

**IN THE RETIREMENT BENEFITS APPEALS TRIBUNAL
AT NAIROBI
CIVIL APPEAL No. 3 of 2013**

Stephen Wahome Ihiga & 16 Others - Appellants

- Versus -

1. Retirement Benefits Authority - 1st Respondent
2. Kenya Airports Authority Staff Superannuation Scheme --- 2nd Respondent

JUDGMENT

Background

The Appellants are Members of the 2nd Respondent. The 1st Respondent is a state corporation established under the Retirement Benefits Act. On 17th June, 2013 the Appellants through their Advocates, Koceyo & Company pursuant to Section 46 of the Retirement Benefits Act filed a Complaint with the 1st Respondent.

The Appellants complained that the 2nd Respondent has:-

1. Failed to give the Appellants annual pension increases as required by the law;
2. Has wrongfully continued to apply the Trust Deed and Rules dated 26th June, 2002 instead of the Trust Deed and Rules dated 2nd October, 2006 in the calculation of their benefits;

3. Has wrongfully underpaid the monthly pensions payable to the Appellant and ought to pay interest on the unpaid monies.

The Appellants concluded by requesting the 1st Respondent to appoint an Interim Administrator to enforce its directives against the 2nd Respondent.

On 1st August, 2013 the 1st Respondent summarily declined the Appellants' complaint on the grounds that it is substantially the same as that raised by other Clients of the Appellants' Advocates in the year, 2007 a decision whereof was made on 16th July, 2007 and communicated to the Appellants' Advocates. The year, 2007 Complaint referred to in the preceding sentence is dated 30th May, 2007. Aggrieved by the decision of the 1st Respondent, the Appellants on 15th August, 2013 filed this Appeal.

The Appellants' case

The Appellants' Memorandum of Appeal was filed together with a Statement of Facts dated 14th August, 2013. The Appellants' main ground of appeal is that the 1st Respondent failed to make a decision on their Complaint. The Appellants set forth the following particulars to support their claim all against the 1st Respondent alleging failure by the 1st Respondent to consider that:-

- (a) the Appellants' Complaint is merited despite the same raising new and fundamental breaches of the Scheme Rules and the Law;
- (b) the breach complained about is continuous and has never been decided and/or resolved and each continuous breach constitutes a new course of action;

- (c) not all Appellants had lodged a complaint in the year, 2007;
- (d) each subsequent month when a monthly pension is underpaid in violation of the law constitutes a fresh cause of action; and
- (e) failure to effect annual pension increases on the Appellants' monthly pension constitutes fresh cause of action.

In the Statement of Facts, the Appellants stated that:-

1. The 2nd Respondent was commenced by the Trust Deed and Rules dated 11th August, 1995 as amended from time to time resting with the amendment represented by the Trust Deed and Rules dated 2nd October, 2006 to provide retirement benefits to persons who become members.
2. On or about 17th June, 2013 they became aware that the 2nd Respondent by way of fraudulent misrepresentation, concealment and/or non-disclosure of material facts caused the Appellants to be paid reduced pensions contrary to the Trust Deed and Rules;
3. The Appellants filed their Complaint on 17th June, 2013 expressing dissatisfaction with the 2nd Respondent and sought the 1st Respondent's intervention in the matter;
4. On 1st August, 2013 the Appellants through their Advocates received a letter by the 1st Respondent declining the Appellants' complaint on the grounds that it is substantially the same as that raised by other Clients of the Appellants' Advocates in the year, 2007 a decision whereof was on 16th July, 2006 and communicated to the Appellants' Advocates;

5. The 1st Respondent failed to consider that not all the Appellants had lodged a complaint in the year 2007 and that generalizing the complaint prejudiced the Appellants;
6. The 1st Respondent failed to arbitrate the Appellants' dispute with the 2nd Respondent.

The First Respondent's Case

The First Respondent has not filed any notice of representation in the case. We mean Memorandum of Appearance or Notice of Appointment of Advocates, Statement of Defence and Statement of Facts. Notwithstanding the foregoing, however, on 23rd July, 2014 the 1st Respondent filed a Notice of Preliminary Objection to the Appellants' case on the following grounds:-

1. Appeal by 1st to 14th Appellants is Res-Judicata by reason whereof the Tribunal is deprived of jurisdiction to hear the case;
2. Appeal by 16th and 17th Appellants is time barred by dint of Section 48 of the Retirement Benefits Act; and
3. The Tribunal has no jurisdiction to extent time for filing appeals.

On the same date, the 1st Respondent filed a List and Buddle of Authorities. The list refers to statutes and case law some of which were not filed.

Those filed are case law in:-

- (a) Mukisa Biscuit Manufacturing Co. Ltd - Vs. - West End Distributors Ltd (1969) EA 696; and
- (b) Pop-in (Kenya) Limited & 3 others - Vs. - Habib Bank AG Zurich Civil Appeal No. 80 of 1988.

