

REPUBLIC OF KENYA

IN THE RETIREMENT BENEFITS APPEALS TRIBUNAL

AT NAIROBI

CIVIL APPEAL NUMBER 4 OF 2013

Christopher Wachira Gathiteri & 2 Others – Appellants

- Versus -

1. Retirement Benefits Authority – First Respondent
2. Kenya Airports Authority Staff Superannuation Scheme –
Second Respondent

JUDGMENT

Resemblance

Except for few allowances, this case bears a similarity with **RBATCA No. 3 of 2013 - Stephen Wahome Ihiga & 16 Others - Versus - Retirement Benefits Authority AND Kenya Airports Authority Staff Superannuation Scheme**. The issues for determination are almost the same.

We will highlight the issues and isolate those which are the same in this case as those determined in **RBATCA No. 3 of 2013 - Stephen Wahome**

Ihiga & 16 Others - Versus - Retirement Benefits Authority AND Kenya Airports Authority Staff Superannuation Scheme for which we have rendered our determination. It is not necessary for us to repeat our willpower on the same issues.

Background

The Appellants state to be Members of the 2nd Respondent. The 1st Respondent is a state corporation established under the Retirement Benefits Act. On 26th June, 2012 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.

By a letter dated 31st July, 2013 the 1st Respondent advised the Appellants' through their Advocates that it had decided the complaint in the year, 2007 and that there was no further decision required of it. 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 cause 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, 2007 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 its Statement of Defence or Statement of Facts. Notwithstanding the foregoing, however, on 8th August, 2014 the 1st Respondent filed Written Submissions together with a List and Bundle of Authorities.

The List and Bundle of Authorities refers to statutes and case law some of which were not filed.

Those filed are case law in:-

- (a) The Owners of Motor Vessel “Lilian S” V Caltex Oil (K) Ltd (1989) KLR1; and
- (b) JR Miscellaneous Application No. 223 of 2012 - Republic vs. Retirement Benefits Appeals Tribunal & 2 Others Ex-Parte Kenya Airports Authority Staff Superannuation Scheme.

Those not filed are statutes and case law namely:-

- (a) The Retirement Benefits Act;
- (b) The Retirement Benefits (Tribunal) Rules;
- (c) Limitation of Actions Act;
- (d) The Judicature Act; and
- (e) Fanikiwa Limited vs. Joseph Komen & 5 Others.

Notwithstanding that the 1st Respondent did not file any pleadings for which it may be bound, it sought to rely on the list stated above 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 future there shall be compliance, in all cases filed in the Tribunal.

In their Statement of Defence and Facts aforesaid, the 2nd Respondent denied the Appellants' claim and stated that:-

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. There the 2nd Respondent did not involve in fraudulent misrepresentation, concealment and/or none disclosure of material facts;
4. The decisions made by the 1st Respondent on 16th July, 2007, HCCC No. 340 of 2008, RBATCA No. 7 of 2010, **JR. 223 of 2012** render the Appellants' case res-judicata and the Tribunal lacks jurisdiction to hear and determine this appeal;
5. The Appellants have not complied with Section 46(2) of the Retirement Benefits Act;

6. The 1st Appellant's name appears in the Complaint dated 30th May, 2007 which was decided by the 1st Respondent on 16th July, 2007 and thereby making his case res-judicare and/or barred by Section 48 of the Retirement Benefits Act in which case the Tribunal lacks jurisdiction to hear and determine this appeal;
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) Plaint in HCCC No. 340 of 2008 - Stephen Wahome Ihiga & 16 others - Vs. - Kenya Airports Authority & 5 others;
- (d) Notice of Withdrawal of Suit dated 10th January, 2011 in HCCC No. 340 of 2008;
- (e) Complaint dated 30th May, 2007; and
- (f) First Respondent's decision dated 16th July, 2007.

The Appeal came for hearing on 3rd October, 2014.

Mr. Koceyo appeared for the Appellants.

