It is so ordered.

DATED, SIGNED & DELIVERED AT NAIROBI VIRTUALLY THIS 15TH DAY OF AUGUST, 2025

R.E. ABURILI

JUDGE