Those not filed are statutes and case law relating to the:-

- (a) Retirement Benefits Act;
- (b) Civil Procedure Rules; and
- (c) Owners of Motor Vessel "Lilian S" - Vs. - Caltex Oil (Kenya) Limited (1989) KLR 1.

Nonetheless, the 1st Respondent sought to rely on these documents during the hearing of this appeal. We shall return to the same when we consider the submissions made by the parties.

The 2nd Respondent's Case

On 15th April, 2014 the 2nd Respondent filed one document headed "**2nd Respondent's Statement of Facts and Defence**". We have highlighted this part of the 2nd Respondent's pleading to underscore the importance of the parties before the Tribunal to comply with the set procedural rules. The rules are the handmaid of justice and unless there is an exception, they should be strictly obeyed.

Rules 6 and 8 of the Retirement Benefits (Tribunal) Rules, 2000 require a person named as a Respondent in an appeal and wishes to defend the case to file separately:-

1. Statement of Defence; and
2. Statement of Facts to which all the documents to be relied at the hearing should be annexed.

A party may choose to file one, both or none of the documents. The objective is to enable the:-

- (a) Tribunal to correctly assess and collect the fees prescribed for filing the documents;
- (b) Parties to clearly and easily understand the other party's case in terms of matters pleaded, facts and documents relied.

The 2nd Respondent has adopted other procedure and not the prescribed one the result being manifest in the rival correspondence between its Advocates and the Tribunal in this case.

Be that as it may, we shall proceed to consider the 2nd Respondent's case without prejudice to the omission. We expect that in somewhat future case if any, there shall be compliance.

In their Statement of Defence and Facts aforesaid, the 2nd Respondent denied the Appellants' claim and raised objection on matters of law as follows:-

1. Appellants ought to prove their Membership in the 2nd Respondent;

2. Appellants' case is barred by Sections 4 and 20 of the Limitation of Actions Act because they discovered in the year 2006 the facts constituting their cause of action by reason whereof the jurisdiction of the Tribunal is affected;
3. The 2nd Respondent denied fraudulent misrepresentation, concealment and/or none disclosure of material facts;
4. The 2nd Respondent referred to the decision made by the 1st Respondent on 16th July, 2007, HCCC No. 340 of 2008 Stephen Wahome Ihiga & Others - Vs. - Kenya Airports Authority & Others, RBATCA No. 7 of 2010, **JR. 223 of 2012** and asserted that the Appellants' case is res-judicata;
5. The 1st and 5th Appellants did not submit their case to the 1st Respondent for determination before filing this appeal;
6. Of all the Appellants, only the 10th Appellant did not participate in the proceedings set out in paragraph 4 above and that the 2nd, 5th and 9th Appellants' claim is res-judicata and barred by Section 48 of the Retirement Benefits Act because:-
 - (a) 5th and 9th Appellants are complainants in the 30th May, 2007 Complaint;
 - (b) 2nd Appellant was Plaintiff in HCCC No. 340 of 2008.
7. The Appellants' claim in this appeal is substantially the same as that filed in the 30th May, 2007 Complaint determined by the 1st Respondent;
8. The Appellants' claim is frivolous, vexatious and scandalous;
9. The Tribunal has no power or jurisdiction under the Retirement Benefits Act to issue the orders requested by the Appellants.

Together with the Statement of Defence and Facts, the 2nd Respondent on even date filed a list of Documents. These comprise:-

- (a) Judgment delivered on 23rd February, 2012 by the Tribunal in RBATCA No. 7 of 2010 - Stephen Wahome Ihiga & 16 others - Vs. - The Trustees, Kenya Airports Authority Superannuation Scheme;
- (b) Judgment dated 30th April, 2013 in JR 223 of 2012 R - Vs. - Retirement Benefits Appeals Tribunal & 2 others;
- (c) Complaint in HCCC No. 340 of 2008 - Stephen Wahome Ihiga & 16 others - Vs. - Kenya Airports Authority & 5 others;
- (d) Complaint dated 30th May, 2007; and
- (e) First Respondent's decision dated 16th July, 2007.

The Appeal came for hearing on 3rd October, 2014. The 1st and 2nd Respondents raised preliminary objection to the Appellants' case. The objections were heard and judgment reserved to be delivered on notice.

The appearance was:-

1. Mr. Titus Koceyo for the Appellants;
2. Mr. Isaack Kiche for the 1st Respondent; and
3. Ms. Wanjiru Ngige for the 2nd Respondent.

Second Respondent's submissions

The 2nd Respondent relied on their Statement of Defence and Facts filed on 15th April, 2014 and Written Submissions filed on 11th July, 2014. They

raised objection relating to jurisdiction, limitation of time and Res-judicata.