The Appellants relied on their Written Submissions filed on 1st August, 2014 and orally submitted that the main issue is comparison of the 2nd Respondent's Trust Deed and Rules of 2002 with that of 2006. The Appellants submitted that the bone of contention is the proviso at page 24 of the 2006 Rules as compared with that in page 22 of the 2002 Rules. The Appellants submitted further that 2nd Respondent has pegged their monthly pension at 12% of pensionable salary an act which is discriminatory and wrongful application of the Rules of the 2nd Respondent commencing the year 2006, when the Rules were amended to read 40% pensionable salary. The Appellants concluded that the 40% minimum of pensionable salary was approved by the 1st Respondent and must apply to them as well and that to continue to pay them at 12% as per the 2002 Rules is wrong.

The Appellants submitted that in compliance with the Retirement Benefits Act the 2nd Respondent amended the 2002 Rules by deleting the same in their entirety and replaced the same with the 2006 Rules as expressed at pages 4 and 5 of the Trust Deed and Rules of 2006. The Appellants added that when amendments to an existing document are being made, it may:-

- (a) Delete or repeal the entire document and replace it with a new one;
- or

- (b) Delete some parts in their entirety and replace the same with new provisions;
- (c) Delete some parts in their entirety; or
- (d) Delete or repeal the entire document and replace it with a new one saving some parts of the old document.

The Appellants concluded that by reason of the 2nd Respondent not having in the amendment saved any provisions of the 2002 Trust Deed and Rules but replaced it entirely with the 2006 Trust Deed and Rules it is thereby bound and the 1st Respondent is obliged to enforce compliance thereby. Appellants are Members of 2nd Respondent per Retirement Benefits Act.

The Appellants further submitted that the 2nd Respondent's failure to give annual pension increase for them but doing so for those who retired in and after the year 2006 is discriminatory and breach of the Retirement Benefits Act. The Appellants contended that the First Appellant is not part of those who filed the complaint of 30th May, 2007 and that the Appeal was filed within 30 days of the 1st Respondent's decision dated 31st July, 2013.

Mr. Kiche appeared for the 1st Respondent.

The 1st Respondent relied on the Written Submissions filed on 8th August, 2014. The 1st Respondent submitted that the Appellants' case is barred by dint of Section 48 of the Retirement Benefits Act and Sections 4 and 20 of the Limitation of Actions Act by reason whereof the Tribunal lacks jurisdiction to extent time for filing and to hear the appeal.

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

Ms. Wanjiru Ngige appeared for the 2nd Respondent.

The 2nd Respondent relied on their Written Submissions filed on 7th August, 2014.

The 2nd Respondent associated with the 1st Respondent's submissions and submitted that the alleged breach is not continuous and that there was no discrimination or wrongful application of Rules by the 2nd Respondent.

The 2nd Respondent concluded that the Appellants did not apply to be Members of the 2nd Respondent as stipulated in the Trust Deed and Rules of the year 2006 and that had they done so and admitted, the 2nd Respondent would have been bound.

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

Appellants' Response

Mr. Koceyo in response to the 1st and 2nd Respondent's submissions largely relied on case law. Citing authority in Nakuru HCCC No. 185 of 2010 - Musa Kiprono Ngetich & another - Vs- Chepyator Cheron, Kisii HCCC No. 568 of 1995 - James Nyasimi Kianga - Vs. - David Mankone Mboa and HCCC No. 89 of 2008 - Benson Hugo Mwangi & 40 others - Vs. - National Bank of Kenya Limited & 8 others the Appellants submitted that breach by the 2nd Respondent was continuous because non-payment of the proper monthly pension is repeated and their claim being equitable, cannot be defeated by Limitation of Actions Act.

The Appellants urged the Tribunal to allow the appeal with costs.

DETERMINATIONS

We take it that although Kenya Airports Authority Staff Retirement Benefits Scheme is named as the 2nd Respondent the case lies properly against the persons who constitute the Board of Trustees of Kenya Airports Authority Staff Retirement Benefits Scheme.

The Appellants are Members of the 2nd Respondent now in receipt of monthly pension from the 2nd Respondent. The 2nd Respondent is a pension trust established by a trust deed irrevocably for the purpose of providing benefits to persons who cease employment with Kenya Airports Authority for specified reasons.

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.

