REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: P.M. Mwilu D.C.J & V-P, Ojwang, Wanjala, Njoki & Lenaola SCJJ)

PETITION NO. 3 OF 2016

—BETWEEN—

ALBERT CHAUREMBO MUMBA & 7 OTHERS
(*Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme)*...**APPELANTS**

—AND—

MAURICE MUNYAO & 148 OTHERS
(*Suing on their own behalf and on behalf of the plaintiffs and other members/beneficiaries of the Kenya Ports Authority Pensions Scheme*)..**RESPONDENTS**

(An Appeal from the Judgment and Order of the Court of Appeal at Malindi (W. Ouko (P), K. M'inoti & Otieno-Odek JJA) dated 26th February, 2016 in Civil Appeal No. 38 of 2014)

JUDGMENT

P.M. Mwilu DCJ & VP, with whom *Ojwang, Wanjala, Njoki & Lenaola, SCJJ* agree:

I. INTRODUCTION

[1] This is a Petition of appeal from the judgment of the Court of Appeal sitting in Malindi affirming the decision of the Environment and Labour Relations Court sitting in Mombasa (O.N. Makau J) dated 14th February, 2014. The appeal is founded on **Article 163(4)** of the Constitution, as of right, and seeks this Court's determination of the following questions:

a) *Whether Articles 162(2)(a) and 162(3) of the Constitution as read together with Section 12 of the Employment and Labour Relations Court Act, 2011 confers jurisdiction on the Employment and Labour Relations Court to hear and determine disputes between Pensioners (herein the*

"Respondents") and Trustees of a Pension Scheme (herein the "appellants");

b) *Whether Article 165(1) of the Constitution and Section 60 of the 1963 Constitution (repealed) conferred the High Court with original jurisdiction to hear and determine disputes between the appellants and the respondents;*
c) *Whether the appellants' constitutional rights to have the dispute determined by a court or tribunal of competent jurisdiction under Articles 47(1) and 50(1) of the Constitution was violated;*
d) *Whether the Court of Appeal violated the appellants' rights by proceeding to re-evaluate the evidence of a court which was not competent to hear and determine the dispute;*
e) *Whether as a matter of law the Honourable Judges of the Court of Appeal erred by proceeding to determine matters not pleaded or canvassed in both the trial court and in the appellate court resulting in an infringement of the Appellant's rights under Articles 47(1) and 50(1) of the Constitution;*
f) *Whether as a matter of law the Honourable Judges of the Court of Appeal erred by upholding the judgment and decree of the trial court that was incompetent to hear and determine the matters before it.*

II. PROCEDURAL BACKGROUND

(a) In the High Court

[2] The relevant antecedent facts giving rise to this second appeal as can be discerned from the record are not contested.

[3] By a Trust Deed dated 1st April, 1998, an irrevocable trust in the form of a Retirement Benefits Scheme called the *Kenya Ports Authority Pension Scheme* (herein the "Scheme") was established between Kenya Ports Authority (herein the "Sponsor") and the Registered Trustees of the Kenya Ports Authority Pension Scheme (herein the "Trustees"*)*. The main objective of the Scheme is to provide pensions and other periodical payments to members upon their retirement at the specified age and further to provide for pensions and other benefits for dependents of deceased members. The Scheme is registered under the Income Tax (Retirement Benefits) Rules 1994 and under the Retirement Benefits Act (RBA Act). The appellants were sued in their capacity as the Trustees of the Scheme.

[4] The respondents who were all former employees of the Sponsor and members / beneficiaries of the Scheme filed suit in the High Court at Mombasa seeking a declaration that the appellants had made unconstitutional, illegal, unlawful, wrongful and fraudulent amendment to the 1998 Trust Deed and Rules made there under (hereinafter "the 1998 Trust Deed").

[5] Rule 6(a) of the 1998 Trust Deed gives the Trustees the general power and exclusive mandate to manage and administer the Scheme while **Rule 6(b)** empowers the Trustees to determine whether and to what extent any person is entitled from time to time to any benefit from the Scheme.

[6] Central to the dispute is **Rule 15** of the 1998 Trust Deed which for the sake of clarity we have reproduced below:

> "*The Trustees may at any time and from time to time with the approval of the Employer amend, revoke or modify by deed any of the provisions of*

this Deed and with the approval of the Employer the Trustees may by resolution in writing passed at a meeting duly called and constituted and signed by all of them amend any of the provisions of the Rules

PROVIDED THAT no such alterations or modifications shall be made which:

(a) ……………..