The 2nd Respondent relied on JR No. 223 of 2012 and asserted that the High Court has prohibited the Tribunal from hearing or entertaining any further proceedings in RBATCA No. 7 of 2010 or hearing or determining the case of the Appellants based on facts or substantially the same facts as those which arose in the said appeal. The 2nd Respondent added that he Appellants' case is an effort to circumvent the High Court order.

The 2nd Respondent cited the Court of Appeal Case of Trade Bank Limited - Vs. - Engineering Construction Limited concluded that although this is another appeal, the facts are the same and that the High Court order in JR No. 223 of 2012 has not been stayed or varied and that the orders therein apply to the Tribunal in this case.

The 2nd Respondent urged the Tribunal to dismiss the case with costs.

First Respondent's submissions

As stated earlier in this judgment, the 1st Respondent has not:-

- (a) entered appearance and filed a Notice of Appointment of Advocates;
- (b) filed a Statement of Defence or Statement of Facts.

In its submissions, the 1st Respondent relied on the Preliminary Objection filed on 23rd July, 2014 together with the List and Bundle of Authorities of even date.

In its submissions, the 1st Respondent relied on the documents filed by the Appellants and the 2nd Respondent to expound on what it considered facts in the case. They challenged the jurisdiction of the Tribunal on the basis that the Appellants' case is Res-judicata and is barred by limitation of time for filing appeals in the Tribunal under Section 48 of the Retirement Benefits Act.

The 1st Respondent referred to the Complaint dated 30th May, 2007 contained in the 2nd Respondent's Statement of Defence and Facts, and pointed out that Appellants 1 to 6, 11, 13 and 16 signed the Complaint following which after the decision of the 1st Respondent, the Appellants filed Civil Appeal Number 7 of 2010. The 1st Respondent submitted that the Tribunal is barred by the High Court prohibition issued in JR Application No. 223 of 2012 from hearing or determining this appeal.

The 1st Respondent concluded that by reason of Appellant Number 8, Wycliffe Kichana Amutala having signed the Complaint dated 30th May, 2007 it does not matter that he was not a party in RBATC No. 7 of 2010 because by dint of Section 48 of the Retirement Benefits Act, he is barred by limitation given that the 1st Respondent's decision in the matter was made on 16th July, 2007.

The 1st Respondent urged the Tribunal to dismiss appeal with costs.

Appellants' submissions

The Appellants relied on their Memorandum of Appeal, Statement of Facts and Written Submissions filed on 20th June, 2013.

They submitted that they are members of the 2nd Respondent and that on or about June, 2013 they became aware that the 2nd Respondent by way of fraudulent misrepresentation, concealment and/or non-disclosure of material facts had reduced the monthly benefits payable to them. It is on this discovery that the Appellants filed a complaint with the 1st Respondent culminating in this appeal.

The Appellants submitted that the 1st Respondent fell in error by failing to investigate their complaint and generalising the Appellants' complaint as that filed in the year, 2007 upon which a decision was given on 16th July, 2007. The Appellants added that their complaint was continuous as it relates to none payment of the correct pension monthly by the 2nd Respondent on which there has never been a decision made by the 1st Respondent or any other competent arbitrator.

The Appellants asserted that their complaint, the subject matter of this appeal is substantially different from that dated 30th May, 2007 relied by the 1st Respondent to decline their case. Specifically, it was submitted that the 1st Appellant has not identified with the complaint dated 30th May, 2007 or at all and that each month when his pension is not paid in full by the 2nd Respondent such action constituted a new cause of action.

Citing authority in HCCC No. 445 of 2008 - Albert Ekirapa & Others - Versus - The Aga Khan Foundation & another the Appellants submitted

that their case is not affected by res-judicata because Judicial Review is not “Suit” so as to constitute Res-judicata and that Judicial Review does not deal with merits of a case.

The Appellants relied on further authority being Eldoret HCCC No. 38 of 2007 - Yuhya Farmers’ Co-operative Society Limited - vs - Mercia Muliro, and asserted that a new suit by a party after Judicial Review is not res-judicata.

The Appellants summed up the case to mean that after JR 223 of 2012 quashing RBATC No. 7 of 2010, subsequent suit by the Appellants cannot be said to be res-judicata. The Appellants concluded their case under this limb by relying on JR Appl. No. 433 of 2012 - Republic - Vs - City Council of Nairobi & others and submitted that Res-judicata does not apply in Judicial Review decisions.

The Appellants submitted that JR 223 of 2012 does prohibit trial of RBATCA No. 7 of 2010 and not this appeal concluding that it would be against public policy to refuse Appellants permission to access justice.

In conclusion, the Appellants submitted that their claim is based on breach of trust which is continuous and that their appeal arises out of the 2nd Respondent’s decision made on 1st August, 2013 and not that of 16th July, 2007. The Appellants added that this Appeal was filed on 15th August, 2013 and therefore it is within the time prescribed by law.

