

IN THE RETIREMENT BENEFITS APPEALS TRIBUNAL
AT NAIROBI
CIVIL APPEAL No. 1 of 2010

1. Augustine Juma
 2. Fred O. Wasike
 3. Maurine Okello
 4. Charles Kariuki
 5. Joshua Manyara
 6. Emmanuel Ogot (In their capacity as trustees of General Motors Kenya Staff Retirement Benefits Scheme) -Appellants
- Versus -**
- Chief Executive Officer - Respondent

JUDGMENT

The Appellants herein being the Trustees of General Motors Kenya Staff Retirement Benefits Scheme (*hereinafter referred to as "the Appellant"*) being aggrieved by the decision made on the 27th November 2009, by the Chief Executive Officer of the Retirement Benefits Authority has filed this appeal. The grounds of Appeal are:-

1. **THAT** the Chief Executive Officer erred in law and in fact by failing to find that he had no jurisdiction to deal with the complaint by virtue of the fact that Capt (Rtd) Charles Masinde ceased to be a member of General Motors Kenya

Staff Retirement Benefits Scheme in accordance with the provisions of the Scheme rules applicable at the time the services were terminated in November 2001.

2. **THAT** the Chief Executive Officer erred in law and in fact by failing to find that he had no jurisdiction to deal with the complaint by virtue of the fact that Capt (Rtd) Charles Masinde has lodged in the High Court of Kenya Civil Suit No. 975 of 2005 against General Motors Kenya Ltd (pending proceedings) in which at paragraphs 9 and 15 of the Further Amended Plaintiff dated 29th October 2008, he is challenging the manner in which his terminal dues were computed and paid out to him and the legality thereof.

3. **THAT** the Chief Executive Officer erred in law and in fact by failing to find that the complaint was and remains an abuse of process by virtue of the fact that Capt (Rtd) Charles Masinde has expressly pleaded in the High Court of Kenya Civil Suit No. 975 of 2005 against General Motors Kenya Ltd (pending proceedings) as is evident in the Further Amended Plaintiff dated 29th October 2008 that he is aware that his terminal dues including retirement benefits were computed and paid out even if, as he alleges, the same was done in an illegal manner.

4. **THAT** the Chief Executive Officer erred in law and in fact by finding that the Appellant herein failed to pay out the retirement benefits to Capt (Rtd) Charles Masinde in accordance with Regulations 21 of the Retirement Benefits (Occupation Retirement Schemes) Regulations 2000 when it in fact did on 28th November 2001.
5. **THAT** the Chief Executive Officer erred in law by failing to find that the Appellant discharged its mandate in accordance with applicable Scheme rules once it conveyed Capt (Rtd) Charles Masinde's retirement benefits to General Motors Kenya Limited on 28th November 2001.
6. **THAT** the Chief Executive Officer erred in law by failing to distinguish the mandate and roles of the Appellant and General Motors Kenya Limited as two separate entities.
7. **THAT** the Chief Executive Officer erred in law by failing to find that the Appellant herein paid Capt (Rtd) Charles Masinde his retirement benefits in accordance with the provisions of the scheme rules of the Scheme applicable at the time the services were terminated in November 2001.
8. **THAT** the Chief Executive Officer erred in law in summarily deciding the matter without considering the applicable Scheme rules in relation to the particular

circumstances respecting Capt (Rtd) Charles Masinde's complaint.

9. **THAT** the Chief Executive Officer erred in Law and in fact by failing to find that the Appellant discharged its mandate fully and is not liable to Capt (Rtd) Charles Masinde as alleged or at all.
10. **THAT** the Chief Executive Officer erred in Law and in fact by failing to find that Capt (Rtd) Charles Masinde's complaint is contrived, feigned and disingenuous.
11. **THAT** the Chief Executive Officer erred in Law and in fact by failing to find that the current Trustees of the Appellant are not liable for any acts or omissions of the past Trustees, if any.
12. **THAT** the Chief Executive Officer erred in fact and in law by failing to consider the Appellant's evidence on record.

The Appellant prays for orders that:-

- (a) This Appeal is allowed and the directions issued by the Chief Executive Officer on the 27th November 2009 be wholly reversed.

- (b) The Tribunal declares that the Appellant is not liable to Capt (Rtd) Charles Masinde and that his retirement benefits were wholly paid out to him on 28th November, 2001.
- (c) The Appellant be awarded the costs of this Appeal.

The Appellant set out the following facts in their statement:-

1. The Appellant is a Scheme that was established under irrevocable trusts with effect from 1st January 1977 and became registered as a retirement benefits scheme under the provisions of the Retirement Benefits Act, 1997 on 15th December 2000. (*page 1*)
2. By a Deed of Variation of Trust Deed dated 29th November 2001, the Appellant varied its Deed of Affirmation and the Revised Rules so as to effect changes necessary to make them compliant with the law following the enactment of the Retirement Benefits Act, 1997 and the Rules and Regulations there under. (*page 2*)
3. By a letter dated 9th November 2001 Capt (Rtd) Charles Masinde resigned from his employment with General Motors Kenya Limited, the Appellant's Founder. (*pages 45 - 46*)

4. By a letter dated 9th November 2001 General Motors Kenya Limited accepted Capt (Rtd) Charles Masinde's resignation and released him from his employment with immediate effect. *(page 47)*
5. By a letter 12th November 2001 General Motors Kenya Limited wrote to Kabage & Mwirigi Insurance Brokers Limited, the Appellant's pension Fund Managers enclosing the Staff Pension Fund withdrawal form for Capt (Rtd) Charles Masinde. *(pages 48 - 49)*
6. By a letter dated 14th November 2001 Kabage & Mwirigi Insurance Brokers Limited forwarded the calculation sheet in respect of Capt (Rtd) Charles Masinde setting out the withdrawal benefits payable. *(page 50)*
7. Subsequently, Barclays Securities Services (Kenya), the custodian of the Fund, issued a cheque dated 28th November 2001 in favour of General Motors Kenya Limited for the sum of Kshs 4,525, 163.90 being the Gross Amount of retirement benefits payable to Capt (Rtd) Charles Masinde. *(page 51)*
8. General Motors Kenya Limited thereafter prepared a Final Payment Authorization Form dated 29th November 2001

- setting out the amounts payable to Capt (Rtd) Charles Masinde after deducting his liabilities to it. (*page 52*)
9. On 4th December 2001, General Motors Kenya Limited delivered its cheque dated 3rd December 2001 in the sum of Kshs 684, 393.30 to Capt (Rtd) Charles Masinde being his final dues. (*page 53*)
 10. Thereafter on 25th January 2002, Capt (Rtd) Charles Masinde signed and lodged with General Motors Kenya Limited a Clearance Certificate acknowledging receipt of all sums payable to him in full and final settlement of his dues arising out of his termination of service. (*page 54*)
 11. At no time thereafter did Capt (Rtd) Charles Masinde allege to the Appellant that his retirement benefits had not been paid.
 12. At the time of Capt (Rtd) Charles Masinde's resignation from employment, the Appellant's Trustees were William Lay, A. Ricardo Resende, Benjamin M. Mshila, John K. Mwirichia, Peter G. Karanja and John T. Kabogo.
 13. The Appellant's Scheme Rules at rule 2(d) provides that a member (*a member means a person who has become a member of the Scheme in terms of Rule 2 and who has not ceased to be a*

member in the terms of the rules) who for any reason leaves Service (Service means service as a permanent employee of the Founder) shall forthwith cease to be a member. (page 32)

14. Effectively, Capt (Rtd) Charles Masinde ceased to be a member of the Appellant Scheme upon his resignation on 9th November 2001 and withdrawal of his full retirement benefits on 28th November 2001.
15. The Appellant's Scheme Rules at rule 10 mandated that a member who resigns from service was entitled to payment of the benefit calculated in accordance with the said rule. *(pages 37-38)*
16. Under Rules 17(b) and 18 of the Scheme's rules, the members including Capt (Rtd) Charles Masinde as he was then, is barred from having any other claim concerning the claim except in accordance with the rules. *(pages 41-42)*
17. Sometime in August 2005, Capt (Rtd) Charles Masinde instituted court proceedings through High Court of Kenya Civil Suit No. 975 of 2005 against General Motors Kenya Ltd (pending proceedings) in which at paragraphs 9 and 15 of the Further Amended Plaintiff dated 29th October 2008, he is challenging the manner in which his

terminal dues were computed and paid out to him and the legality thereof. (*page 55*)

18. For reasons not known to the Appellant, Capt (Rtd) Charles Masinde having claimed in a letter dated 18th May 2009 that he needed to access what he referred to as 'deferred benefits' on account of early retirement (*page 68*) lodged a complaint with the Chief Executive Officer on 4th June 2009 alleging that his pension benefits had not been paid. (*page 70*)
19. By a letter dated 5th June 2009 the Chief Executive Officer requested the Appellant's Board of Trustees to respond to the complaint. (*page 69*)
20. The Appellant gave its reasons in response as follows:
 - That Capt (Rtd) Charles Masinde was employed on 1st February 1990 by General Motors Kenya Limited and became a member of the Appellant's scheme on the same date.
 - That he resigned from employment on 9th November 2001 and his employment was terminated on 9th November 2001.