By a letter dated 31st July, 2013 the 1st Respondent declined the Appellants' complaint in the following terms: - *"We thank you for your letter dated June, 26th 2012 and confirm having read the enclosures therein. The complaint as you are aware was decided by us in the year, 2007. There is no further decision we are required to make in the matter"*.

By a letter dated 1st August, 2013 the Appellants through their Advocates informed the 1st Respondent that they did not file any complaint in the year, 2007 as alleged and requested the 1st Respondent to review its decision.

The 1st Respondent's reply is contained in a letter dated 12th August, 2013 as follows: - *"Your letter dated August 1, 2013 refers. The position of the Authority is that the issues your three clients are raising are the same issues your previous clients raised which were finally determined by the court. Accordingly, the Authority's decision which was communicated to you in 2007 applies in this case and the Authority is not in possession of any new facts to justify a review of our decision"*

The Complaint dated 30th May, 2007 and the 1st Respondent's decision thereon are annexed to the 2nd Respondent's Statement of Defence and Facts at pages 102 to 107 and 108 to 109 respectively.

The Appellants' complaints are 3 set out above. The 1st Respondent's two letters above taken in context mean that the 1st Respondent repeats the contents of his decision dated 16th July, 2007. This being so, it means that the 1st Respondent has decided the Appellants' as follows:-

1. Failed to give the Appellants annual pension increases as required by the law - *“The Law requires that the scheme actuary should make provision for annual pension increases. We understand from the Administrators (Aon Minet Limited) that a valuation is being done and as soon as it is complete this provision will be effected promptly”*.
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 - *“This was effected by an amendment to the Scheme Rules after you had ceased employment with the Sponsor. On the facts stated. We do not find this does affect you in any manner prohibited by the law”*.
3. Has wrongfully underpaid the monthly pensions payable to the Appellants and ought to pay interest on the unpaid monies. *There is no decision taken on this complaint.*

We have set out the correspondence between Appellants and the 1st Respondent because they form the nitty-gritty of this Appeal. The parties' respective cases have centred on these documents.

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;
6. Whether the Memorandum of appeal is frivolous, vexatious and scandalous;
7. Whether the Appellants are entitled to have their benefits calculated in accordance with the Trust Deed and Rules dated 2nd October, 2006;
8. Whether the Tribunal has jurisdiction to grant the reliefs sought by the Appellants;

We have decided issue numbers 1 to 5 in RBATCA No. 3 of 2013 - *Stephen Wahome Ihiga & 16 Others - Versus - Retirement Benefits Authority AND Kenya Airports Authority Staff Superannuation Scheme*. The five issues arose out of a preliminary objection taken by the 1st and 2nd Respondents. 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.

The same Advocates and parties (except the Appellants in this case who share same facts with the Appellants in *RBATCA No. 3 of 2013 - Stephen Wahome Ihiga & 16 Others - Versus - Retirement Benefits Authority AND Kenya Airports Authority Staff Superannuation Scheme*) were involved in that case on same shared facts. It is not necessary for us to repeat our decision in this case. Suffice to say that the 1st Appellant did not sign the complaint dated 30th May, 2007 and cannot reasonably be held to account in respect thereof.

We shall, therefore, consider issue numbers 6 to 8 inclusive in their order.

6. Whether the Memorandum of appeal is frivolous, vexations and scandalous.

Although the 2nd Respondent stated in its Statement of Defence and Facts, that the appeal is frivolous, vexatious and scandalous there no particulars given or material laid to us by the 2nd Respondent to back the averment. Nevertheless, we shall proceed to determine it because its nature is such that if we make a finding in favour of it, it will determine the appeal with finality.