The Appellants urged the Tribunal to dismiss objections and allow the appeal with costs.

DETERMINATIONS

We have reviewed the pleadings filed herein and considered the rival written and oral submissions of the parties. The parties have not filed issues for determinations. After considering the case, we have framed the issues we consider necessary to dispose of the Preliminary Objection taken by the 1st and 2nd Respondent.

Before setting out the issues, we consider it appropriate to state in our understanding:-

1. The nature of the Appellants' claim; and
2. What a Preliminary Objection is, its nature and application.

1. NATURE OF APPELLANTS' CLAIM

The Appellants' claim is based on alleged fraudulent misrepresentation, concealment and/or non-disclosure by the 2nd Respondent which has resulted in loss to the Appellants. These are allegations founded on breach of trust.

Although the Complaints filed on 17th June, 2013 is done through their Advocates, each Appellant has a separate claim but presented on the same shared facts. These are:-

- (a) The Appellants are Members of the 2nd Respondent now receiving their monthly pension from the 2nd Respondent;

- (b) The 2nd Respondent is a fiduciary and owes fiduciary obligations to the Appellants separately;
- (c) The Appellants have discovered that the 2nd Respondent has breached their fiduciary obligations to each one of them;
- (d) The 1st Respondent is obliged to investigate the alleged breaches by the 2nd Respondent and direct remedial action;
- (e) The 1st Respondent has failed in its duty;
- (f) The Tribunal may intervene to correct the errors made by the 1st and 2nd Respondents.

2. PRELIMINARY OBJECTION

It:-

- (a) is in the nature of a protest;
- (b) consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if successfully taken as a primary point would have the effect of disposing the suit;
- (c) raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct;
- (d) cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

Examples would be an objection to jurisdiction of the court, or a plea of limitation or a binding contract between the parties.

The issues for determination are:-

1. Whether the Tribunal has jurisdiction to hear and determine the Appellants' case;
2. Whether the Appellants' case is barred by Limitation of Actions Act;
3. Whether the Appellants' case is barred by Retirement Benefits Act;
4. Whether the orders issued in JR 223 of 2012 bar the Tribunal from hearing and determining this case;
5. Whether the Appellants' complaint, the subject matter of this appeal, is res-judicata;

We shall now proceed to consider each issue separately.

1. Whether the Tribunal has jurisdiction to hear and determine the Appellants' case

By jurisdiction it is meant the authority which a judicial forum has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. A court of law draws tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction to hear and determine the case in dispute.

The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which jurisdiction shall extend, or it may partake both these characteristics.

If for example, the jurisdiction of an inferior court depends on the existence of a particular state of facts, the court must inquire into the existence of the facts in order to decide whether it has jurisdiction. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction, therefore, must be acquired before judgment is given.

The jurisdiction of the Tribunal is donated by Sections 48(1) and (2) of the Retirement Benefits Act. The Act provides:-

- (1) Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made there-under may appeal to the Tribunal within thirty days of the receipt of the decision.*
- (2) Where any dispute arises between any person and the Authority as to the exercise of the powers conferred upon the Authority by this Act, either party may appeal to the Tribunal in such manner as may be prescribed.*

As for the Appellants who are Members of 2nd Respondent their first recourse if a dispute arises between them and the 2nd Respondent, is to the 1st Respondent before filing an appeal to the Tribunal. This is the procedure prescribed by Section 46 of the Retirement Benefits Act. The Act provides that “*Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer 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". "Chief Executive Officer" in the Act means the person appointed to hold office in that designation under the Act.

It is clear to us that both Sections 46 and 48 of the Retirement Benefits Act have set preconditions for the Tribunal to assume jurisdiction in the present case. These are:-

- (a) The Appellants' dispute with the 2nd Respondent must have been referred in writing to and determined by the 1st Respondent; and*
- (b) An appeal against the 1st Respondent's decision ought to have been filed in the Tribunal within thirty days of the date the Appellants received the decision of the 1st Respondent.*

On the face of the record:-

- (a) On 17th June, 2013 the Appellants filed a Complaint against the 2nd Respondent with the 1st Respondent;
- (b) On 1st August, 2013 the 1st Respondent made a decision on the Appellants' complaint; and
- (c) On 15th August, 2013 the Appellants filed this appeal.

Thus it would appear that the jurisdiction of the Tribunal is complete. But there is a submission by the 2nd Respondent that the 1st and 5th Appellants, namely Stephen Wahome Ihiga and Moses Wanyonyi Wekesa respectively did not submit their case to the 1st Respondent for determination before filing this appeal. We do not agree.

Their Complaints appear at pages 110 to 114 and 128 to 134 respectively of the Appellants' Memorandum of Appeal and Statement of Facts.