- That he was paid all his dues in accordance with rule 10 of the Scheme Rules.
 - That Capt (Rtd) Charles Masinde had lodged in the High Court of Kenya Civil Suit No. 975 of 2005 against General Motors Kenya Ltd (pending proceedings) in which at paragraphs 9 and 15 of the Further Amended Plaint dated 29th October 2008, he is challenging the manner in which his terminal dues were computed and paid out to him and the legality thereof.
21. By a letter dated 27th November 2009 (*page 77*) the Chief Executive Officer directed the Appellant to within 14 days:
- Confirm to Mr. Charles Masinde that he is entitled to his vested benefits in the scheme in full.
 - Pay the said Mr. Charles Masinde all his vested benefits in the scheme.
22. The Chief Executive Officer erred in law and in fact in finding that the Capt (Rtd) Charles Masinde's retirement benefits had not been paid in accordance with the provisions of the scheme rules of the Appellant applicable

at the time his services were terminated because he failed to consider the following facts:-

- Capt (Rtd) Charles Masinde retired from employment on 9th November 2001 and therefore ceased to be a member of the Appellant Scheme with effect from his termination of employment hence the Chief Executive Officer lacked jurisdiction to entertain his complaint.
- The response by the trustees was satisfactory.
- Capt (Rtd) Charles Masinde was aware that his retirement benefits was released to General Motors Kenya Limited on 28th November 2001 and that indeed he had initiated civil proceedings through High Court of Kenya Civil Suit No. 975 of 2005 against General Motors Kenya Ltd (pending proceedings) in which at paragraphs 9 and 15 of the Further Amended Plaint dated 29th October 2008, he is challenging the manner in which his terminal dues were computed and paid out to him and the legality thereof.
- Capt (Rtd) Charles Masinde's Complaint dated 4th July 2009, to the extent that it concealed all material facts relating to his termination of employment, was contrived, feigned and disingenuous not meriting the

consideration accorded to it by the Chief Executive Officer.

- No liability could attach to the Appellant in any event as the present Trustees were not in-charge of the Scheme in November 2001.
23. The Chief Executive Officer erred in Law and in fact by failing to hold that the Appellant computed Capt (Rtd) Charles Masinde's pension entitlements in accordance with the scheme rules on the basis that he voluntarily retired and was therefore entitled to his full pension and gratuities in accordance with Rule 10 of the Scheme rules.
 24. The Chief Executive Officer erred in law by failing to find that the Appellant discharged its mandate in accordance with applicable Scheme rules once it conveyed Capt (Rtd) Charles Masinde's retirement benefits to General Motors Kenya Limited on 28th November 2001
 25. The Chief Executive Officer erred in Law and in fact by failing to hold that the Appellant paid out Capt (Rtd) Charles Masinde's pension entitlements in accordance with the scheme rules.

26. The Chief Executive Officer erred in Law and in fact by failing to hold that Capt (Rtd) Charles Masinde's Complaint is wholly impermissible under the Scheme rules.

The Respondent filed a defence and set out the following matters:-

1. Save as in hereinafter specifically admitted, the Respondent denies each and every allegation contained in the Memorandum of Appeal as if the same were set out herein and traversed seriatim.
2. The Respondent is a statutory body established under the Retirement Benefits Act (No. 3 of 1997) of the Laws of Kenya and its address for service for purpose of this appeal is 14th Floor, Rahimtulla Towers, Upper Hill Road, P.O. Box 57733-00200, Nairobi.
3. The Respondent denies the contents of paragraph 1 of the Memorandum of Appeal and puts the Appellant to strict proof thereof. Further, the Respondent avers that as the Chief Executive Officer of the Retirement Benefits Authority responsible for the execution of the mandate of and the day to day management of the affairs of the Authority, he had jurisdiction to deal with the complaint as submitted and dealt with.

4. The Respondent denies the contents of paragraph 2 of the Memorandum of Appeal and puts the Appellant to strict proof thereof. Further, the Respondent avers that as the Chief Executive of the Retirement Benefits Authority had jurisdiction to deal with the complaint in that while the contributor had indeed lodged a matter in the High Court of Kenya Civil Suit No. 975 of 2005 against the General Motors Kenya Ltd., the contributor had not laid a claim for retirement benefits and neither were the Appellants parties to the said matter.

5. The Respondent also denies in their entirety the contents of paragraphs 3, 4 and 5 and puts the Appellant to strict proof thereof. Further, the Respondent avers that he did no err in law or fact or misdirect himself in any manner in his orders to the Trustees of the subject scheme and properly found that the said Trustees had contrary to the applicable Rules of the Scheme, unsafely and unsoundly conducted the matters of the Scheme to the detriment of the scheme and its members and in particular the subject contributor.

6. The Respondent also denies in its entirety the contents of paragraph 6 and puts the Appellant to strict proof thereof. In response, the Respondent avers that the mandate of the Trustees to a scheme is wholly separate from that of its sponsor

and the Appellant had not properly drawn that distinction between them in dealing with the member herein.

7. In answer to paragraph 7, 8, 9, 10 and 12 of the Memorandum of Appeal, the Respondent avers that at all times he not only sought the co-operation and comments of the Appellants in relation to the particular circumstances respecting to the complaint, but also took the same and all the Appellant's evidence on record into consideration before reaching the subject decision of appeal and that he is a stranger *in toto* to the allegations to the contrary which he puts the Appellants to strict proof.
8. The Respondent denies the contents of paragraph 11 of the Memorandum of Appeal and puts the Appellant to strict proof thereof. Further,, the Respondent avers that the argument that the current Trustees of the Appellant not having been Trustees at the time are not liable for the actions of the Scheme's Trustees at that time is fallacious and legally untenable as it is trite law that under an irrevocable trust as that under consideration herein and the respective rules thereto, the rights and obligations of the Trustees include their survivors, successors and/or assigns.
9. Without prejudice to the foregoing, the Respondent avers that the Appellant is not-suited and the Memorandum of Appeal as

drawn and filed does not disclose any reasonable cause of action. The Respondent shall to this end apply and pray that the Appeal herein be struck out *in limine* with costs. The grounds in support of this objection are:

a. The decision of the Respondent was based on sound interpretation of the law and on the legal instruments and reasonable consideration of the facts, and in fulfillment of its duties under the Act;

b. The appeal is legally unsustainable as there is no law breached by the Respondent in coming to its decision.

10. In further answer to the aforesaid paragraphs, the Respondent directs the Appellants to the non-assignment, attachment and sequestration of retirement benefits.

11. In further answer to the aforesaid paragraphs, the Respondent avers that the retirement or resignation of a member from the sponsor's employ, while it terminates the membership of a contributor in that scheme from that point going forward, it does not in any way deny or in whatever manner prejudice the contributor's entitlements accrued and existing prior to the termination of membership and puts the Appellants to strict proof to the contrary.

12. In further answer to the aforesaid paragraphs, the Respondent avers that the Trustees mandate and responsibilities to a contributor to the scheme can only be discharged once it has delivered to that member the proper and full payment of retirement benefits accrued by the contributor and within the requisite statutory period and which mandate the Respondent reiterates, the Appellants have failed to discharge.

13. The Respondent therefore denies any illegality, capriciousness and/or malice in the said decision.

14. The Respondent admits the jurisdiction of the Honorable Tribunal.

The Respondent prays that the Appellant's Appeal be dismissed with costs.

The Respondent set out the following statement of facts:-

1. The Respondent is a statutory body established under the Retirement Benefits Act (No. 3 of 1997) of the Laws of Kenya and its address for service for purpose of this appeal is 14th Floor, Rahimtulla Towers, Upper Hill Road, P.O. Box 57733-00200, Nairobi.

2. The matter in dispute in regard to the non-payment to Mr. Charles Masinde (hereinafter referred to as “the Contributor”) was brought to the attention of the Respondent through a properly filed complaint dated 4th June 2009. (Annexed herewith and marked “RBA 1” is a copy of the complaint form)
3. The Respondent accepts the facts as stated in paragraph 1 and 2 of the Appellant’s Statement of Facts.
4. The Respondent accepts the documents marked from page 1 to 44 annexed to the Statement of Facts of the Appellant dated 21st December 2009 and filed in the Retirement Benefits Appeals Tribunal on 26th January 2010.
5. On 1st August 2005, the contributor lodged a matter in the High Court of Kenya Civil Suit No. 975 of 2005 against the General Motors Kenya Ltd. which claim was amended on 9th September 2005 as indicated in the annexure paginated 55 through to 67 of the Appellant’s Statement of Facts and according to the information availed to the Authority, the same is still pending before the High Court.
6. On various dates between June 2009 and November 2009, the Respondent through its letters dated 29th June 2009, 7th September 2009 and 2nd November 2009 sought the co-operation and comments of the Appellants in relation to the

particular circumstances respecting to the complaint and took the same and all the Appellant's evidence on record into consideration before reaching the subject decision of appeal. (Annexed herewith and marked "RBA 2" is the bundle of correspondence).

7. The Appellants neither substantively responded to the various requests and reminders issued by the Authority, nor did they comply with the directions issued herein and as a consequence the Authority was constrained to issue formal direction under s.39 of the Retirement Benefits Act, 1997 which order is dated 27th November 2009 which is the subject of Appeal herein. (Annexed herewith and marked "RBA 3" is a copy of the formal direction from the Authority).
8. The Respondent directs the Appellants to the non-assignment, non-attachment and non-sequestration of benefits or contributions accruing or payable to a contributor under Rule 16 of the Scheme's Trust Deed and Rules.
9. The Trustees mandate and responsibilities to a contributor to the scheme can only be discharged once it has delivered to that member the proper and full payment of retirement benefits accrued by the contributor and within the requisite statutory period and which mandate the Respondent reiterates, the Appellants have failed to discharge.

