IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: MUSINGA (P.), GATEMBU & MATIVO, JJ.A.)

CIVIL APPEAL NO. E767 OF 2023

BETWEEN

THE BOARD OF TRUSTEES,
TELPOSTA PENSION SCHEME.....APPELLANT

AND

RETIREMENT BENEFITS
APPEALS TRIBUNAL.....1ST RESPONDENT
THE HONOURABLE
ATTORNEY GENERAL.....2ND RESPONDENT
RETIRMENT BENEFITS AUTHORITY.....3RD RESPONDENT
BONIFACE MARIGA & 948 OTHERS.....4TH RESPONDENT

(Being an appeal from the Judgment and decree of the High Court of Kenya at Nairobi ***(J. Chigiti (SC), J.)*** *dated 16th August 2023*

in

JR. Misc. Civil Application No. 141 of 2017).

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JUDGMENT OF THE COURT

1. The facts which precipitated the proceedings before the High Court which culminated in this appeal are principally straightforward and uncontested. The 4th respondent and 948 others are former employees of Telkom Kenya. Prior to their separation from their hitherto employer, they were members

of the Telposta Pension Scheme (the appellant) by virtue of their employment. In that capacity, they were entitled to their pension benefits as provided for in the Trust Deed and the Rules of the Scheme. Upon separation with Telkom Kenya, the 4th respondent (Boniface Mariga) complained to the appellant that their pension benefits were not calculated in accordance with the Scheme Rules. He filed a complaint with the 3rd respondent, (the Retirement Benefits Authority), on his own behalf and on behalf of 600 others pursuant to Section 46 of the Retirement Benefits Act (the Act), citing miscalculation and underpayment of their benefits.

2. By a decision dated 3rd October 2012, the 3rd respondent found that the 4th respondent's benefits were properly calculated and therefore the complaints were unmerited. It directed the appellant to recalculate their benefits and present them with their revised statements and pay them accordingly.

3. Dissatisfied by the said decision, on 17th October 2012, the 4th respondent, acting on his own behalf and on behalf of 948 others, filed Tribunal Appeal No. 7 of 2011 before the 1st respondent pursuant to Section 48 of the Act. It is important to mention that whereas the claimants before the 3rd

respondent were the 4th respondent and 600 others, 348 new appellants joined the proceedings in this appeal before the 1st respondent. The legality, propriety or otherwise of the addition of the new appellants at this appellate stage was one of the contested issues in the High Court and in this appeal.

4. In their appeal before the 1st respondent, the 4th respondent and 948 others prayed for orders that the said decision be set aside and they be paid their benefits to be computed by an independent actuarial consultant. They also prayed for an order that the transfer of their pension benefits from the Telposta Pension Scheme to Alexander Forbes Retirement Fund be declared illegal, null and void ab initio. Lastly, they prayed for a declaration that the continued existence of the Alexander Forbes Retirement fund is in contravention of the Act and the Regulations which only recognizes Occupational Retirement Benefits Scheme and Individual Retirement Benefits Scheme.

5. After hearing the parties, the 1st respondent framed only two issues for determination, namely: (a) what was the proper method to be used in calculating the benefits due to the 4th respondent and (b) what was the appropriate order on costs.

In its decision dated 13th February 2017, the 1st respondent allowed the appeal in the following terms:

a) The appeal be and is hereby allowed.

b) The trustee of the 2nd respondent shall compute and pay the benefits due to each of the appellant by applying the rules of the scheme on accrued rights stated in this judgment which is, "a pension equal to 1/480ths of each appellant's final pensionable salary for each complete month of pensionable service."

c) The trustee of the 2nd respondent may offset from any monies found due to each of the appellant any amount of benefits so far paid.

d) The trustee of the 2nd respondent shall prepare and submit to each of the appellants a statement of account showing how the benefit payable is calculated and arrived at.

e) The trustee of the 2nd respondent shall pay interest on the sum found unpaid in (b) above from the date it fell due until payment in full which shall not be less than the investment interest declared by the 2nd respondent in the years that the benefits remained due.

f) The 144 members of the Telposta Provident Fund who have been paid their benefits in accordance with the Rules of the Fund have exhausted all their accrued rights and have no further claim against the 2nd respondent.

g) *Either party shall pay its own costs.*

6. Aggrieved by the above verdict, the appellant filed ***Miscellaneous Civil Application No. 141 of 2017; Republic vs. Retirement Benefits Appeals Tribunal & Others Ex***

parte The board of Trustees, Telposta Pension Scheme, seeking an order of certiorari to quash the said decision, an order of prohibition to prohibit its enforcement. It also prayed for costs of the application.