In fact the entire Appellants' Complaints, the subject matter of this appeal appear at pages 7 to 151 inclusive of their Memorandum of Appeal and Statement of Facts. These are the Complaints the 1st Respondent decided and communicated its decision by a letter dated 1st August, 2013 to the Appellants' Advocates. This is the decision, against which this appeal was filed on 15th August, 2013.

We reject the objection and accept jurisdiction to hear and determine the cases for all the Appellants.

2. Whether the Appellants' case is barred by Limitation of Actions Act

The Appellants in their separate Complaints filed on 17th June, 2013 have stated that on or about the said date they discovered that the 2nd Respondent by way of fraudulent misrepresentation, concealment and/or non-disclosure has failed to pay their retirement benefits in accordance its rules and the law. The 2nd Respondent in its Statement of Defence and Facts stated that the Appellants by their own admission discovered the alleged fraudulent misrepresentation, concealment and/or non-disclosure by the 2nd Respondent in the year, 2006 and therefore, their claim would be barred by Sections 4 and 20 of the Limitation of Actions Act. We have not seen any such admission by the Appellants.

Nevertheless, we have read and considered both Sections 4 and 20 of the Limitation of Actions Act.

With greatest respect to Counsel, we are unable to find how the Appellants' beneficial interest claim in trust couched in breach of trust in continuous tense would be affected by this law.

Whether or not that the claim of the Appellants is properly founded on fraudulent misrepresentation, concealment and/or non-disclosure and as to when the Appellants became aware of it, are matters of fact to be proved. As stated earlier, we are persuaded that a preliminary objection would only be properly founded if it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

The other part of the Appellants' case is based on trust. We are persuaded by both statute and case law relied by the Appellants that their claim being one of non-payment of their retirement benefits monthly, a beneficial claim, it cannot be properly caught by limitation. We agree with the Learned Judge in the Kisii HCCC No. 568 of 1995 - James Nyasimi Kianga - Vs - David Mankone Mboa that the Appellants' claim cannot be subject to limitation of time as it is a continuous process and/or breach.

The 1st Respondent has not taken this ground to protest the Appellants' claim we think, for a good reason. The 1st Respondent having decided the claim of the Appellants without raising limitation of action is deemed, to have assumed jurisdiction on the issue and cannot legitimately raise it on appeal.

We reject the objection.

3. Whether the Appellants' case is barred by Retirement Benefits Act

We have pointed out that each Appellant has a separate claim but presented on the same shared facts. We have also under issue Number 1 sufficiently explained the procedure of filing appeals in the Tribunal and the time limited by law. Suffice to say that the Appellants and/or any of them would be barred from filing an appeal in the Tribunal if:-

- (a) One did not submit his claim first for determination by the 1st Respondent before filing the Appeal; or
- (b) Thirty days have lapsed before an appeal from the decision of the 1st Respondent is filed.

It was submitted that the 1st, 3rd, 9th, 12th, 15th, 16th and 17 Appellants signed the Complaint dated 30th May, 2007 and that they are, therefore, the proper subject of the 1st Respondent's decision dated 16th July, 2007. The Complaint is annexed at pages 102 to 107 inclusive of the 2nd Respondent's Statement of Defence and Facts. For the purpose of the Complaint dated 30th May, 2007 these Appellants' prescribed time for filing an appeal ended on or about 15th August, 2007. Their appeal to the Tribunal in this respect is, in the circumstances, clearly barred by Section 48(1) of the Retirement Benefits Act.

Saving other circumstances, it would be ideal to uphold the objection in respect of Appellant numbers 1st, 3rd, 9th, 12th, 15th, 16th and 17th.

The objection taken by the 1st and 2nd Respondents refer, *inter-alia*, to proceedings before the 1st Respondent in respect of the Complaint dated 30th May, 2007 and the decision thereon dated 16th July, 2007. In order to find the consequence of the 1st Respondent's decision on the future conduct of the 1st, 3rd, 9th, 12th, 15th, 16th and 17th Appellants it is necessary to consider the nature and result of proceedings before the 1st Respondent.

The 1st Respondent is a state corporation established under the Retirement Benefits Act. Its mandate is set out in Section 5 of the said Act to:-

- (a) Regulate the establishment of retirement benefits schemes;
- (b) Protect the interest of members and sponsors of retirement benefits schemes;
- (c) -----;
- (d) -----;
- (e) -----.

In so far as it is relevant to the Appellants, the jurisdiction of the 1st Respondent is donated by Section 46 of the Retirement Benefits Act cited above.

There are no statutory rules set as to the form the writing of a dispute to the 1st Respondent will be or the proceedings before it will admit the matter. This places the 1st Respondent in a quasi-judicial position where in ideal situation; its proceedings will adopt a judicial process without a formal procedural basis in law. In its administrative function, the 1st Respondent is bound to adhere to the requirements for due process for the benefit of the parties, for example:-

- (a) Adequate Notice and opportunity to be heard;
- (b) Right to confront parties and witnesses;
- (c) Right to have findings of facts and law, and explicit reasons for the decision;
- (d) Right to judicial review, etc.