10. The Respondent heard nothing further on this matter until it was served with a Memorandum of Appeal.

The Appellant filed written submissions as follows:-

1.0 Introduction

1.1 On the 27th of November 2009 the Chief Executive Officer (CEO) of the Retirements Benefits Authority - the Respondent directed the Appellant herein:

1. To Confirm to Mr. Charles Masinde (the complainant and former employee of GMKL) that he is entitled to his vested Benefits in the scheme in full.

2. To pay the said Mr. Charles Masinde all his vested benefits in the scheme.

(See page 77-79 of the Appellant Statement of Facts)

Pursuant to the said directions the Appellants herein filed the present Appeal under section 48(i) of the Retirement Benefits Act (RBA) on the grounds particularly set out in the Memorandum of Appeal and supported by The Appellant's Statement of Facts filed on the 21st of December 2009 seeking to have the directions reversed. The CEO filed its defence and Statement of Facts in response on the 11th February 2010.

1.2 These submissions are organized as follows:

- 1.2.1 Part 2 gives background of the relevant facts to this Appeal;
- 1.2.2 Part 3 addresses the Memorandum of Appeal and the Defence and the HCCC No. 795 of 2005;
- 1.4.3 Part 4 concludes;

2.0 *Relevant Facts to the Appeal.*

- 2.1 On the 9th of November 2001 Mr. Charles Masinde, the complainant and the subject of the said directions issued by the CEO on the 27th of November 2010, resigned from the employment of the Appellant's sponsor GMKL after having served for 11 years 1 month. The resignation was duly accepted. (*See page 46 and 47 of the Appellants statement of facts*).
- 2.2 Having been an employee of the sponsor, Mr. Charles Masinde was a member of General Motors Staff Pension Scheme (the Appellant) as provided under the Rules (*see page 32 Rule 2 (a) and (d) in the Appellants statement of facts*). As a member of the Appellant, it is not in dispute that Mr. Masinde made monthly contributions to the scheme. He was therefore upon resignation entitled to the Benefit of the same. In addition having served for 11years he was also entitled to his employers' contribution as provided under the scheme Rules.
- 2.3 Following his resignation from GMKL; the Appellant's Trustees notified the Scheme's Administrators - Kabange & Mwirigi Insurance Brokers Limited. All his benefits were

withdrawn from the scheme fund to be conveyed to him within a period of 19 days from the date of withdrawal. (*See pages 48-50 of the Appellants Statement of Facts*).

2.4 The calculations of Mr. Masinde's benefits were computed by the Appellant's administrators. Mr. Masinde having worked for over 5 years with the company he was entitled to both his contributions and his employers contributions as provided in the Scheme Rules. (*See page 49 of the Appellants Statement of Facts*). Consequently a cheque of Ksh. 4,525,163.90/= was drawn out of the pension fund being the total benefits due to Mr. Masinde, and according to the practice at the time, the same was forwarded to GMKL for onwards transmission to Mr. Masinde after deduction of the necessary taxes. The Appellant states that Mr. Masinde does not contest the amounts paid out as his benefits by the Appellant. (*See pages 97 and 98 of the Appellants statement of Fact*).

2.5 As Mr. Masinde had Various Loans and Liabilities with GMKL; upon receipt of the cheque of his benefits the same were computed together with his terminal dues and paid out to him less the outstanding liabilities. Mr. Masinde later sued GMKL in HCCC No. 795 of 2005 challenging among other issues the deductions made from his terminal dues and benefits. He requested for a true and proper account of the deductions amounting to 5,556,510.60/=. The high court has since delivered its judgment on the matter on the 19th

August 2010. Importantly the court did not declare the deductions as illegal but only directed that GMKL give Mr. Masinde a true account the deductions. *(See page 52, 53, 81-96, 99-105 of the Appellants Statement of Facts)*

- 2.6 On the 18th of May 2009, about 8 years after his resignation, Mr. Masinde wrote to the Scheme requesting for the payment of his deferred benefits having attended his retirement age. This was despite he's being well aware that there were no deferred benefits retained by the scheme after his resignation. *(See page 68 of the Appellants Statement of Facts).*
- 2.7 On the 5th June 2009 the Appellant received a letter from The CEO of the Retirement Benefits Authority, the Respondent herein, *(see pages 69 - 74 of the statement of fact)* requesting a response with respect to the payment of Mr. Masinde's benefits as stated in the complaint filed with the Retirements Benefits Authority. In the claim Mr. Masinde falsely states that he has not been paid his benefits, he also withheld facts relating to his resignation.
- 2.8 The Appellant responded vide the letter dated 24th of June 2009 and 17th of July 2009 informing the CEO that Mr. Masinde's had been paid All his benefits by the scheme. The Appellant also informed the CEO of the existence of HCCC No. 795 of 2005 and subsequently forwarded the Plaintiff and the defence in the suit as requested to the CEO. *(See pages 80 of the Respondent's Statement of Facts)*

2.9 On the 17th of November 2009 the CEO issued directives against the Scheme necessitating the filing of this Appeal in which the Appellant seeks Orders that:

- i) The directions issued by the registrar are reversed.
- ii) A declaration that Mr. Charles Masinde's benefits were wholly paid out to him on the 28th of November 2001.
- iii) An order for costs.

3.0 *The Memorandum of Appeal and the Defence.*

The Appellant scheme challenged the directions issued by the CEO on the 27th November 2009 on 4 distinctive grounds namely; jurisdiction, errors/misdirection of law and fact by the CEO, failure by the CEO to distinguish the Appellant from GMKL and feigned claim filed by the complainant discussed herein bellow.

3.1 *Jurisdiction.*

3.1.1 The Appellant under paragraphs 2 and 3 of the Memorandum of Appeal challenges the jurisdiction of the CEO in issuing the said Directions with Respect to Mr. Masinde, for the reason that the jurisdiction of the CEO emanates from the fact that the complainant is a member of the a registered retirement benefits scheme as recognized

under the Retirement Benefits Act under section 46 (i) which provides:

“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”.

The Appellant’s Scheme Rules drafted under the Trust Deeds expressly defines who a member of the scheme is. *(See Rule 2 at Page 32 of the Appellants Statement of facts) which states at Sub rule 2(b) that an employee of the founder shall automatically be a member of the scheme and at clause (d) the membership ceases upon leaving service.*

3.1.2 It is not in dispute that Mr. Masinde was a member of the Appellant’s scheme during the subsistence of his employment and until he tendered his resignation on the 9th of November 2001. Upon his resignation all his benefits were withdrawn from the scheme and he therefore ceased to be member. The obligations of the Scheme towards a member ceases upon paying out all the withdrawn benefits of a member. Mr. Masinde ceased being a member of the scheme upon his resignation / leaving service and all his benefits having been paid out of the scheme on the 28th November 2001. In this respect, the CEO had no jurisdiction to deal with this complaint.

3.1.3 Further Mr. Masinde filed HCCC No. 975 of 2005 challenging the deductions from his terminal dues and benefits and the legality there of. Importantly the suit is brought against GMKL against whom he properly raised the issue of the deductions amongst other issues. A reading of paragraph 9 and 15 of the Plaint (*see pages 55 to 63 of the Appellants Statement of Facts*) shows that the complainant does not dispute the fact that his benefits were paid out to him.

The Appellant submits that once the CEO was notified that a dispute relating to Mr. Masinde's terminal dues and benefits had been filed in the high court, he had no jurisdiction to entertain Mr. Masinde's claim. Mr. Masinde had in respect chosen his preferred option of recourse through the high court. The CEO was informed of the same by the appellant vide the letter dated 24th June 2009 yet he erroneously proceeded to issue separate directions against the Appellant scheme on the 27th November 2010. The Appellant prays that the said directions be reversed. (*See page 80 of the Appellants Statement of Facts*).

3.2 *The law:*

The Appellant under Paragraphs 3, 4, 5, 7, 8 and 9 of the Memorandum of Appeal challenges the directions of the

CEO on the grounds of errors of law and fact and or misdirection of the same.

Whereas the CEO addressed himself to the provisions of the Law, and facts before him the Appellant states that he arrived at the wrong conclusion despite sufficient information being supplied to him by the Appellant.

The relevant statutes in respect to this matter are:

- i) The Retirement Benefits Act as at November 2001
- ii) The Retirements Benefits (Occupational Retirement Benefits Schemes) Regulations as at November 2001 and
- iii) General Motors Staff Pension Scheme Rules as at November 2001.

The RTA under section 46 instructs the CEO to take into consideration both the provisions of the law and the scheme Rules in reviewing any decision made by a scheme. The CEO erroneous conclusions are elaborated below.