7. The application was brought under Order 53 Rule 3 (1) of the Civil Procedure Rules, 2010, Sections 8 & 9 of the Law Reform Act and Section 11 of the Fair Administrative Action Act. It was supported by the grounds listed on its face, the Statutory Statement dated 28th March 2017 and the verifying affidavit of Peter K. Rotich of even date both annexed to the application seeking leave.

8. Briefly, the key grounds in support of the application were: (a) the 1st respondent entertained an appeal from persons who were not parties before the 3rd respondent, and therefore persons who were not aggrieved by the 3rd respondent's decision as provided under the Act. (b) the 1st respondent permitted the introduction of new issues that had not been raised by the appellant in the original proceedings. (c) the 1st respondent erred in ordering the Trustees to pay the benefits contrary to the law and the provisions of the Trust Deed and Rules. (d) the respondent issued an interlocutory judgment

and at the same time ordered the appellant to determine the amounts payable to the claimants in a manner not provided in the Scheme Rules. (e) the impugned decision is irrational, unreasonable and contrary to the law.

9. In opposing the application, the 1st respondent filed a Replying Affidavit dated 25th February 2022 sworn by its clerk, Mr. Fred Gekonde, deposing that the 4th respondent and others filed a complaint with the 3rd respondent, alleging that the appellant had miscalculated and underpaid them their benefits upon retirement. He averred that a consent was recorded on 22nd July 2016 as follows:

> ***"By consent actuaries to meet and narrow down the issues. Any issues not agreed may be filed for determination by the Tribunal. Case stood over for mention on 9th September, 2016".***

10. Mr. Gekonde averred that both parties engaged an actuary and all the actuaries were heard and cross examined during the hearing, and the Tribunal identified one issue for determination, that is, what was the proper method to be used in calculating the benefits due and payable to the 4th respondent and the 948 others.

11. The 3rd respondent did not be file any response to the judicial review application.

12. In opposition to the application, the 4th respondent swore a replying affidavit dated 29th November 2019 on his own behalf and on behalf of the 948 others. His salient averments were: (a) the 1st respondent acted fairly and followed all the laid down procedures, including the rules of natural justice, and that it operated within the confines of the law and properly exercised its jurisdiction under Section 48 of the Retirement Benefits Act which permits any person aggrieved by a decision of the Authority or of the Chief Executive Officer to appeal to the 1st respondent within 30 days. (b) the 1st respondent took into account all the relevant facts as stipulated under Section 49 of the Act before arriving at its decision. (c) the 1st respondent is legally empowered to determine pension disputes and to call for expert witness while hearing cases. (d) the grounds raised in the judicial review application are grounds of appeal since they delved into the merits of the decision. (e) the application was an appeal disguised as a judicial review application, that it was incompetent, fatally

defective, frivolous, vexatious, unmerited and an abuse of the court's time.

13. In the impugned judgment dated 16th August 2023, ***(Chigiti, J.)*** isolated two issues for determination, namely; whether the court had jurisdiction to determine the matter, and whether the orders sought could be issued. The learned judge cited Article 165 (3) (c) of the Constitution and answered the first issue in the affirmative. Regarding the second issue, the learned judge found that the appellant had not proved that the Tribunal's decision was materially influenced by an error of law. The learned judge agreed with the respondents herein that the application was an appeal disguised as a judicial review application since the grounds raised delved into the merits of the case. Accordingly, the learned judge held that the application was incompetent, fatally defective, unmerited, frivolous, and vexatious, an abuse of the court's time and dismissed it.

14. Aggrieved by the above verdict, the appellant appealed to this Court. In its Memorandum of Appeal dated 19th September 2023, it cited 15 grounds of appeal which were rationalized into four grounds in the appellant's submissions dated 25th

April 2024 as follows: (a) the learned judge erred in law in failing to find that the introduction of new parties at the appeal stage was ultra vires the tribunal's jurisdiction under section 48 of the Act; (b) by directing the appellants to compute and pay to the 4th respondent and 948 others benefits in accordance with a formula established by the 1st respondent, it abdicated its adjudicatory powers; (c) the learned judge erred by failing to find that the order directing the appellant to pay pension dues otherwise than in accordance with the Trust Deed and Rules was unreasonable, illegal and ultra vires; and (d) the learned judge failed to correctly apply the principles of proportionality or appreciate it in view of the significant ramifications of the tribunal's orders.