Going by the provisions of Section 46 of the Retirement Benefits Act above, it is clear that the powers of adjudication given to the 1st Respondent is in respect of the application of the rules of a retirement benefits scheme and the prevailing written law under which the scheme is established. For the 2nd Respondent, adjudication is limited to its Rules and the Retirement Benefits Act.

The 1st Respondent is therefore obliged to objectively determine facts and draw conclusions from them as to provide the basis of official action. Such actions are able to remedy a situation or impose legal penalties, and may affect the legal rights, duties or privileges of specific parties.

We have considered the powers conferred on the 1st Respondent and the nature of proceedings before it. Much as the proceedings before the 1st Respondent are not a “suit” or that the 1st Respondent to be a “court” whose decision may have a binding effect say, a *precedent* or the application of *res-judicata* to be appropriate, we are certain that decisions of the 1st Respondent are binding on the parties before it.

The 1st, 3rd, 9th, 12th, 15th, 16th and 17th Appellants have filed fresh Complaint at the same time with the other Appellants in this case. Such move may be

untidly for the 1st, 3rd, 9th, 12th, 15th, 16th and 17th Appellants because it appears to circumvent their actions by their Complaint dated 30th May, 2007, the 1st Respondent's decision dated 16th July, 2007 and expiry of the time limited for filing appeals in the Tribunal.

In the absence of the necessary statutory direction as it is for cases before courts of law and tribunals, we are unable to restrict the 1st, 3rd, 9th, 12th, 15th, 16th and 17th Appellants or other persons claiming under them from referring a dispute to the 1st Respondent on the same or shared facts. If an appeal from the decision dated 16th July, 2007 was filed by the 1st, 3rd, 9th, 12th, 15th, 16th and 17th Appellants or any of them and determined on merits, we would be able to utilise appropriate bar in the statute to prevent litigation on determined issues.

In respect of the Complaint dated 30th May, 2007 for which the 1st Respondent rendered a decision on 16th July, 2007 we find that the the 1st, 3rd, 9th, 12th, 15th, 16th and 17th Appellants' claim in this case is barred by the time prescribed under Section 48(1) of the Retirement Benefits Act for filing appeals in the Tribunal.

4. Whether the orders issued in JR 223 of 2012 bar the Tribunal from hearing and determining this case

The 2nd Respondent submitted that the High Court in **JR No. 223 of 2012** has prohibited the Tribunal from hearing or entertaining any further proceedings in RBATCA No. 7 of 2010 or hearing or determining the case of the Appellants based on facts or substantially the same facts as those which arose in the said appeal.

The background of JR 223 of 2012 is that:-

- (a) The 1st, 3rd, 9th, 12th, 15th, 16th and 17th Appellants filed with the 1st Respondent a Complaint dated 30th May, 2007 against the 2nd Respondent;
- (b) On 16th July, 2007 the 1st Respondent made a decision on the Appellants' Complaint;
- (c) On 23rd November, 2010 the Appellants and others not in this case filed RBATCA No. 7 of 2010 together with an application for extension of time limited for filing appeals in the Tribunal against the decision made on 16th July, 2007 by the 1st Respondent;
- (d) On 24th May, 2011 the Tribunal on application by the Appellants and others not in this case enlarged time for filing the appeal referred to in (c), above;
- (e) The Tribunal proceeded to hear and on 23rd February, 2013 determined the appeal referred to in (c), above.

It is against this experience that the 2nd Respondent filed the Judicial Review Miscellaneous Civil Application No. 223 of 2012 (in this judgment referred to as “**JR 223 of 2012**”). In the **JR 223 of 2012** the 2nd Respondent successfully challenged the jurisdiction of the Tribunal in extending the time prescribed in Section 48(1) of the Retirement Benefits Act for filing an appeal in the Tribunal. It is on this finding that the High Court made the following orders:-

- (a) An order of Certiorari is hereby issued removing into this Court the orders of the 1st Respondent dated 23rd February, 2012 in RBATC No. 7 of 2010 and the same are hereby quashed;
- (b) An order of prohibition is hereby issued restraining the 1st Respondent from hearing and or entertaining any further proceedings in RBATC No. 7 of 2010;
- (c) -----;
- (d) -----.

In our understanding, the High Court:-

- (a) Quashed the decision made by the Tribunal on 23rd February, 2012 in RBATC No. 7 of 2010 because such decision was made without jurisdiction;
- (b) Found that the error affecting jurisdiction of the Tribunal is that the Tribunal extended the time prescribed under Section 48(2) of the Retirement Benefits Act when the law did not give the Tribunal power to do so;
- (c) Restrained the Tribunal from hearing and or entertaining any further proceedings in RBATC No. 7 of 2010 because the Tribunal lacked jurisdiction to hear and determine the case;
- (d) Rightly did not go the other matters affecting the merits of RBATC No. 7 of 2010 as decided by the Tribunal.