3.2.1. *Membership - The Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 18 provides for Eligibility of Membership. It states:*

- (2) *Where a scheme is established or the scheme rules relating to eligibility for membership are amended, the scheme rules or*

amending scheme rules, as the case may be, shall provide in relation to any person who:-

- (a) "at the date the scheme is established or the amending scheme rules become operative, as the case may be, is an employee of a participating sponsor and -(.....)*
- (b) After the date referred to in (a) above, becomes an employee of a sponsor and is eligible for membership of the scheme, that he shall, as a condition of his employment, become a member."*

Accordingly Rule 2 of the Appellants Scheme Rules (see page 32-33 if the Appellant's Statement of Facts) read in conjunction with Regulation 18, provides for Admission to Membership and determination of the same. It states:

- (b) Eligible employees shall as a condition of employment become a member of the scheme*
- (d) A member who for any reason leaves service shall forthwith cease to be a member.*

An interpretation of the same leads to the conclusion that Mr. Charles Masinde ceased to be a member of the Appellant upon resignation on the 9th of November 2001 and the subsequent withdrawal of his full benefits on the 28th November 2001. At the time of filing the Complaint Mr. Masinde was no longer a member of the scheme and having

withdrawn his full benefits had no deferred benefits to claim from the scheme. The CEO was in error in entertaining Mr. Masinde's false claim as a member when he clearly ceased to be a member upon his resignation from employment or that his benefits were not paid out.

3.2.2 Vesting of Benefits - Regulation 20; Benefits to fully vest in 3 years.

It states that:

"The scheme Rules shall provide that the benefits be fully vested in a member within one year of commencement of pensionable service

Accordingly Rule 15 of the Appellant's Rules provides: (*see page 41 of the Appellant's Statement of Facts*)

"All benefits derived from contributions made by a member shall vest immediately in that member and the benefits derived from contributions made by the founder shall fully vest in the member after a maximum of five years of contribution years"

It is not in dispute that Mr. Masindes's benefits under the scheme while his membership subsisted vested in him as provided in the law. The CEO while addressing himself to the proper provisions of the law and the Scheme Rules erroneously concluded that Mr. Masinde's benefits had not been vested in him yet they in fact did. It was on this basis that upon the application for withdrawal, Mr. Masinde's benefits consisting of his own contribution and his employers contributions totalling to Ksh. 4,525,163.90/=

vested and were paid out on instructions that the same be remitted to him after the payment of taxes. The CEO was in error to state that Mr. Masinde had been deprived of his rights as a member when he was in fact paid all his vested benefits according to the practices at the time as testified by Mr. Wasike- the Appellant's witness. The same remains uncontroverted by the CEO.

3.2.3 Payment of Benefits upon termination of service - Regulation 21 provides for leaving service Benefits and provides as follows:

" (i) the Scheme Rules shall make provisions as to the treatment of the retirement benefits of a member where such member ceases to be an employee of the sponsor before attaining the retirement age and such provisions may include:

(a) Payment of benefits to the leaving member provided that the member shall not be entitled to the employers contributions as provided in the trust deed.

(b) Deferment of benefits until the leaving member attains the normal retirement age.

(c) Transferring of the benefits to another scheme elected in writing by the leaving member.

Accordingly Rule 10 of the Appellant's Rules read in conjunction with the above provisions (*See page 37 and 38 of the Appellant's Statement of Facts*) of the relevant part to

this Appeal provides that upon resignation a member is entitled to:

- (i) *The whole of his benefits secured by his total contribution to the scheme.*

- (ii) *Benefits secured by the founders contribution paid on his behalf if the employee has completed a period of 5 years is entitled to 100% of the benefits*

The Rule further elaborates on the options as provided under Regulation 21:

In particular Sub-Rule 10(4)

Option 1- The funds may be transferred to another Retirement Benefits Scheme.

*Option 2-*The member may defer his benefits to be payable on his pension date, but may elect not to continue making his contributions to the scheme.

Option 3- The member may elect to receive a surrender value of his benefits under the scheme.

It is the Appellants Submission that upon resignation from employment Mr. Masinde opted as provided under the Regulations 21 (i) (a), read in conjunction with Rule 10 Option 3 of the scheme Rules, to withdraw all his benefits from the scheme. ***(See page 48 of the Appellants statement of Facts. See also page 49).***

This is evidenced at page 49 of the Appellant's statement of facts, under the Head – Benefit Refund; it is expressly stated that a

cash refund is required. The number of years of service is stated and the Members share of the refund is stated as 100%.

At the same page under the head of continuation of cover; it clearly states that the withdrawing member does not wish to maintain contribution privately or vide a new employer.

The effect of this was to instruct the fund administrators to withdraw all the benefits vested in Mr. Masinde from the scheme fund. To this end the fund Administrators; Kabange & Mwirigi Insurance Brokers Ltd computed Mr. Masinde's Benefits (*see pages 50 of the Appellants Statement of facts*) a cheque of Ksh. 4,525,163/= was drawn up on the 28th of November 2001 by the fund custodians - Barclays security services Limited. The same was forwarded to GMKL for remittance to Mr. Masinde subject to the payment of necessary taxes as the practice was then. (*See page 97 of the Appellants statement of Facts*). The appellants witness testified as to the manner of payment the CEO did not join issue or challenge the same.

It is the Appellants submissions that Mr. Masinde's benefits were paid out to him from the scheme on the 28th of November 2001 and he received the full benefit of the same. The CEO was in error by concluding that the benefits had not been paid out.

The Retirements benefits (Administrators Regulations)

In 2007 on the 10th July the then Finance Minister issued the Retirement Benefits (Administrators Regulation 2007) which now expressly provides under regulations 7 (g) that one of the roles of the administrator shall be to compute and pay benefits to its members and their beneficiaries **directly** as provided for in the law and the scheme rules. The previous requirement was to vest the benefit in the member.

The Appellant witness stated that since the enactment of the Regulation the cheques due are drawn in the name of the member / beneficiary. Prior to that he testified that it was practice in many corporations that the cheques were drawn in the name of the sponsor who was to convey the same to the employee. We bring it to the attention of this Tribunal that the above provision was enacted after Mr. Masinde had resigned from his employment in 2001. Laws do not apply retrospectively! The same should not be used to penalize the Appellant who discharged its obligations accordingly under the relevant law at the time.

3.2.4 Assignment:

The CEO notified the Appellant on the non - assignability of benefits.

Regulation 22 provides for the non - assignability of Benefits: It states that:

“ the Scheme Rules shall provide that no benefits or contributions accruing or payable there under shall be capable of assignment

except for the purposes of securing a mortgage loan issued by an institution approved by the authority”.

The regulation read in conjunction with Rule 16 of the Appellant’s Rules which provides:

“No benefit or contributions accruing or payable hereunder shall be capable of assignment”.

The CEO infers that Mr. Masinde’s Benefits were assigned?

Assignment is defined in the Blacks Law Dictionary as “the transfer of rights or property. *“An assignment is a transfer or setting over of property or of some right or interest from one person to another.”*

The Appellant scheme instructed the fund administrators to withdraw Mr. Masinde’s entire benefits comprised if his contribution and his employers contribution from the fund. At no point did the Appellant retain any of Mr. Masinde’s Benefits neither were they conferred upon another person or entity. The full benefits were conveyed to Mr. Masinde.

The CEO was wrong in concluding that the Appellant has assigned Mr. Masinde’s benefits. Mr. Masinde despite the deductions made by GMKL Mr. Masinde was not deprived of his benefit he in fact retained a house, 2 cars the net amount and left the company debt free! Mr. Masinde’s received his full benefits from the Appellant. The CEO was in error instructing the Appellant to re-pay Mr. Masinde’s benefits.

3.2.5 Protection against attachment - Section 36 of the Retirement Benefits Act provides;

“Notwithstanding anything to the contrary contained in any other written Law where a judgment or order against a member of a scheme is made, no execution or attachment of process of any nature shall be issued in respect of the contributions or funds of the member or his employer except in accordance with the scheme rules and such contribution shall not form part of the assets of the member or of his employer in the event of Bankruptcy”

In this respect the CEO misdirected himself as no execution from any decree of any court was or had been levied against Mr. Masinde’s benefits. To this end this section does not apply in the present circumstances.

3.3 That the CEO erred in law by failing to distinguish the mandates and Roles of the Appellant and GMKL paragraph 6 of the Memorandum of Appeal.

The CEO ought to have distinguished or taken into consideration that the Appellant discharged its mandate distinct from GMKL.

The Appellants Trustees informed the CEO vide the letter dated the 24th June 2009 that Mr. Masinde’s benefits were withdrawn and paid out according to the provisions of the Scheme Rules upon his resignation from GMKL. As stated above the cheque was drawn from the fund and forwarded

to GMKL for remittance to Mr. Masinde upon the payment of the necessary taxes. (*See page 97 to 98 of the Appellant statement of Fact*)

Hence as at the 28th of November 2001 the scheme had fulfilled its obligations towards Mr. Masinde.

Upon receipt of the cheque, GMKL calculated Mr. Masinde's Final dues, deducting the outstanding liabilities with the knowledge of Mr. Masinde (*see pages 99 - 105 of the Appellants statement of facts*) in effect granting Mr. Masinde the benefit of all the assets and releasing the net balance to him vide the cheque of Ksh.684,393.30/= drawn in his favour on the 3rd of December 2001. (*See page 53 of the Appellants Statement of Fact*). The Appellant scheme had nothing to do with the deductions.

The deductions made by GMKL cannot be visited upon the Appellant by this Tribunal. The deductions were a subject of the suit filed by Mr. Masinde against GMKL. It will be inequitable and unjust to now hold the scheme liable and direct the scheme to Re- pay Mr. Masinde benefits.

3.3.1 HCCC No. 795 of 2005. Rtd Capt Charles Masinde Vs General Motors Kenya Limited.

Mr. Masinde filed this suit and challenged his resignation, terminal benefits and deduction made by GMKL from his

terminal dues and benefits to offset his outstanding liabilities with the company. The suit conclusively determined the dispute between Mr. Masinde and GMKL with respect to the issue of his resignation, his terminal dues and the deductions made by the company.