15. The appellant prays for orders that: (a) this appeal be allowed, and the judgment and decree of ***Chigiti, J.*** delivered on 16th August 2023 in JR No. 141 of 2017 be set aside and the same be substituted with an order allowing the appellant's notice of motion dated 11th April 2017; (b) the 1st respondent's decision dated 13th February 2017 be set aside and the same be referred back to the Tribunal for re-hearing; and (c) the costs of the appeal be awarded to the appellant.

16. When the appeal came before us for virtual hearing on 26th June 2024, Mr. George Oraro SC, led the appellant's legal team comprising of himself, Mr. Kamala and Ms. Mwongeli. Mr. Mugisha appeared for the 3rd respondent, Mr. Amadi appeared for the 4th respondent (Boniface Mariga). Ms. Atieno holding brief for Mr. Koceyo informed the Court that she was also representing 4th respondent and the 948 respondents. There was no appearance by the 1st and 2nd respondents nor did they participate in this appeal.

17. The appellant's submissions together with their case digest are dated 25th April 2024. The 3rd respondent's submissions together with a case digest are dated 14th June 2024. The 4th respondent's submissions are dated 26th April 2024. Mr. Koceyo's submissions are dated 19th June 2024 and they are filed on behalf of the 4th respondent (also represented by Mr. Amadi) and 943 others. This evident duplication in representation of the 4th respondent was not explained.

18. In support of the appeal, Mr. Oraro SC maintained that the learned judge erred in law in failing to find that the introduction of new parties at an appeal stage was ultra vires the tribunal's jurisdiction under Section 48 of the Act. He

contended that the addition of the 348 parties at the appellate stage was treated casually by the 1st respondent to the point that the 1st respondent never made a finding on the issue, yet these added parties never filed a complaint before the Chief Executive Officer under Section 46 of the Act and therefore, they could not appeal to the 1st respondent against the decision of the 3rd respondent. He faulted the learned judge for equating addition of parties to an appeal to joinder of parties in a suit. To support his submission, Mr. Oraro cited the Supreme Court decision in ***Albert Chaurembo Mumba & 7 Others (Sued on their own behalf and on behalf of Others vs. Munyao & 14 Others [2019] eKLR*** that the Retirement Benefits Appeals Tribunal's mandate is to hear appeals from the decision of the Authority or the CEO.

19. Mr. Oraro argued that by directing the appellant to compute and pay to the 4th respondent and 948 others benefits in accordance with a formula established by the rules of the Scheme, the 1st respondent abdicated its adjudicatory powers. Counsel maintained that the pension in question was only payable upon attaining the age of retirement at 55 or early retirement at 50, and even though all the pensioners were

below the age of 50 years, the 1st respondent directed the appellant to compute, provide them with statements and pay them on a formula calculated applying 1/480th of their monthly salary, which was contrary to the 1st respondent's findings and rules. In support of this submission, he cited ***Telkom Kenya Limited vs. John Ochanda*** ***(Suing on his behalf and on behalf of 966 Former Employees of Telkom [2014] KECA 600 (KLR)*** where this Court held that delegating judicial functions to a party is a nullity.

20. Counsel also submitted that the learned judge erred in law and in fact in finding that the 1st respondent had jurisdiction to issue a structural interdict when such a jurisdiction is only limited to the High Court in exercise of its mandate under Article 23 of the Constitution in public law matters. Counsel contended that by requiring the parties to compute pension dues, with no recourse for the resolving any dispute that may arise from the exercise, the learned judge disregarded the doctrine of functus officio.

21. Regarding the learned Judge's failure to find that the order directing the appellant to pay pension dues otherwise than in accordance with the Trust Deed and Rules was unreasonable,

illegal and *ultra vires,* Mr. Oraro argued that the trustee is required by law to compute and pay pension benefits only in accordance with what is prescribed in the Trust Deed and Rules, and any payment made otherwise than in accordance with the same would be illegal. It was therefore a contradiction in terms for the 1st respondent to order a formula contrary to the judgment, Trust deed and the amended Trust Deed or Rules. Mr. Oraro contended that it was erroneous for the learned judge to hold that the dispute concerning the formula to be adopted to compute the pension benefits and entitlements could only be settled by the Court of Appeal as it called for a merit analysis and was therefore beyond the jurisdiction of the High Court. Counsel cited the High Court decision in ***SMEP Retirement Benefits Trustee vs. Retirement Benefits Authority & Another [2017] eKLR*** that any order requiring the applicant to pay retirement benefits otherwise than in accordance with the Trust Deed and Rules would be irrational, unreasonable and illegal.