It is important to specifically emphasise that:-

1. The only reason which compelled the High Court to quash the decision of the Tribunal is the finding that the Tribunal exceeded its jurisdiction by extending the time prescribed in Section 48(1) of the Retirement Benefits Act for filing an appeal in the Tribunal; and
2. Save for extension of time, it is clear to us that the finding and decision by the High Court rightly did not go to or affect the merits of the Tribunal decision in RBATC No. 7 of 2010.

With greatest respect to Counsel, we do not accept the submission that the High Court in **JR No. 223 of 2012** has prohibited the Tribunal from hearing or determining the case of the Appellants based on facts or substantially the same facts as those which arose in RBATC No. 7 of 2010. To accept such interpretation of the High Court order in **JR No. 223 of 2012** would:-

- (a) Subvert the nature and effect of a judicial review application;
- (b) Result in manifest injustice to the Appellants and other persons who may be Members of the 2nd Respondent who were not parties in RBATC No. 7 of 2010 and have distinct claim(s) founded on cause(s) of action against the 2nd Respondent anchored on the same shared facts;
- (c) Permit the 2nd Respondent to continue unchecked, the actions complained by the Appellants;
- (d) Shield the 1st Respondent's decision from review on appeal as prescribed by the law;
- (e) Offend public policy by preventing the Appellants and others who are Members of and may be affected by the actions of the 2nd Respondent on similar or shared facts.

We decline the objection taken in this respect.

5. Whether the Appellants' complaint, the subject matter of this appeal, is res-judicata.

The 1st and 2nd Respondents objection is fastened on alleged actions of the Appellants in:-

- (a) Filing a Complaint dated 30th May, 2007 which was decided by the 1st Respondent on 16th July, 2007;
- (b) Filing HCCC No. 340 of 2008 which was withdrawn before being heard on merits;
- (c) Filing RBATCA No. 7 of 2010 which was heard and determined by the Tribunal on 23rd February, 2012; and
- (d) Participating in JR 223 of 2012 which was heard and determined on 30th April, 2013.

Res-judicata is enacted and explained in Section 7 of the Civil Procedure Act. In order it to succeed, the party relying on it must show that:-

- (i) A matter directly and substantially in issue in the subsequent suit was directly and substantially in issue in a former suit;
- (ii) The former suit must have been between the same parties or parties claiming under them or having a common interest in the subject matter of the suit;
- (iii) The parties must have litigated under the same title in the former suit;

- (iv) The court which decided the former suit must have been competent to try the suit;
- (v) The matter in issue must have been heard and finally decided in the former suit.

The objective of this protection is to ensure that there is an end to litigation. All these would adversely affect the Appellants if there is evidence that they together with others or others claiming under them filed the same or substantially the same suit as present in this appeal and was determined with finality by a court of competent jurisdiction.

In our view the defence is based on there being a past suit decided by a court. The objection taken by the 1st and 2nd Respondents refers to proceedings in various forums involving the Appellants and the 2nd Respondents as in the:-

- (a) First Respondent by way of a complaint by the Appellants against the 2nd Respondent;
- (b) High Court by way of Plaint being HCCC No. 340 of 1988;
- (c) Tribunal in RBATCA No. 7 of 2010 by way of an appeal; and
- (d) High Court by way of Judicial Proceedings in **JR 223 of 2012**.

We shall consider the nature and effect of proceedings in these forums in turn.

1. COMPLAINT BEFORE THE 1st RESPONDENT

We have in issue number 3 considered the nature and result of proceedings before the 1st Respondent. We reiterate our discussion therein and add for the purpose of this issue the matters below.

In our assessment of the powers conferred on the 1st Respondent *vis-à-vis* res-judicata as enacted and explained in Section 7 of the Civil Procedure Act, and the definition of the words “suit” and “court” in Section 2 of the Civil Procedure Act as read together with the definition of “Action” in Section 3 of the Interpretation and General Provisions Act, we do not find that proceedings before the 1st Respondent to be a “suit” or that the 1st Respondent to be a “court” whose decision may have a binding effect say, a *precedent*. If Parliament required these to apply to the 1st Respondent, it would have said so in appropriate or relevant legislation.

We do not find merit in the submission that *res-judicata* would apply on account of the decision of the 1st Respondent.

Notwithstanding the foregoing, however, we are satisfied that where the 1st Respondent has made a decision on a matter before it, it is entitled if another matter bearing similar facts is placed before it, to repeat the same decision. Such course of action in our view is expeditious, fair, lawful, reasonable and ensures consistency.