Of the part relevant to this Tribunal was the issue of the computation and deduction of Ksh. 5, 556,510.60/= from Mr. Masinde's terminal dues and benefits.

The court ruled; with respect to the deduction Justice Aroni stated:

"Although the plaintiff signed a clearance certificate it was his contention that he did not agree with the computation neither did he sign the discharge certificate. 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 recalculated the discrepancies noted rectified and the same explained to the Plaintiff. In this regard the court is inclined to grant prayer b of the further amended plaint, that a true and proper account of the Ksh. 5,556,510.60 deducted from the Plaintiffs dues and benefits be made and any refund due to him be paid forthwith".

The issue of the deductions having been decided and upheld by the high court is *resjudicata* and unless an appeal is preferred to the Court of Appeal by Mr. Masinde, this Tribunal has no power to revisit the issue on deductions. To do so will be tantamount to the Tribunal sitting in appeal of the high court's decision. There is no residual jurisdiction to

this Tribunal to revise the high court's decision that would be overstepping its mandate.

Further the hierarchy of courts as stated in Article 165 of the constitution of Kenya 2010, dictates that lower courts, including tribunals save as provided therein, are bound by the decisions of the high court. Consequently the high court's decision as regards the deductions stands. The Appellant invites the Tribunal to look at pages 99 - 105 of the Appellants statement of Facts read in conjunction with page 52 with respect to Mr. Masinde's liabilities with GMKL necessitating the deductions.

It would be in contravention of the law for this Tribunal to now reconsider the issue of the deductions and to visit an act done by GMKL upon the Appellant who was not a party to the deductions. The Appellant submits that this honourable Tribunal is bound by the high court's decision with respect to the deduction.

3.4 The Appellant states that complaint is feigned paragraph 10 and 12 of the Memorandum of Appeal.

Mr. Charles Masinde resigned from employment on the 9th of November 2001 and his benefits were paid out from the scheme on the 28th of November 2009 and ceased to be a member of the scheme effective the 28th of November 2001 a fact he was well aware of.

Despite Mr. Masinde being aware that that his benefits were all paid out he went ahead and wrote to the scheme requesting for what he termed as his “deferred benefits”.

On the 4th of June 2009 Mr. Masinde filed a complaint with the RBA and concealed all material facts relating to his termination of his employment and payment of his benefits, the existence of HCC No. 795 of 2005 and his having opted to seek recourse to the high court in the first instance.

Upon receipt of the Complaint the Appellant responded thereto by stating that the scheme does not hold any of Mr. Masinde’s the pension benefits due to Mr. Masinde and that his personal contributions together with his employers contribution were paid out to him when he left employment and that Mr. Masinde is feigning ignorance

In HCCC 795 of 2005 Mr. Charles Masinde challenged the manner in which the deductions were made from his terminal dues and benefits and the legality thereof. In the same suit he does not dispute that his benefits were paid out and were computed together with his terminal dues. Neither does he contest the amounts paid out as his benefits from the scheme. He only sought additional monies on account of his resignation!

Upon this information the CEO ought to have known or considered the possibility that the said complaint is feigned.

4.0 Conclusion.

The Appellant being a trust fund holds monies in accordance with the provisions of Retirements Benefits Act No. 3 of 1997 and the Trust Deed for the benefit of its members. The scheme is run in accordance with the law and holds no funds of its own.

Upon application for withdrawal of benefits, the Appellant is obligated to pay out the vested benefits on behalf of a member. The Appellant is deemed to have discharged its mandate to the respective member once a cheque is drawn out of the fund and conveyed.

There were no deferred benefits that are the subject of the complaint and this Appeal. This is noted from the documents produced above establishing that all of Mr. Masinde's benefits were withdrawn computed and paid out in accordance with the law at the time for his benefit. The Appellant discharged its mandate with regard to Mr. Masinde's benefits once the cheque of Ksh. 4, 525, 163/= was paid out of the scheme fund within 19 days of the request.

The Appellant did not assign or deduct any of Mr. Masinde's Benefits as alleged. This has been demonstrated in part 3.2.3, 3.2.4 and 3.3 above. In any event the said dispute is between GMKL and Mr. Masinde which has since been decided by the high court. Mr. Masinde was accorded the

benefit of his rights pursuant to regulation 21 and he accordingly received the full benefit of his rights under the scheme, he cannot dispute the same.

The issue of deductions cannot be visited upon the scheme. The same has already been settled in HCCC No. 795 of 2005. This Tribunal cannot sit in appeal to that decision. Mr. Masinde's recourse is to appeal to the court of appeal.

The CEO ought to have taken the above facts in to consideration before directing the Appellant to Re-Pay Mr. Masinde's benefits in contravention of the law. The complaint is out rightly disingenuous and an abuse of process by Mr. Masinde in an attempt to obtain further monies from the Appellant.

The Appellant accordingly prays that the directive issued by the CEO on the 27th of November 2009 be reversed and that this honourable Tribunal declares that Mr. Masinde's retirement Benefits were paid out on the 28th of November 2001

The Appellant also prays for cost of this appeal.

The Respondent also filed written submissions and stated:-

INTRODUCTION

Before the Honourable Tribunal is an appeal by the Appellant dated 21st December 2009 against the decision of the Respondent dated 27th November 2009 where the Chief Executive Officer directed the Appellant as follows:

- That it confirms to Mr. Charles Masinde (hereinafter referred to as “the contributor”) that he is entitled to his vested benefits in the scheme in full.
- That it pays the said Mr. Charles Masinde all his vested benefits in the scheme.

It is the Appellants submission that the Chief Executive Officer in its said decision:

- Erred in law and in fact in finding that Mr. Charles Masinde’s retirement benefits had not been paid in accordance with the provisions of the scheme rules of the Appellant applicable at the time his services were terminated.
- Erred in law and fact by failing to hold that the Appellant computed Mr. Charles Masinde’s pension entitlement in accordance with the scheme rules.
- Erred in law by failing to find that the Appellant discharged its mandate in accordance with applicable scheme rules

once it conveyed Mr. Charles Masinde's retirement benefits to General Motors Kenya Limited on 28th November 2001.

- Erred in law and fact in failing to hold that the Appellant paid out Mr. Charles Masinde's pension entitlements in accordance with the scheme rules.
- Erred in law and in fact by failing to hold that Mr. Charles Masinde is wholly impermissible under the scheme rules.

In response the Respondent filed a statement of facts and Defence both dated 11th February 2010 where it is submitted as follows:

- That the contributor filed a complaint form dated 4th June 2009 regarding the non-payment of his pension benefits as is required under the Law.
- Sometime between June 2009 and November 2009 the Respondent through its numerous letters dated 29th June 2009, 7th September 2009 and 2nd November 2009 sought the co-operation and comments of the Appellant in relation to the particular circumstances regarding the complaint and took the Appellant's evidence on record in to consideration before reaching the decision the subject matter of the Appeal herein.

- The Appellants neither substantively responded to the various requests and reminders issued by the Authority nor did they comply with the directions issued herein and as a consequence the Authority was constrained to issue formal direction under section 39 of the Retirement Benefits Act, 1997.
- Under rule 16 of the Schemes Trust Rule the Respondent directs the Appellant to the non-assignment, non-attachment and non-sequestration of benefits or contributions accruing or payable to a contributor.
- The Trustees mandate and responsibilities to a contributor to the scheme can only be discharged once it has delivered to that member the proper and full payment of retirement benefits accrued by the contributor and within the statutory period and which mandate the Respondent reiterates the Appellants have failed to discharge.

It is The Respondent's submission that the decision dated 27th of November 2009, the subject matter of this suit, was indeed legal and just and the same should be upheld by this Honourable Tribunal.

The Chief Executive Officer determined that Capt. (Rtd) Charles Masinde is entitled to his vested benefits in the scheme and ordered the trustees to ensure that Mr. Masinde was paid all his

vested benefits in accordance with Regulation 21 of the retirement Benefits (Occupational Retirement Schemes) Regulations 2000.

This decision arose out of a complaint filed by Capt. (Rtd) Charles Masinde dated the 4th of June 2009 brought against the trustees of the scheme whereby Mr. Masinde claimed that upon termination of his services with General Motors his pension benefits were not paid to him.

It is noteworthy that the Appellant has misled this Tribunal as to the Scheme Rules applicable at the time of termination of Service. The contributor's services were terminated on 9th November 2001 whereas the scheme rules used by the Appellant came in to force on 29th November 2001. Indeed the trust deed was actually varied after the contributor had already left the services of General Motors.

It is our humble submission that this Honourable Tribunal ought to satisfy itself as to the scheme rules applicable to the contributor in this case. In our opinion the contributor is not bound by the said scheme rules as he was not privy to the terms of the said contract and further that the Human resource manager at the relevant time (see page 48 of the Appellant's statement of facts) acted on behalf of General Motors (the sponsor) and not on behalf of the trustees as.

In the event that this Tribunal finds that the said scheme rules are applicable it our submission that the sponsor should double the contributors benefits as stipulated in *Rule 3 b (ii) of the rules of the General Motors Kenya Ltd Retirement Benefits Program.*

We shall respond to the following allegations in the Appellant's submissions:

1. The matter of jurisdiction of the CEO.
2. The apparent error in law with regard to:
 - Membership
 - Vesting of benefits
 - Assignment
 - Protection against attachment
 - Failing to distinguish between the mandate of the trustees and the sponsor
 - The High Court civil case
 - That Mr. Masinde was aware his benefits were paid out to him.