Order 2 Rule 15 of the Civil Procedure Rules, 2010 makes the following provisions:-

“(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) -----; or

(b) it is scandalous, frivolous or vexatious; or

(c) -----; or

(d) -----, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

In **Bullen and Leake and Jacobs Precedents of Pleadings 12th Edition** the terms scandalous, frivolous, vexatious and abuse of the court process are defined and remedy for pleading found to be the same prescribed as follows:-

*“A pleading or an action is **frivolous** when it is without substance or groundless or fanciful and it is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Thus, a proceeding may be said to be frivolous when a party is trifling with the court or when to put it forward would be wasting the time of the court or when it is not capable of reasoned argument. Again, a proceeding may be said to be vexatious when it is or is shown to be without foundation or where it cannot possibly succeed or where the action is brought or the defense is raised only for annoyance or to gain some fanciful advantage or when it can really lead to no possible good. So it is vexatious and wrong to make solicitors parties to an action in order to obtain discovery from them.”*

Jowett’s Dictionary: English Law. 2nd Edition and Mulla on the Code of Civil Procedure, 13th Edition describes the above words as follows:-

*“A proceeding is said to be **vexatious** when the party bringing it is not acting bona fide and merely wishes to annoy or embarrass his opponent. Or when it is not calculated to lead to any practical result, such a proceeding is often described as frivolous and vexatious.”*

A matter is said to be **scandalous** when:-

“.....it is calculated to do great and permanent injury to all persons whom it affects, by making the records of the court the means of perpetrating libelous and malignant slanders.”

It is established practice that an objection based on these premises be made by way of an application, the grounds relied on be specified in the application and that the application must be supported by affidavit evidence. The 2nd Respondent has not availed itself this procedure.

Turning to the substance of the submission, we reiterate the words of in the case of D.T. Dobie & Company (K) Limited Vs. Muchina (1982) KLR 1: and Sher Karuturi Limited (formely Known as Sher Agencies Limited) v V/D Berg Roses Kenya Limited [2010] eKLR in an application seeking to strike out a case on the grounds set out in the then **Order 6 rules 13 of the Civil Procedure Rules** now **Order 2 Rule 15 of the Civil Procedure Rules, 2010** both the Court of Appeal and High Court respectively had occasion to consider the power of the Court and how it is used. The Court of Appeal, Madan JA (as he then was) said, *“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal.”* The High Court said that *the power to strike out a pleading or any part of a pleading is a power that courts must exercise*

with a lot of restraint. In similar circumstances, when High Court case of Kisii Farmers Co-operative Union Limited Vs. Sanjay Natwarlal Chaunhan t/a Oriental Motors, was taken to the Court of Appeal in Civil Appeal No.32 of 2003 the Court of Appeal stated as follows:- “*Normally it is better to allow a weak case to go to trial than invoke the guillotine process.*”

The submission made is based on the ground that the appeal is scandalous, frivolous and vexatious. The Appellants’ complaint to the 1st Respondent is that the 2nd Respondents has not paid the correct benefits to the Appellants. The allegation is premised on the following facts:-

- (a) With effect from 1st July, 2006 the 2nd Respondent amended their Trust Deed and Rules and provided for payment of benefits not comprising less than 40% of their final salary;
- (b) The 2nd Respondent has after the amendment referred to in (a) above continued to pay benefits to Appellants equaling 12% of their final salary; and
- (c) The 2nd Respondent has not provided any annual pension increases to the Appellants.

The 1st Respondent did not file any pleadings to answer these allegations. They may, therefore, be properly deemed to be admitted. Exception for mere denial and a statement that such conduct by it is not discriminatory of the Appellants, the 2nd Respondent has not specifically responded to the Appellants' claim.

We do not find merit in this submission.

7. Whether the Appellants are entitled to have their benefits calculated in accordance with the Trust Deed and Rules dated 2nd October, 2006.

Regulation 16 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 makes the following provisions in regard to amendment of the Rules of a retirement benefits schemes:-

“(1) A scheme may amend its rules as specified in the rules, but no such amendment shall be valid:-

(a) if it purports to invalidate or reduce accrued rights and interests of the sponsors and members of the scheme;

(b) -----;

(c) unless it has been approved by the Authority and registered as provided in paragraph (3).

(2) *Within thirty days from the date of the passing of a resolution for the amendment of the scheme rules a copy of such amendment shall be transmitted by the trustees to the Authority for registration:-*

Provided that if any such amendment affects the financial position of the scheme, the trustees shall transmit to the Authority a certificate signed by an actuary.