22. Addressing the ground that the learned judge failed to correctly apply or appreciate the principles of proportionality in view of the significant ramifications of the 1st respondent's

orders, Mr. Oraro, stressed that the learned judge fettered his own discretion by failing to determine how the judgment would affect other members of the Telposta Pension Fund who have the same accrued rights but have been excluded by the judgment. Counsel further submitted that Telposta Pension Fund cannot survive the payment of the sum of Kshs 13.928 billion. To support this submission, he cited ***Geoffrey Ojuong Okumu vs. Engineers Board of Kenya [2020] KECA 203 (KLR)*** where this Court held that proportionality invites the court to evaluate the merits of the decision by assessing the balance which the decision maker had struck, not merely whether it is within the range of the rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, the intensity of review is guaranteed by the twin requirement of Article 24.

23. Mr. Mugisha, learned counsel for the 3rd respondent supported the appeal. Regarding the alleged introduction of new parties at an appellate stage, he submitted that the right to appeal to

the 1st respondent's right is conferred by statute and therefore the new 348 additional parties were not aggrieved parties within the meaning of section 48 (1) of the Act because they were not parties in the original complaint filed before the 3rd respondent.

24. Addressing the question whether the learned judge's failure to find the order directing the appellant to pay dues contrary to the provisions of the Trust Deed and Rules was unreasonable and *ultra vires* the Act, Mr. Mugisha submitted that under Section 40 of the Act, Trustees are expected to ensure that the scheme fund is managed in accordance with the Act, Regulations, Scheme Rules and directive of the Chief executive Officer and that the Amended Trust Deed and Rules of 2004 clearly provides for all the benefits payable to the claimants. Counsel maintained that the formula ordered by the 1st respondent was contrary to its judgment and the amended Trust Deed and Rules of the appellant provided under Rule 8 (g) and 13 (b) of the 2004 Rules.

25. Submitting on the issue whether the 1st respondent abdicated its adjudicatory powers by directing the appellant to compute and pay the benefits claimed in accordance with the

established formula, counsel maintained that the 1st respondent did not provide a starting date, therefore, the judicial review orders sought were merited to quash the said illegality.

26. On whether the learned judge correctly applied the principle of proportionality, Mr. Mugisha submitted that the learned judge erred in law in restricting the right to judicial review to procedural impropriety unless a violation of the Constitution was invoked, thereby excluding the scope of statutory violation, illegality and ultra vires. Counsel further submitted that it was evident that the 1st respondent acted ultra vires by admitting 348 new parties to an appeal when the said parties had not been part of the complaint. Further, the 1st respondent also acted ultra vires in ordering a formula to be applied in the computation of the benefits contrary to Rule 8 (g) of the Trust Deed of 2004. Consequently, the learned judge erred in failing to find the 1st respondent's decision was a nullity, vague and unenforceable.

27. Learned counsel for the 4th respondent, Mr. Amadi, opposed the appeal. He maintained that since the application dated 11th April 2017 invoked Order 53 Rules 1, 2, & 4 of the Civil

Procedure Rules and that the appellant never alleged any infringement of the rights or constitutional violations, the learned judge was justified in refraining from carrying out a merit review of the case and instead focused on the process and the manner in which the contested decision was arrived at.

28. Counsel submitted that the appellant failed to demonstrate that the 1st respondent's decision was tainted by an error of law, irrational and/or unreasonable. He maintained that the 1st respondent accorded the appellants a fair hearing as provided by Article 50 of the Constitution, and that the 1st respondent had jurisdiction to determine the matter pursuant to Section 48 of the Act. He contended that this appeal only focuses on the merits of the decision rather than the procedural aspects of the decision-making process.