1. JURISDICTION

The Appellant contends that the CEO had no jurisdiction to hear the matter as Mr. Masinde had left the service of General Motors and make reference to Section 46 of the RBA Act which vests the CEO with the power to hear appeals where a member is dissatisfied with a decision made by the manager, custodian or trustees. Mr. Masinde made such an

appeal by virtue of his complaint dated 4th of June 2009. By virtue of Mr. Masinde not receiving his retirement benefits his only remedy could be found with the CEO as provided for in section 46 of the RBA Act.

The power to the CEO to intervene in matters regarding the scheme is not only limited to appeals made by members. Section 39(1) of the RBA Act states that:

“Where, in the opinion of the Chief Executive Officer, a trustee, manager or custodian of a scheme is pursuing an act or course of conduct which the Chief Executive Officer considers to be an unsafe or unsound practice, or in any way detrimental to the scheme, the Chief Executive Officer shall, by notice in writing, direct such trustee, manager or custodian to refrain from pursuing such act or course of conduct.”

By finding that Mr. Masinde had not been paid his benefits and that the CEO further stated that “your conduct as trustees is therefore unsafe and unsound and consequently detrimental to the above scheme” and further ordered that the trustees make payment to Mr. Masinde in full of his vested benefits in order to remedy the situation.

With regards to jurisdiction, the Appellants further submit that the issue of Mr. Masinde’s benefits were dealt with in HCCC No. 975 of 2005 and make reference to paragraphs 9 and 15 of the plaint.

Paragraph 9 of the plaint made reference to an amount of 5,556,510.00 to be deducted from his terminal dues which

amounted to 6,240,903.80. The deduction was unclear to everyone including the Human Resource department of the Sponsor, and thus required the sponsor, General Motors to make a true and proper account of such deduction.

Paragraph 15 made reference to retirement benefits, records of employment and testimonials that were illegally seized.

The said suit made no prayers for the retirement benefits. It sought redundancy payment and a true and proper account of the deductions made by General Motors. The latter prayers were granted by the High court and failure of the other prayers sought in no way affect the jurisdiction of this Tribunal.

2. THE LAW

The law applicable is expressed in:

- The Retirement Benefits (Occupational Retirement Schemes) Regulations 2000;
- The Retirement Benefits Act;
- The General Motors Staff Pension Scheme Rules applicable at the time of termination of Service.

2.1 Membership

Whereas regulation 18 of the Retirement Benefits (Occupational Retirement Schemes) Regulations 2000

provides for eligibility of membership, the Appellant contends that Mr. Masinde ceased being a member of the scheme as soon as his service was terminated.

The Respondent however is of the view that the trustees cannot evade their obligations under the scheme rules as the Chief Executive Officer had jurisdiction to hear the matter despite Mr. Masinde's termination of service.

The scheme rules under Regulation 20 governs liability of trustees whereby the Trustees shall be required to make payment and perform obligations under the scheme where they have been notified by the Founder or Member.... of all events giving rise or affecting the incidence of such liability.

2.2 Vesting of Benefits

With regard to the Appellants contention that the Trustees paid the amount due to Mr. Masinde in full, the Respondent relies on *regulation 20 of the Retirement Benefits (Occupational Retirement Schemes) Regulations 2000* and the Rules of the General Motors Retirement Benefits Scheme on page 39 of the Appellants' statement of facts. *Regulation 20* states that:

"The scheme rules shall provide that benefits be fully vested in a member within one year of commencement of pensionable service:

Provided that:

(i) All benefits derived from statutory contributions and contributions made by a member shall vest immediately in the member;

The periods of service of a member for the purposes of this regulation shall be determined without regard to temporary interruptions of employment of continuous periods of up to nine months or less."

This can be read with rule 15 of the rules of the General Motors Kenya Ltd Retirement Benefits Program which expressly states that:

"All benefits derived from contributions made by a member shall vest immediately in that member and the benefits derived from contributions made by the Founder shall fully vest in a member after a maximum of five years of contribution years."

The trustees therefore failed in their fiduciary duty to Mr. Masinde which required them to vest the payment in the member. Instead, the payment was made to the Founder i.e. General Motors who then went on to make illegal deductions contrary to Rule 16 rules of the General Motors Kenya Ltd Retirement Benefits Program which states that:

"No benefit or contributions accruing or payable hereunder shall be capable of assignment."

2.3 Payment of benefits

Regulation 21(1) of the Retirement Benefits (Occupational Retirement Schemes) Regulations 2000 states that:

"21. (1) The scheme rules shall make provision as to the treatment of the retirement benefits of a member where such member ceases to be an

employee of the sponsor before attaining the retirement age and such provisions may include:

(a) Payment of benefits to the leaving member, provided that the member shall not be entitled to the employer's contribution save as provided in the trust deed.

(b) Deferment of benefits until the leaving member attains the normal retirement age; and

(c) Transferring of benefits to another scheme elected in writing by the leaving member."

This provision was catered for under *rule 10(iv) of the General Motors Kenya Ltd Retirement Benefits Program* whereby the member has the option of:

Option 1: transfer to another retirement benefits scheme

The member may opt for the transfer of his benefits under the scheme to his new employer's retirement benefits scheme

Option 2: deferred benefits

He may elect not to continue making contributions to the scheme. In that event he shall be entitled to the benefits secured by the total contributions made on his account before and after he ceased to be in the service which shall be payable at his Normal Pension Date.

Option 3: return of Contributions

He may elect to receive the cash surrender value of his benefits under the scheme.

From the foregoing the decision should be made by the member. However, the retirement benefits Claim Form on page 49 of the

Appellants statement of facts illustrates that such decision was not left to Mr. Masinde as the form was signed by Mr. Benjamin Mshila who was then the HR Manager of the sponsor company. It is quite clear that Mr. Masinde was unaware of any such payment as upon attaining the age of 55 on the 18th of May 2009 which was the Normal Pension Date, he requested payment of his deferred benefits by his letter dated 18th May 2009. (See page 68 of the Appellant's statement of facts.)

2.4 The Retirements benefits (administrators Regulations)

Section 20 and 21 of the Act fully vest the benefits in the Member himself although this regulation was only introduced in 2007, After the commencement of this matter which occurred in 2001, the scheme rules themselves, which were applicable at the time, fully vest the benefits immediately in the Member under Rule 15 of the General Motors Kenya Ltd Retirement Benefits Program.

Though it is not contended that the amendment to the rules was made in 2007, the Respondents view is that the Trustees were vested with a fiduciary duty to act in the best interests of the Member.

The trustees failed to execute this duty when the member was not informed that the payment was being made to him, the form was filled and signed by one Ben Mshila and furthermore, once the cheque was made out to the Sponsor instead of the member, he

was not informed of its existence and the sponsor then went on to make deductions from the cheque.

Despite the appellants contention that the said acts were common practise at the time that does not then legitimize the same. The trustees actions were found by the CEO to be “...unsafe and unsound and consequently detrimental to the above scheme” thus requiring them to make the necessary payment to Mr. Masinde.

2.5 Assignment

Section 36 of the Retirement Benefits Act protects the contributor against attachment. It states that:

“Notwithstanding anything to the contrary contained in any other written law, where a judgment or order against a member of a scheme is made, no execution or attachment or process of any nature shall be issued in respect of the contributions or funds of the member or his employer except in accordance with the scheme the 'scheme rules and such contributions shall not form part of the assets of the member or of his employer in the event of bankruptcy.”

When read with the scheme rules, rule 16 states that “No benefit or contributions accruing or payable hereunder shall be capable of assignment.” Under the same rules the sponsor should have sought a remedy by virtue of rule 27 which specifies that the founder may sue the member for any unpaid loans and only in the event of an order against the member can the Founder attach the Members contributions.

“The founder has a right to sue any member for any unpaid loans advanced by to the member by the founder and where a judgment or order against the member of the scheme is made, execution or attachment or process of any nature may be issued in respect of the contributions or other benefits of that Member under the scheme to recover such unpaid loans.”

We are also guided by the following authority:

RBTC NO.1 OF 2009 Trustees of New KCC Ltd(Junior) Staff Pension Scheme -Vs- CEO RBA

The Appellant appealed to the Tribunal against a decision made by the Respondent on 24th October 2008 where the Respondent directed among others that the Appellant pays the complainant his accrued retirement benefits.

At pager 13, paragraph 3, the Appellants submitted that they paid the Complainant’s benefits to KCC Ltd for onward transmission to the Complainant. There was however no evidence given to the Tribunal to show that the alleged payment was indeed made or acknowledged by the alleged payee.

The Tribunal concluded that the said payment if made to KCC ltd was wrongful because it was not made to the complainant who was *the only party legally and lawfully entitled to it*.

In affirming the Respondent's decision the Tribunal held on page 16 at paragraph 3; *"We find that the decision made by the Respondent on 24th October 2008 supra is a correct and a proper one arrived at by him on the consideration and assessment of all facts adduced before him. Consequently, this appeal is dismissed on merit"*

It is our humble submission that the Appellant has not provided any evidence to this Tribunal that it indeed paid the Complainant his retirement benefits and hence the Appellant should comply with the Respondent's decision dated 27th November 2007 as the same is correct and proper.

3. DISTINCTION BETWEEN THE SPONSOR, GENERAL MOTORS KENYA LTD AND THE TRUSTEES

The Appellant claims that the trustees discharged their mandate by drawing the cheque in favour of General Motors in accordance with the scheme rules.