(3) *Where the Authority finds that any such amendment is consistent with the Act, and is satisfied that the financial soundness of the scheme will not be affected, it shall within sixty days register the amendment and return the copy of the resolution to the trustees with the date of registration endorsed thereon, and such amendment shall be deemed to take effect as from the date determined by the scheme concerned, or, if no date has been so determined, as from the date of registration”.*

Under Regulation 8(2)(i) of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 places a duty of care on the Trustees of a retirement benefits schemes in respect of the preparation of documents which bind the scheme “*ensuring that all documents intended to bind the scheme are professionally prepared*”. These include the Trust Deed and Rules whether or not power of amendment is being exercised by the Trustees.

The 2nd Respondent is a defined benefits scheme. By a Trust Deed and Rules dated 2nd October, 2006 the 2nd Respondent’s amended its Trust Deeds and Rules dated 11th August, 1995 and 26th June, 2002. This is so because it is stated in recital (d) of page 4 to the 2nd Respondent’s Trust Deed and Rules dated 2nd October, 2006 that by a Resolution of the 2nd Respondent dated 1st July, 2006 with the consent of **Kenya Airports**

Authority (the Sponsor of the 2nd Respondent) that the contents of the 2nd Respondent's Trust Deed and Rules dated 11th August, 1995 and the subsequent Trust Deed and Rules dated 26th June, 2002 were amended by replacing the contents of the two Trust Deeds and Rules in their entirety with effect from 1st July, 2006 with those of the Trust Deed and Rules dated 2nd October, 2006. Going by declaration (vi) at page 5, the commencement date of the amendment is 1st July, 2006. Whether or not the financial position of the 2nd Respondent is affected (or the extent of it) by the amendment, it is a matter between the 1st and 2nd Respondent. The 1st Respondent has not denied the Appellants' contention that it accorded approval to the amendment.

So much so that the provisions of Regulation 16 cited above are satisfied. The parties and any other person engaged thereby are bound.

Rule 4(a) of the Trust Deed and Rules dated 2nd October, 2006 states:-

“Subject to the provisions of the Trust Deed and Rules, each Member who shall retire from the permanent service of the Sponsor on Normal Retirement Date, shall be entitled to a pension for life equal to 1/480th of his Final Pensionable Salary multiplied by the number of months of pensionable service and paid to the Member in accordance with the Rules of the Scheme. PROVIDED ALWAYS in this Rule that the pension shall not be less than 40% of final pensionable salary. That all benefits derived from contributions made by a Member shall vest immediately in the Member”.

The bone of contention is the proviso in Rule 4(a) above. This proviso does not appear in the 2nd Respondent's Trust Deed and Rules dated 11th August, 1995 or 26th June, 2006. The rest of the content of the Rule does. We are unable to ascertain the basis of the 2nd Respondent calculating the Appellants' monthly pension at 12% of their final pensionable salary.

Section 40 of the Retirement Benefits Act makes the following provision:-

“The trustee, manager, custodian or administrator of a scheme shall:-

- (a) ensure that the scheme fund is at all times managed in accordance with this Act, any regulations made there under, the scheme rules and any directions given by the Chief Executive Officer;*
- (b) take reasonable care to ensure that the management of the scheme is carried out in the best interests of the members and sponsors of the scheme;*
- (c) report to the Chief Executive Officer, as soon as reasonably practicable, any unusual occurrence which in his view could jeopardise the rights of the members or sponsors of the scheme; and*
- (d) — “.*

It is manifest in this legislative prescription that the Trust Deed and Rules of a retirement benefits schemes binds every person connected with it, member, trustee and service provider and the Chief Executive Officer of the regulator namely, the 1st Respondent, is placed at the apex to supervise and direct compliance with the Scheme Rules and the law. The 2nd Respondent is a defined benefits scheme. The right which has vested in the Members of the 2nd Respondent including the Appellants is to be paid a pension for life equal to 1/480th of their individual Final Pensionable Salary multiplied by the number of months of pensionable service and with effect from 1st July, 2002 such pension shall not be less than 40% of final pensionable salary.