29. Submitting on the accusation that the 1st respondent abdicated its adjudicatory powers by directing the appellants to compute and pay to the 4th respondent benefits in accordance with a formula established under the Scheme Rules, Mr. Amadi argued that the appellant was the sole custodian of the 4th respondent's records and the trustee of

the irrevocable Trust Deed, and the onus and responsibility of the computation of benefits lies upon the appellants. Consequently, the orders issued by the 1st respondent were legally sound, realistic, devoid of generalization, feasible and not directed at third parties lacking the constitutional or statutory mandate to enforce them.

30. Mr. Amadi also submitted that the learned judge's interpretation of the Supreme Court decision in the ***Mitu-Bell Welfare Society vs. Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] KESC 34 (KLR)*** that when a court issues an order whose objective is to enforce a right or to redress the violation of such a right, it cannot be said to have abdicated its judicial function, as long as the said orders are carefully and judicially crafted.

31. On the question whether the learned judge correctly found that the introduction of the alleged 348 new members called for a merit analysis, Mr. Amadi submitted that the appellant failed to tender evidence on the particulars of the persons who were not proper parties to the suit, nor did the appellant object to their inclusion or appeal against their inclusion, therefore it

consented to the 1st respondent's decision. Counsel submitted that the introduction of the new members is an issue that requires a merit analysis, which falls outside the jurisdiction of a Judicial Review Court.

32. Addressing the argument that the learned judge misapplied the principle of proportionality, Mr. Amadi maintained that the learned judge made reference to Section 40 of the Act which provides for remedies for schemes facing liquidity issues. Furthermore, the learned judge noted that the appellant had the option of making an application to be allowed to settle the judgment through instalments, but it opted not to utilize the said option. He emphasized that the appellant never adduced evidence to support their assertion that payment of the decretal sum would render them insolvent. Conversely, counsel underscored the pain and suffering endured by the pensioners, some of whom have passed on without receiving their pension.

33. Lastly, Mr. Amadi insisted that the appellant failed to prove that the impugned decision was materially influenced by an error of law, nor did it demonstrate that the 1st respondent

lacked jurisdiction to hear and determine the matter, or that the impugned decision was ultra vires.

34. Ms Atieno, who as mentioned earlier maintained that she was also acting for the 4th respondent represented by Mr. Amadi and the other respondents, also opposed the appeal. Responding to the argument that the learned judge misdirected himself by holding that the appellant's application was an appeal disguised as a judicial review application, Ms Atieno maintained that the learned judge could not delve into a merit review of the case since the focus was on the legality and procedural propriety of the decision. Counsel maintained that it was imperative for the appellant to demonstrate that the 1st respondent's decision was irrational, unreasonable and that it disregarded relevant laws.

35. Regarding the accusation that the 1st respondent abdicated its adjudicatory powers by directing the appellant to compute and pay the 4th respondents in accordance with a formula established by the 1st respondent, counsel associated herself with Mr. Amadi's submissions.

36. We have considered the appeal, the submissions of counsel and the law, in the manner of a retrial in order to arrive at our own conclusions, this being a first appeal. We find that the following three issues will effectively determine this appeal, namely; (a) whether the learned judge erred by failing to undertake a merit review of the decision; (b) whether the 1st respondent abdicated its duties by directing the appellant to compute and pay the 4th respondents benefits in accordance with a formula an established; and, (c) whether the orders sought before the High Court were merited.

37. Regarding the 1st issue, the appellant and the 3rd respondent faulted the learned judge for refusing to delve into the merits of the 1st respondent's decision and for holding that the grounds cited were grounds of appeal as opposed to a judicial review application. In a nutshell, the appellant's contestation was that 348 new parties joined the proceedings at an appellate stage before the 1st respondent. It was argued that the 348 persons never filed a complaint before the 3rd respondent, therefore they were not proper parties under section 48 of the Act. The appellant maintained that the 1st respondent had no jurisdiction to hear an appeal filed by

persons who were not complainants before the 3rd respondent. The appellant, supported by the 3rd respondent, argued that the learned judge fell into an error when he confined his determination to process, procedure and the manner in which it was arrived at and failed to appreciate that the issues presented before him transcended the traditional judicial review grounds.