The rules however place the burden of vesting the payments in the member and this was further distinguished by amendment of the rules to ensure that payment was made directly to the member.

From the documents before the Tribunal, it is clear that the payment was ordered by the sponsor themselves without consulting the Member, furthermore once the cheque was drawn no attempt was made by the Trustees or the Sponsor, general Motors to notify Mr. Masinde that his retirement benefits had been paid out and that deductions would be made to furnish his debts.

As such by acting in favour of the sponsor as opposed to acting in the best interests of the Member, the trustees failed in their mandate

4. HCCC No. 795 of 2005 Rtd. Capt Charles Masinde vs. General Motors Kenya limited.

In that matter, Plaintiff sought the following prayers:

- a) 8,850,000/= under paragraph 23 which refers to that as a result of non-employment for 34 months due to non-issuance of a certificate of service by the defendant as aforesaid he was unable to earn 8,850,000/=
- b) A true and proper account of Kshs 5,556,510.60/= deducted by the defendant from the plaintiff's terminal benefits under paragraph 12 which makes reference to a ploy by the defendant's MD and HR Director to render the plaintiff's position obsolete without having to pay him his redundancy dues.
- c) A declaration that the plaintiff was rendered redundant by the defendant

- d) Redundancy payments amounting to Kshs. 17,35200/-
- e) General damages
- f) Exemplary and aggravated damages.

From the foregoing it is clear that no mention was made of retirement benefits as from the letter dated the 18th of May Mr. Masinde was of the opinion they would fall due upon the Normal Date of Retirement.

Although the court did not grant the other prayers the prayer with regard to a true and proper account was granted whereby the Judge stated:

'From the evidence on record the mathematics of the deductions was not clear even to the defence witness. It is only reasonable that the deductions be recalculated, the discrepancies noted, rectified and the same explained to the plaintiff. In this regard the court is inclined to grant prayer b of the further amended plaint that the true and proper account of the Kshs, 5,556,510.60/= deducted from the plaintiffs dues and benefits be made and any refund due to him be paid forthwith. "

The judgment therefore indicates that upon such clarification any necessary refund shall be remitted to Mr. Masinde. Upon making an account it was clarified that the deductions were made from the Members benefits which should not have been made available to the sponsor to make deductions.

For this reason, the judgment of the High court in no way affects the CEO's decision and if anything, should only serve to corroborate his decision as it was clear that the payment of his

benefits was not remitted to the Member as is the mandate of the Trustees.

5. COMPLAINT

With regard to the Appellants averments that the complainant was aware that the payments were made to him we put them to strict proof thereof as the request for payment came from the sponsors themselves without any direction from the Member.

The trustees without regard to the instructions of the Member went on to make payment to the sponsor who then made deductions from the Members retirement benefits.

Only upon reaching the Normal retirement date did the member become aware that his payments were made and it was not until an account was ordered by the high court that he learnt that the sponsor made the deductions from those benefits.

In addition, the contributor also made contribution to the Kenya National assurance Company Limited which was later placed under receivership. However the sponsor has to date not declared nor accounted for any monies that may be due and outstanding to the contributor.

It is the contributor's submission that all the money under the scheme was later released to General Motors and Members have not yet been paid. The Appellant needs to address the Tribunal on this issue.

CONCLUSION

The Trustees of a Retirement Benefits fund have a fiduciary duty to the Members of the fund to act in his best interests. In this instance, the trustee, under the instruction of the Sponsor, made the payment of the member's retirement benefits in the name of the sponsor.

The trustees then went on to remit the same to the sponsor, without informing the Member that such payments had been made, from which the sponsor then made deductions.

The CEO, therefore, made a just decision in finding that the Trustees acted in a manner that was unsafe and unsound and consequently detrimental to the above scheme.

Accordingly the respondent prays that this appeal be dismissed with costs and as such the Trustees should remit Mr. Masinde's benefits and contributions to him as decided by the Chief Executive Officer.

On 10th March, 2011 the case was heard. Mr. Wasike gave verbal evidence for the Appellants. On 5th April, 2011 counsel for the parties highlighted their submissions. The parties were also granted leave to file any documents that they wish which may assist the Tribunal in arriving at a just decision. Judgment was reserved to be delivered on notice. Both parties filed further submissions and submitted documents.

The issues that arise for determination are:-

1. Whether the Respondent has jurisdiction to determine the complaint filed by Captain (Rtd) Charles Masinde against the Appellants.
2. Whether the High Court has determined Captain (Rtd) Charles Masinde's claim against the Appellants.
3. Whether the Appellants are liable to Captain (Rtd) Charles Masinde.
4. Interest and costs.

The jurisdiction of the Respondent is being challenged on the basis that at the time the complaint was filed, Captain (Rtd) Charles Masinde had ceased being Member of the Appellants' Scheme, no benefits had vested in the said Captain (Rtd) Charles Masinde and that there were proceedings pending in the High Court between the said Captain (Rtd) Charles Masinde and the Sponsor of the General Motors Kenya Limited Staff Retirement Benefits Scheme namely, General Motors Kenya Limited. This is **HCCC No. 795 of 2005 Rtd. Capt Charles Masinde vs. General Motors Kenya limited**. The Respondent's jurisdiction is donated by Section 46(1) of the Retirement Benefits Act which reads "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". The

word “**Member**” is defined in the said Act as “a member of a retirement benefits scheme and includes a person entitled to or receiving a benefit under a retirement benefits scheme”

Mr. Wasike in his evidence admitted that Captain (Rtd) Charles Masinde was a Member of the General Motors Kenya Limited Staff Retirement Benefits Scheme and entitled to benefits as expressed in the Trust Deed and Rules of the said Scheme. Going by the definition of Member above, it is clear to us that a person would not cease to be a Member of a retirement benefits scheme until all his benefits are paid in accordance with the Scheme Rules and the trusts thereby discharged. The contention by the Appellants that Captain (Rtd) Charles Masinde ceased to be a Member of the General Motors Kenya Limited Staff Retirement Benefits Scheme on 9th November, 2001 when he terminated employment with General Motors Kenya Limited is devoid of merit and is rejected.

On 9th November, 2001 when Captain (Rtd) Charles Masinde terminated employment with General Motors Kenya Limited both the Scheme Rules of General Motors Kenya Limited Staff Retirement Benefits Scheme and law expressly provided that benefits shall fully vest in a member within five years of commencement of pensionable service. The relevant law is Regulation 20 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000. Captain (Rtd)

Charles Masinde had served General Motors Kenya Limited and been Member of General Motors Kenya Limited Staff Retirement Benefits Scheme since 1st February, 1990. We find that benefits vested in him.

Captain (Rtd) Charles Masinde filed his complaint with the Respondent on 4th June, 2009. Sometime in August 2005, Captain (Rtd) Charles Masinde instituted court proceedings through High Court of Kenya Civil Suit No. 975 of 2005 against General Motors Kenya Ltd in which at paragraphs 9 and 15 of the Further Amended Plaint dated 29th October 2008, he is challenging the manner in which his terminal dues were computed and paid out to him and the legality thereof. The jurisdiction of the Respondent would have been affected by the proceedings if the payment of Captain (Rtd) Charles Masinde's retirement benefits by the Appellants was an issue before the High Court. It would have been an issue if there was a jointer of issues on, among others, the following matters:-

- (a) Whether a breach of trust has been committed;
- (b) Whether General Motors Kenya Limited is liable for breach of trust;
- (c) What the measure of liability for such breach is;
- (d) Whether there is any right to contribution or indemnity by the Appellants;

- (e) Whether General Motors Kenya Limited may be relieved from liability by the court or otherwise.

We have perused the Further Amended Plaintiff dated 29th October, 2008, the Amended Defence dated 21st May, 2007 (these appear at pages 55 to 62 and 63 to 67 respectively of the Appellants' Statement of Facts) and other pleadings filed in High Court of Kenya Civil Suit No. 975 of 2005 Captain (Rtd) Charles Masinde – versus - General Motors Kenya Ltd. Under Rule 27 of the Appellants' rules, General Motors Kenya Limited was entitled by way of Counter-Claim to raise its liabilities against the Plaintiff. It did not. We are unable to find that on 27th November, 2009 when the Respondent heard and determined the complaint filed by Captain (Rtd) Charles Masinde against the Appellants the suit or proceedings in the High Court did not contain a matter in issue directly and substantially between the same parties, or between parties under whom they or any of them claim, litigating under the same title. Such a scenario would have required the Respondent to stay the proceedings before it.

We have made a finding that the suit or proceedings in the High Court did not contain a matter in issue directly and substantially between the Appellants and Captain (Rtd) Charles Masinde, or between the parties under whom they or any of them claim, litigating under the same title. We have further read the judgment delivered by the High Court on 19th August, By analogy we

conclude that the High Court has not determined Captain (Rtd) Charles Masinde's claim against the Appellants;

By their own admission, the Appellants state that the benefits due to Captain (Rtd) Charles Masinde were withdrawn and paid to General Motors Kenya Ltd. The withdrawal was made pursuant to a request made by a letter dated 12th November, 2001 addressed to the then Administrators of the Appellants' scheme, Kabage Mwirigi Insurance Brokers Limited. The then the Human Resources Manager of General Motors Kenya Limited, Mr. B. M. Mshila signed both the letter aforesaid and Retirement Benefits Claim Form. These are marked at pages 48 and 49 respectively of the Appellants' Statement of Facts. In the Retirement Benefits Claim Form, it is indicated that a cash refund is required. It was submitted for the Respondent that at the time Mr. Mshila signed the two documents, he was not a trustee of the Appellants' scheme. He became trustee on 29th November, 2001 when he signed the Trust Deed and Rules of even date. We say so because his name does not appear in the Trust Deed and Rules dated 20th April, 1979 of the Appellants' Scheme. There was no evidence by the Appellants to suggest otherwise.