By reason of the 2nd Respondents having, in exercise of their power of amendment repealed the Trust Deeds and Rules dated 11th August 1995 and 26th June, 2002 and replaced the same with those dated 2nd October, 2006 upon which they obtained approval of the 1st Respondent as required by the law, there is no other document which governs relationship between the 2nd Respondent and the Appellants in the provision of retirement benefits except that dated 2nd October, 2006. We find that the Appellants are entitled with effect from 1st July, 2006 entitled to have their benefits calculated in accordance with the Trust Deed and Rules dated 2nd October, 2006.

8. Whether the Tribunal has no jurisdiction to grant the reliefs sought by the Appellants.

It is trite law that the jurisdiction of the Tribunal kicks in after the 1st Respondent has made a decision on a dispute presented to it, *inter-alia*, by a member of a retirement benefits scheme. The jurisdiction is appellate in nature. A body exercising this jurisdiction is obliged to review afresh the matters placed before the organization whose decision is appealed and make its own independent decision thereon.

In their separate complaints, the Appellants placed before the 1st Respondent the following matters:-

1. The Appellants are Members of the 2nd Respondent now receiving their monthly pension from the 2nd Respondent;
2. The 1st Respondent is obliged to investigate the alleged breaches by the 2nd Respondent and direct remedial action;
3. The 2nd Respondent has failed to give the Appellants annual pension increases as required by the law;
4. The 2nd Respondent 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;
5. The 2nd Respondent has wrongfully underpaid the monthly pensions payable to the Appellant and ought to pay interest on the unpaid monies.

Upon the matters set out above, the Appellants sought the following reliefs:-

1. Their monthly pension be increased to not less than 40% of their last pensionable salary with effect from 1st July, 2006;
2. Arrears of unpaid pension from 1st July, 2006;
3. Interest from (2) above;
4. Amount increment of pensions as provided for in the Retirement Benefits Act.

Under Section 2 of the Retirement Benefits Act, the word “Member” in relation to a retirement benefits scheme (as the 2nd Respondent) means a member of a retirement benefits scheme and includes a person entitled to or receiving a benefit under a retirement benefits scheme. The Appellants are in this category. They are entitled and receiving a benefit from the 2nd Respondent. We have not found merit in the 2nd Respondent’s plea that the Appellants have not proved membership in the 2nd Respondent.

We shall examine each relief separately and the 1st Respondent’s decision thereon:-

- (a) Their monthly pension be increased to not less than 40% of their last pensionable salary with effect from 1st July, 2006.

We have made a finding that since 1st July, 2006 the Trust Deed and Rules dated 2nd October, 2006 is the document which governs the relationship between the Appellants and the 2nd Respondent. Consequently, the 2nd Respondent ought commencing 1st July, 2006 to have calculated and paid the Appellants’ monthly pension at a rate not being less than 40% of final their individual pensionable salary on the date of retirement. It is not reasonable or logical for the 1st Respondent to state that the 2nd Respondent’s failure

to pay the Appellants monthly pension as expressed in the preceding sentence the Appellants are not prejudiced in a manner proscribed by the law.

(b) Arrears of unpaid pension from 1st July, 2006.

The 2nd Respondent commencing 1st July, 2006 continued to pay the Appellants' monthly pension at a rate of 12% and not 40% of final their individual pensionable salary on the date of retirement as required in the Trust Deed and Rules dated 2nd October, 2006. There is a differential of 28% monthly which will form the basis of arrears in favour of each Appellant. This is a debt (unpaid benefits) payable by the 2nd Respondent to the Appellants.

(c) Interest from (2) above.

Regulation 7(kk) of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 in regard to retirement benefits not paid within the prescribed for interest to be chargeable on such late payment of withdrawal benefits from the scheme at a rate not be less than the investment interest declared by the scheme in the year the payment was due.

We are certain that the 1st and 2nd Respondents have a record of investment interest declared by the 2nd Respondent since the date provision for annual pension increases became law on 12th June, 2003 and 1st July, 2006 when it became obligatory for the 2nd Respondent to pay the Appellants' benefits in

accordance with the Trust Deed and Rules dated 2nd October, 2006 to-date. This information is available in the annual audited accounts of the 2nd Respondent which ought to have been filed with the 1st Respondent over the years.