(b) …………………

(c) Reduce the benefit of a pensioner or dependent or affect the accrued benefit of any member except with the consent of such pensioner or dependent or member." [*Emphasis ours*]

[7] Pursuant to Rule 15 cited above, the appellants, as Trustees of the Scheme, amended the 1998 Trust Deed and some of the Rules of the Scheme. The impugned amendments relevant to this appeal are as follows:

a) *A First Deed of Amendment dated 1st December 2002 deleted in entirety and replaced the Original Trust Deed dated 1st January 1998 and the Rules thereunder.*

b) *The definition of "final pensionable salary" was deleted and replaced with a new definition of "final pensionable salary" to mean* **"***the average of the Member's pensionable salary during the last three (3) years preceding the date of leaving service, retirement or death."*

c) *A Second Deed of Amendment is dated 7th January 2005. However, the effective date is backdated. The amendment in the definition of final pensionable salary is effective from 1st July 2004 and all other*

amendments are to be deemed to have come into force on 1st July 2003.

d) *The PROVISO in* ***rule 15*** *in the 1998 Trust Deed was replaced by* ***rule 24*** *in the Second Deed of Amendment creating the new Trust Deed in which there is no PROVISO reserving any powers of amendment to be subject to consent of the pensioner, member or dependent beneficiaries of the Scheme. In the new Rule 24, it is the consent of the Commissioner and the Retirement Benefits Authority that is required to effect any alteration, variation or amendment to the Trust.*

[8] The respondents' complaint was that the above amendments had the effect of reducing the accrued benefits of the respondents and other members and beneficiaries of the Scheme. The respondents also prayed for the arrears of their accrued pension benefits including the lump sum pay on retirement and the monthly pension which resulted from the underpaid pension due to the said fraudulent and unconstitutional amendment of the Trust deed. They pleaded 12 particulars of fraud which included concealment by the respondents that the Sponsor had not remitted Ksh.6,857,627,602 to the Scheme as at 31st December 2003 and Ksh.6,982, 340,602 as at 31st December 2004.

[9] The appellants in their defence summarily denied liability and justified the impugned amendment to the Trust Deed finding support in the amended provisions of Rule 15 of the Trust Deed.

[10] On 26th February, 2013 after a few witnesses had testified but before the hearing was concluded by the High Court (before Mwongo & Muya JJ), counsel

for both parties entered a consent for the matter to be transferred to the Employment and Labour Relations Court for want of jurisdiction by the High Court as the dispute in their view involved employment and labour relations matters.

(b) In the Employment & Labour Relations Court

[11] Before the Employment and Labour Relations Court, the respondents pitched their case primarily on the grounds that the appellants had no proper or legal authority to amend the Trust Deed and the Rules of the Scheme as they did in 2002 and 2005 including the introduction of remedial pension plan of 2004 without the respondents' consent. That the appellants were to manage and administer the Trust in compliance with the provisions of the Deed and the Rules made thereunder. The respondents further argued that the appellants were bound to hold the Schemes' assets in trust for members and to ensure that there were sufficient funds by inter alia receiving members' contributions from the employer for its safe custody and prudent administration.

[12] They argued that even though **rule 6(a)** of the 1998 Trust Deed gave the Trustees the general power and exclusive mandate to manage and administer the Scheme, such powers could only be exercised by the Trustees subject to other provisions of the Trust Deed and Rules and specifically **rule 15** which required the consent of the respondents for any amendments which had the effect of decreasing their pension. They stressed that **rule 15(a)** of the 1998 Trust Deed provided that the trustees had the power to amend the Deed and the Rules with the approval of the Sponsor provided that no alteration which diminishes the

benefits of a pensioner, dependant or member would take effect without the consent of the pensioner, dependant or member.

[14] On the allegations of fraud, the respondents contended that the alleged financial deficit in the scheme's fund was not valid and genuine because it was caused by failure by the Sponsor to remit Kshs.6,857,627,602.00 as at 31st December 2003 which debt accrued to Kshs.6,982,340,602.00 as at 31st December 2004. They further contended that respondents breached their obligation by failing to collect the said debt from the Sponsor and instead fraudulently colluded with the Sponsor to amend the Trust Deed and put in place a Remedial Pension Plan without disclosing to the Retirement Benefits Authority (hereinafter "the Authority") and the Commissioner for Income Tax that the Sponsor had failed to remit pension contribution to the Scheme.