38. Addressing the said issue, the learned judge in the impugned judgment stated:

> ***"139. The Applicant in the instant case has moved the court through the provisions of Order 53 of The Civil Procedure Rules as a result of which this Court has to limit itself to the process, procedure and manner in which the decision complained of was reached or arrived at."***

39. Interestingly, the above observation by the learned judge is not supported by the record. Conversely, in both the application seeking leave to commence the judicial review proceedings and the substantive application, the appellant had in addition to citing Order 53 Rule 3 (1) of the Civil Procedure Rules, 2010, invoked Section 11 of the Fair Administrative Action Act. The following excerpt lifted from both applications tells it all:

> ***"Under Order 53 Rule 3 (1) of the Civil Procedure Rules, 2010, Sections 8 and 9 of the Law Reform Act***

and Section 11 of the Fair Administrative Action Act and all other enabling provisions of the law."

40. Evidently, the learned judge overlooked Section 11 of the Fair Administrative Act which was clearly pleaded in the application before him. This oversight by the learned judge is not without ramifications. As a consequence of overlooking the said provision, the learned judge determined the application, confining himself only to the decision -making process. In other words, the learned judge only considered the question whether the impugned decision was tainted by procedural impropriety. The term procedural impropriety was used by Lord Diplock in the House of Lords decision of ***Council of Civil Service Union vs. Minister for the Civil Service [1985] 1 A.C. 374*** to explain that a public authority could be acting *ultra vires* if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of judicial review, the other being illegality and irrationality.

41. The other direct consequence of learned judge's failure to consider that the applicant had invoked section 11 of the Fair Administrative Action Act is that he deprived himself the

opportunity of addressing his mind to the import of invoking the said Section in the application before him. The Fair Administrative Action Act was enacted pursuant to Article 47 (3) of the Constitution to operationalize the constitutionally guaranteed right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, provided under Article 47 (1). Therefore, the said statute enjoys a constitutional underpinning because it was enacted specifically to give effect to a right provided in the Bill of Rights.

42. Importantly, Section 2 of the Fair Administrative Action Act defines an *"administrative action"* to include—the powers, functions and duties exercised by authorities or *quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.* Consequently, it goes without saying that the impugned decision was an administrative action within the ambit of the said definition. This being the position, the learned judge erred by holding that the application before him did not cite violations of constitutional rights.

43. Article 47 (1) is not to be viewed in isolation. Article 23 (3) of the Constitution provides the remedies the Court can grant in cases for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. It also provides that in proceedings brought under Article 22, the court can grant appropriate reliefs, including a declaration of rights, an injunction, a conservatory order, and invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the bill of rights, an order of compensation and an order of judicial review. The term *"proceedings"* referred to in Article 23 include judicial review proceedings, which is what was before the learned judge.

44. Equally important is Section 11 (1) of the Fair Administrative Action Act which the appellant had cited. It provides:

11 Orders in proceedings for judicial review

1) In proceedings for judicial review under section 8(1), the court may grant any order that is just and equitable, including an order–

a) declaring the rights of the parties in respect of any matter to which the administrative action relates;

b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;

c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;

d) prohibiting the administrator from acting in a particular manner;

e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

g) prohibiting the administrator from acting in a particular manner;

h) granting a temporary interdict or other temporary relief; or

i) for the award of costs or other pecuniary compensation in appropriate cases.

45. Clearly, the reliefs sought by the appellant in its application are among the reliefs provided in the above section. Also relevant to the issues at hand is Section 7 (1) of the Fair Administrative Action Act which provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to- (a) a court in accordance with section 8, (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Subsection section (2) of the said provision provides that a court or tribunal under subsection (1) may review an administrative action or decision, if- the person who made the

impugned decision has, inter alia, acted without jurisdiction, was not authorized to perform the actions complained, acted in excess of jurisdiction, the action or decision was materially influenced by an error of law, a mandatory and material procedure or condition prescribed by an empowering provision was not complied with, the action or decision was procedurally unfair, the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant; the administrator failed to take into account relevant considerations only to mention but some.

46. A reading of language and tenor of Articles 22, 23 and 47 of the Constitution and the provisions of the Fair Administrative Act cited above leaves no doubt that judicial review is no just a common law remedy as it used to be before the emergence of transformative and progressive Constitutions such as our 2010 Constitution. Judicial review not only enjoys statutory underpinning, courtesy of the provisions of the Fair Administrative Action Act which has expanded the grounds for seeking judicial review orders, but is also deeply entrenched in our Constitution. The expanded scope of Judicial Review

also calls for a merit analysis of the grounds as provided under the Fair Administrative Action Act, which is a fundamental shift from the traditional approach of Judicial Review, which was limited to procedural considerations. As was held by the Constitutional Court of South Africa in ***Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others 2000 (2) SA 674 (CC) at 33:***