We satisfied that the Appellants are entitled to interest in respect of any benefits that have not been paid to them by the 2nd Respondents and that such interest should not be less than the investment interest declared by the 2nd Respondent in the year the payment was due.

(d) Amount increment of pensions as provided for in the Retirement Benefits Act.

Regulation 31 of the Retirement Benefits (Occupational Retirement Benefits Scheme) Regulations, 2000 (amendment) became law on 16th June, 2005 and makes the following provisions:-

“(1) (a) A defined benefit scheme shall, at least once in every three years from the date of registration be valued by an actuary in the prescribed form and submit a copy of the valuation report to the Authority and to its sponsor within five months from the end of the financial year:-

Provided that in the case of a pension scheme, the actuary shall provide for annual pension increases and determine a rate of increase of the pension which shall apply until the next valuation.

(b) ———.

(c) ———.

(2) A scheme shall within three months upon receipt of the actuarial report from the actuary publish a notice to its members that such report or an abstract thereof, is available in its office for inspection”.

This provision commands regular pension increases. The 1st Respondent in its decision of 16th July, 2007 (now repeated for the Appellants’ case) stated that:-

“the law requires that the Scheme actuary should make provision for annual pension increases. We understand from the Administrators (Aon Minet Limited) that a valuation is being done and as soon as it is complete this provision will be effected promptly.”

Upon this legislative direction, it befell upon the 2nd Respondent to cause an actuarial valuation to be done and a publication made to its Members including the Appellants and the 1st Respondent to supervise compliance thereof. The Appellants alleged that as at the time of hearing this appeal, this provision of the law is being violated by the 2nd Respondent with the result that their monthly pensions have remained static from the dates they became pensionable respectively to-date despite the 1st Respondent’s recommendations in their letter of 16th July, 2007 and the 1st Respondent has not enforced compliance as required by the law. Except for the mere denial in their statement of defence and facts, the 2nd Respondent has not offered any explanation or evidence to the contrary.

The 1st and 2nd Respondents did not counter this allegation or give any information or undertaking as to compliance. We are bound to conclude that the allegation is admitted.

We find that the Appellants are entitled to annual pension increases as may be determined by the 2nd Respondent's actuary and the 1st Respondent is obliged to enforce compliance thereof.

It is clear to us that as a consequence of the breaches of the Trust Deed and Rules as well as the law, the Appellants' rights and entitlements in the 2nd Respondent have been severely prejudiced and reduced respectively and specifically resulting in underpayments and non-payments for them and inordinate low pensions being offered by the 2nd Respondent. In our understanding, the duty of the 1st Respondent under section 46 of Retirement Benefits Act, include investigation and ensuring that the procedures established under the law and the Scheme Rules of respective retirement benefits schemes are complied with. It also has to monitor generally the management and administration of retirement benefits schemes. Such action must be expeditious, efficient, lawful, reasonable and procedurally fair. The process requires to be conducted with veracity and that the 1st Respondent has to display impartiality and transparency in all its undertakings. It is the well-established principle that the governance of retirement benefits schemes should be in a manner that is efficient, fair,

competitive, accountable and transparent on action that inspires public confidence in the procedure as well as the management of the scheme.

We are certain that the 1st Respondent fell in error when it purported to summarily dispose of the Appellants' complaints (without investigation) by reference to a complaint filed by other persons in the year, 2007.

In the upshot, we find that we have jurisdiction to grant reliefs (a), (b), (c) and (d) sought by the Appellants.

We are inclined to allow this appeal.

Consequently, we make the following orders:-

- (a) The appeal be and is hereby allowed;
- (b) The 2nd Respondent shall with effect from 1st July, 2006 calculate and pay to the Appellants their monthly pension at a rate not less than 40% of each Appellant's final pensionable salary.
- (c) The 2nd Respondent shall pay interest on the sum found unpaid in (b) above from 1st July, 2006 until payment in full which shall not be less than the investment interest declared by the 3rd Respondent in the years that the benefit has remained due;

(d) The 1st and 2nd Respondents shall jointly and severally pay the Appellants costs of the Appeal assessed at Kshs. 20,000.00.

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

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 1st Respondent.

No appearance for the 2nd Respondent.