On 14th November, 2001 Kabage & Mwirigi Insurance Brokers Limited forwarded to General Motors Kenya Limited a calculation showing a sum of Kshs. 4,525,163.89 as the benefits payable to Captain (Rtd) Charles Masinde and on 28th November,

2001 Barclays Bank of Kenya Limited the then Custodian of the Appellants' Scheme issued a cheque payable to General Motors Kenya Limited for the same amount. These are shown at pages 50 and 51 respectively of the Appellants' Statement of Facts. The Appellants submitted that their practice then of settling retirement benefits claims was to pay the same to the Sponsor for own-ward transmission to the beneficiary; in this case Captain (Rtd) Charles Masinde. They also submitted that as the benefits have been withdrawn from the Scheme and paid to the Sponsor, their liability has been discharged and they are not liable to Captain (Rtd) Charles Masinde even if he did not receive the monies. The Appellants submitted that even though General Motors Kenya Limited appropriated Captain (Rtd) Charles Masinde's benefits towards settlement of some alleged liabilities, he received the benefit of it and therefore they are not liable to him. If we accept this submission, we would be sanctioning a situation where the Appellants and General Motors Kenya Limited have jointly and/or severally acted in breach of trust and to say that the end justifies the means. Indeed their action may be described as misappropriation and arbitrary deprivation of the right to property without recourse to law and justice. We decline to accept the Appellants' contention.

If the alleged liabilities of Captain (Rtd) Charles Masinde to the General Motors Kenya Limited were disclosed or subjected to arbitration by a third party, the Captain (Rtd) Charles Masinde

would have been entitled to such defences as may be applicable under the law. Such action by General Motors Kenya Limited would have been consistent with Rule 27 of the Appellants' Scheme Rules. The Rule obliges General Motors Kenya Limited to sue a Member of the Appellants' Scheme to recover any liabilities due to it. This was not done.

Clause 12(b)(iv) of the Appellants' Trust Deed permits the Appellants to give written authority to any person to give or receive receipts and discharges on their behalf. The Appellants did not produce evidence of any receipt having been given on their behalf by General Motors Kenya Limited or any other person in respect of the benefits due to Captain (Rtd) Charles Masinde. We conclude that the trusts of the Appellants in respect of Captain (Rtd) Charles Masinde have not been discharged.

The Respondent contended that the procedure used to withdraw the benefits of Captain (Rtd) Charles Masinde is irregular, contrary to the Trust Deed and Rules of the Appellants' scheme and the law. The beneficiary, Captain (Rtd) Charles Masinde was not involved in the process of withdrawal of his benefits and has not been requested to nor signed an appropriate discharge for the monies. The withdrawal was not made known to him as it ought to have been.

Rule 10(iv) of the Appellants' scheme rules requires a beneficiary who has resigned (as is the case with Captain (Rtd) Charles Masinde) from employment before reaching the Normal Retirement Age (55 years) to in respect of his benefits exercise one of the options:-

1. Transfer to another scheme; or
2. Defer to retirement age; or
3. Withdraw cash surrender value of both his and sponsor contributions.

The Respondent submitted that the Appellants ought to have obtained consent of Captain (Rtd) Charles Masinde in respect of these choices. They did not.

The Appellants are trustees of a trust namely, General Motors Kenya Limited Staff Retirement Benefits Scheme which is subject to the Retirement Benefits Act and the law generally. Under Sections 24 and 40 of the Retirement Benefits Act the trusts are established irrevocably and the Appellants are required respectively to:-

- (a) ensure that the General Motors Kenya Limited Staff Retirement Benefits Scheme is at all times managed in accordance with the law, the Trust Deed & Rules and any directions given by the Respondent; and
- (b) take reasonable care to ensure that the management of the said General Motors Kenya Limited Staff Retirement Benefits

Scheme is carried out in the best interests of the Members (who include Captain (Rtd) Charles Masinde).

The general duties of the Appellants without limiting are that they shall:-

- (1) not delegate their trusts;
- (2) pay the right amount of benefits to the correct recipient;
- (3) act in the best interest of beneficiaries of the trust;
- (4) render to a beneficiary a true and honest account of the assets of the trust.

The Trust Deed and Rules dated 29th November, 2001 of General Motors Kenya Limited Staff Retirement Benefits Schemes was relied by the parties as a basis for their case. It makes the following provisions:-

1. Clause 3 - Directs that the main purpose of the Appellants' scheme is to provide pensions to Members -----.
2. Clause 15(c) - The Appellants are required to compute and prepare statements of payment of benefits to Members;
3. Rule 10(i) & (ii) - All the benefits secured by contributions made by the Member and Founder shall vest in the Member immediately and upon 5 or more years of contributions respectively;
4. Rule 16 - No benefits or contributions accruing shall be assigned.

It is trite law that in all cases, one identifies a breach of trust by showing that a term of the trust or a general duty imposed on the trustees has been contravened.

When the Appellants:-

1. Permitted B.M. Mshila to write a letter to Kabage & Mwirigi Insurance Brokers Limited and sign a Retirement Benefits Claim Form when he was not a trustee and without consulting the beneficiary, they delegated their trusts to the Founder, breached their fiduciary duty to Captain (Rtd) Charles Masinde and participated in irregular non permitted assistance in breach of trust by the Founder. We say so because B.M. Mshila acted for the Founder and at all times knew or ought to have known that he was dealing with trust funds which did not belong to the Founder (General Motors Kenya Limited);
2. Permitted payment of the retirement benefits of Captain (Rtd) Charles Masinde to General Motors Kenya Limited they breached the objective of the Scheme in Clause 3 of the Trust Deed which is to provide benefits to Members, their general duty to pay benefits to the correct recipient and Rule 15(c) stated above.
3. Permitted General Motors to purport to use the retirement benefits of Captain (Rtd) Charles Masinde in satisfaction of alleged liabilities, they acquiesced in illegal assignment of retirement benefits and breach of trust on knowing receipt of

trust assets. The Appellants violated Regulation 22 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 and Rule 16 (stated above).

Where a trustee pays money to a person who is not a proper beneficiary of the trust, the liability of the trustees is strict. The law does not inquire into whether the trustee breached the trust innocently, negligently or intentionally. The trustee is liable for his breaches regardless. The settled law is that a trustee is bound to pay the right amount of benefits to the correct recipient. The trustee's duty to act loyally, honestly and in good faith are an irreducible core set of trustee obligations, breach of which cannot be relieved. A trustee must at all times act in the best interest of a Member. These general and express duties apply in respect of the Appellants vis-a-vis Captain (Rtd) Charles Masinde. The Appellants acted in breach of these duties. The Appellants are jointly and severally liable to Captain (Rtd) Charles Masinde in the sum of Kshs. 4,525,163.89 allegedly paid by them to General Motors Kenya Limited.

Regulation 7(kk) of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 requires every retirement benefits scheme to mandatorily have rules which are written in English and make provision for interest chargeable on late payment of benefits from the scheme; Provided that such

interest shall not be less than the investment interest declared by the scheme in the year the payment was due.

In conclusion we answer the issues thus:-

1. *Whether the Respondent has jurisdiction to determine the complaint filed by Captain (Rtd) Charles Masinde against the Appellants. YES.*
2. *Whether the High Court has determined Captain (Rtd) Charles Masinde's claim against the Appellants. NO.*
3. *Whether the Appellants are liable to Captain (Rtd) Charles Masinde. YES.*
4. Interest and costs.

Having considered fully all the submissions made before us, we find that there is little merit in the grounds of appeal and that the Respondent made a proper assessment of the facts before him and arrived at a proper and sound decision. We do not find reason to interfere in this and consequently dismiss the appeal.

In the upshot, we make the following orders:-

- (a) The appeal be and is hereby dismissed;
- (b) The Appellants shall jointly and severally pay to Captain (Rtd) Charles Masinde the sum of Kshs. 4,525,163.89;
- (c) The Appellants shall jointly and severally prepare and submit to Captain (Rtd) Charles Masinde a statement of

- account showing how the sum of Kshs. 4,525,163.89 is calculated and arrived at;
- (d) The Appellants shall jointly and severally pay interest on the sum decreed in (b) above from 14th November, 2001 until payment in full which shall not be less than the investment interest declared by the General Motors Kenya Limited Staff Retirement Benefits Scheme in the years that the benefit has remained due;
 - (e) The Appellants shall jointly and severally pay the Respondent's costs of the Appeal.

Orders accordingly.

We are greatly indebted to Counsel representing both parties for their co-operation, research and able submissions. We thank them for all their industry.

DATED at **NAIROBI** this 27th day of July, 2011.

Original Signed

Justice (Rtd) Shaikh M. Amin – Chairman

Original Signed

Barnabas G. Kariuki – Member

Original Signed

Naftal Juma Odinjo – Member

Original Signed

Joseph K. Kamiri – Member

Original Not Signed - Dissenting

Anthony P. Davies – Member