> ***"the common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts."***

47. In fact, a close examination of some of the grounds which were cited by the appellant show that they not only fell within the traditional judicial review grounds such as illegality (acting beyond legal authority), irrationality (making decisions that no reasonable authority would make), and procedural impropriety (failure to follow proper procedures), but also they fell within the ambit of section 11 of the Fair Administrative Action Act. The grounds cited included want of jurisdiction owing to addition of new parties at the appellate stage, the

propriety of the 1st respondent's decision to entertain new parties at the appellate stage, whether the Trustees were ordered to pay benefits contrary to the Trust Deeds and Scheme Rules, whether the 1st respondent abdicated his adjudicatory powers by ordering the appellant to calculate the benefits claimed by the 4th to 948 respondents, whether the formula ordered by the court was ultra vires the Act, the Scheme Rules and Regulations, and whether the impugned decision was irrational, unreasonable and contrary to the law.

48. In our view, it was incumbent upon the judge to satisfy himself whether any of the grounds cited by the appellant fell under section 7 of the Fair Administrative Action Act which permits some element of a merit review in judicial review proceedings. As was held by this Court in ***Suchan Investment Ltd vs. Ministry of Natural Heritage & Culture & 3 Others*** ***[2016] eKLR,*** in appropriate cases and arising from the grounds for judicial review now set out in Section 7 of the Fair Administrative Action Act, an element of merit review may be required in judicial review. It stated:

"56. Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to

include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act."

49. On what pertains merit review, this Court, though not providing an exhaustive list, in ***Executive Director, Anti-Counterfeit Authority & another vs. Uwin Investments***

Africa Company Limited & 3 Others ***[2022] KECA 1335 (KLR***) stated:

> ***"Merit review includes a review of the fairness, reasonableness, rationality, and relevance of the considerations taken into account in the making of an impugned decision or action."***

50. The Supreme Court in ***Dande & 3 others vs. Inspector General, National Police Service & 5 Others (Petition 6 [E007], 4 (E005) & 8 [E010] of 2022 (Consolidated)) [2023] KESC 40 (KLR),*** aptly delineated the scope of judicial review proceedings and circumstances under which a court can delve into the merits of an administrative action. In the said decision, while disagreeing with the reasoning of the Court of Appeal and in complete shift from its previous decision in ***SGS Kenya Limited vs. Energy Regulatory Commission and 2 Others, Supreme Court Petition No 2 of 2019,*** it held *inter alia* that:

> ***"87 With utmost respect to the learned Judges of the Court of Appeal, we disagree with the above reasoning and find that the appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, this required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided. A court cannot issue judicial review orders under the Constitution if it limits itself to the traditional review known to common law and***

codified in order 53 of the Civil Procedure Rules. The dual approach to judicial review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings. Our decision in the Jirongo and Praxedes Saisi cases speaks succinctly to this issue. That is also why, the question below is pertinent to the present appeal."

51. Therefore, the learned judge erred in limiting himself to the process, procedure and manner in which the impugned decision was arrived at, and failed to appreciate that the appellant had invoked section 11 of the Fair Administrative Action Act. Also, the learned judge failed to address his mind to the provisions of Section 7 of the Fair Administrative Action Act which clearly shows that an element of merit review may be required in judicial review. Therefore, the learned judge failed to determine issues which had been properly presented before him. It is also our finding that the learned Judge erred in holding that he lacked the jurisdiction to conduct a merit review in the circumstances of this case. Therefore, this appeal is merited, and on this ground alone, it is hereby allowed. Having so found, we find no need to determine the other issues.

52. Accordingly, we allow this appeal, set aside the judgment and decree of ***Chigiti, J.*** delivered on 16th August 2023 in JR No. 141 of 2017, and substitute it with an order allowing the appellant's notice of motion dated 11th April 2017. We also set aside the 1st respondent's decision dated 13th February 2017 and remit the dispute back to the 1st respondent for re-hearing. Each party shall bear his/its own costs of this appeal.

Dated and delivered at Nairobi this 20th day of December, 2024.

D. K. MUSINGA, (P.)

.....
JUDGE OF APPEAL

S. GATEMBU KAIRU, CIArb, FCIArb

.....
JUDGE OF APPEAL

J. MATIVO

.....
JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed.

DEPUTY REGISTRAR