2. PLAINT BEING HCCC NO. 340 OF 1988

The words “action” and “suit” are defined in the Interpretation and General Provisions Act and Civil Procedure Act to mean “*any civil proceedings in a court and includes any suit as defined in section 2 of the*

Civil Procedure Act” and “*all civil proceedings commenced in any manner prescribed*” respectively. This is a “suit” and the High Court is a “court” as defined in Section 2 of the Civil Procedure Act. The nature of it is an “action” as defined in Section 3 of the Interpretation and General Provisions Act. If all factors set out in Section 7 of the Civil Procedure Act are met, the objection against the Appellants’ case would be valid.

But there is a missing link. The absent connection is that **HCCC No. 340 of 1988** was not heard and determined on its merits by a court of competent jurisdiction. The case was withdrawn before hearing and determination by the court.

There is no valid objection on this basis.

3. APPEAL IN THE TRIBUNAL BEING RBATCA No. 7 OF 2010

Again, this is a “Suit” and the Tribunal is a “court” as defined in Section 2 of the Civil Procedure Act. The nature of it is “Civil Proceedings” as defined in Section 3 of the Interpretation and General Clauses Act. If all factors set out in Section 7 of the Civil Procedure Act are met, the objection against the Appellants’ case would be valid.

But there is a misjoinder. The missing links is that, by the binding finding and decision of the High Court in **JR 223 of 2012** the case (**RBATCA No. 7 of 2010**) was not heard and determined by a court of competent jurisdiction. The decision of the Tribunal was quashed.

Had the decision of the Tribunal in **RBATCA No. 7 OF 2010** not been quashed, there, perhaps have been a case for application of *res-judicata* in this appeal.

There is, therefore, no valid objection on this basis.

4. JUDICIAL PROCEEDINGS IN JR 223 OF 2012

There is sufficient case law stating the nature and effect of Judicial Review Proceedings. Some of the authorities were cited by the parties in this case. We have reviewed the cases and come to the conclusion that:-

1. Judicial Review Proceedings are not a “Suit” as written and explained in Sections 2 and 7 of the Civil Procedure Act as read together with the definition of “Action” in Section 3 of the Interpretation and General Provisions Act;
2. Findings and conclusions made in a Judicial Review Proceeding do not go to the merits of the impugned decision and therefore do not bar or affect future proceedings between the parties or others on similar shared facts.

In entirety, if the 1st and 2nd Respondents’ analogy and submissions on the application of *res-judicata* are upheld, the following scenario will obtain:-

- (a) The Appellants would be barred from referring any further dispute on distinct claims based on same shared facts or other with the 2nd Respondent to the 1st Respondent;

- (b) Members of the 2nd Respondent who did not file the Complaint dated 30th May, 2007 would be barred from referring any dispute with the 2nd Respondent to the 1st Respondent on distinct claims or other based on same shared facts;
- (c) Members of the 2nd Respondent who did not file RBATCA No. 7 of 2010 would be barred from referring any dispute with the 2nd Respondent to the 1st Respondent or to the Tribunal on distinct claims or other based on same shared facts;
- (d) The Appellants' appeal against the decision of the 1st Respondent would not be heard on its merits.

In the upshot, we reject in totality the objections taken on account of *res-judicata*.

There are 2 points raised by the 1st and 2nd Respondent during the hearing of the Preliminary Objection which we have not considered valid for determination at this stage.

In its objection, the 1st Respondent stated the Tribunal has no jurisdiction to extent time within which appeals must be filed under Section 48 of the Retirement Benefits Act. No party in this case has applied for extension of time or pleaded such course of action in the pleadings so far filed. We do not find the basis for such plea.

The 2nd Respondent in its Statement of Defence and Facts denied the Appellants' Membership in the 2nd Respondent and put them into strict proof. This appears preposterous. We say so because it is stated at page 3 of the Judgment in **JR 223 of 2013** that in a Verifying Affidavit sworn on

24th May, 2012 by **Ken W. Kaunda**, a Trustee and Board Secretary of the 2nd Respondent and filed in the case, the Appellants are Members of the 2nd Respondent.

In view of our findings herein, the Preliminary Objection taken by the 1st and 2nd Respondents is dismissed with costs payable to the Appellants by the 1st and 2nd Respondents jointly and severally. The costs will be agreed between the parties within 30 days from to-day failing which at the instance of either party the Tribunal shall assess and certify the costs.

DATED at Nairobi this 14th day of November, 2014.

Kakai Cheloti - Chairman.

Veronica S. Owende (Mrs.) - Member.

Ambassador Simon B. Arap Bullut - Member.

Job N. Momanyi - Member.

Judgment read in the presence of:-

Clare Abuodha holding brief for the Tribunal Clerk.

Mr. Amadi for the Appellants.

Mr. Rotich for Mr. Kiche for the 2nd Respondent.

No appearance for the 1st Respondent.

Original Judgment 141114