[15] According to the respondents, had the appellants not fraudulently concealed the fact that the sponsor owed the Kshs.6.9 billion pension contribution to the scheme, the Remedial Pension Plan would not have been approved because it was not necessary. In their view, the fraudulent failure by the appellants' to factor in the over Kshs. 6.9 billion debt payable by the Sponsor in their accounts was for the benefit of the Sponsor at the detriment of the respondents and other members. Consequently, the respondents submitted that the fraudulent concealment of the debt owed by the Sponsor and the decreasing of the respondents' benefits accruing under their original Trust Deed amounts to gross abuse and breach of trust created under the Trust Deed, Deed of Amendment and/or the Constitution of the Republic of Kenya.

[16] On their part, the appellants countered the respondents' arguments by submitting that the Employment and Labour Relations Court lacks jurisdiction to interfere with or amend the rules governing the Scheme or vary, alter, enhance, improve or reverse the effect that those rules have on the pensions payable to the respondents and other members and beneficiaries of the Scheme.

[17] They argued that the Trustees had the right, duty, obligation, power and capacity to effect the impugned amendments of the Trust Deed and the Rules and the right to impose the Remedial Pension Plan without seeking and obtaining consent from the claimants so long as the Sponsor, Kenya Revenue Authority, and the Authority were in agreement.

[18] The appellants further pleaded that the respondents were not at any time employees of the appellants and that the Scheme was governed by the Rules contained in the Trust Deed as amended and not by the Kenya Ports Authority 2002 Revised Regulations. They also submitted that the suit was prematurely filed before exhausting the dispute resolution mechanism set out under **section 46** of the **RBA Act**.

[20] Curiously and of interest, the record also confirms that a Pension's Officer who was the main witness for the appellants confirmed on cross examination and on oath that had the Sponsor paid the Kshs.6.9 billion to the Scheme as required, the Remedial Pension Plan would not have arisen. The witness further admitted that the respondents and/or their predecessors had the obligation to collect the said debt from the sponsor. He also confirmed the Remedial Plan did not disclose the said debt of Kshs.6.9 billion due from the sponsor but only volunteered Kshs.1.2 billion as capital injection. He further confirmed that the

Remedial Pension Plan was strictly private and confidential and that the respondents and the members never participated in its making and it was never disclosed to them. He verified further that the Remedial Pension Plan was to end in 2012 but it was still continuing in 2013. He agreed that the scheme had accumulated money after the retirement age was increased to 60 years and the Remedial Pension Plan should have therefore ended.

[21] Upon consideration of the pleadings on record, the evidence, the rival submissions and the authorities in support of each party's respective positions, the trial court set out among others the following central issues for determination, *to wit*,

> *(a) Whether the appellants and/or their predecessors had the absolute power to amend the original Trust Deed of 1998;*
>
> *(b) Whether the 2002 Deed of Amendment and Rules and the subsequent Remedial Pension Plan were made in violation of Clause 15(c) of the Original Trust Deed of 1998;*
>
> *(c) Whether the amendment to the 1998 Trust Deed in 2002 and the subsequent Remedial Pension Plan was fraudulent, illegal, wrongful, unlawful or unconstitutional; and*
>
> *(d) Whether the relief sought and the unpleaded reliefs should issue*.

Judgment was delivered on 14th February 2014 against the respondents.

[22] On the first question as to whether the respondents and/or their predecessors had the absolute power to amend the original Trust Deed of 1998, the learned Judge held that the Trustees' power to amend, revoke or modify the Trust Deed and Rules was not absolute and that the Trustees were bound to seek

the consent of the claimants before amending the 1998 Trust Deed by the Deed of Amendment of 2002 because the effect of the said amendment plus the subsequent introduction of the Remedial Pension Plan was to diminish the pension benefit to members including the claimants**.**

[23] The judge also held that the 2002 Deed of Amendment and Rules and the subsequent Remedial Pension Plan were made in violation of Clause 15(c) of the original Trust Deed of 1998, for the same was done without the consent of the members including the claimants yet it diminished their benefits. This is notwithstanding that the same was approved by the Authority.

[24] The judge also found that the amendment to the 1998 Trust Deed in 2002 and the subsequent Remedial Pension Plan was fraudulent, illegal, wrongful, unlawful or unconstitutional. This was because the respondents had concealed the Sponsor's indebtedness to the government official while seeking approval to reduce the respondents' benefits without their consent. The same was thus held to be unconstitutional within the meaning of **sections 70** and **75** of the Constitution of Kenya was in force up to August 2010, now repealed, on the right to property.

[25] In view of the foregoing findings, the trial court made a declaration that the amendment of 1998 Trust Deed and the Rules by the 2002 Deed of Amendment and all subsequent amendments to the Trust Deed or Resolutions by the appellants or their predecessors including the Remedial Pension Plan were a nullity. Consequently, the court ordered and directed that status quo *ante* be maintained under the 1998 original Trust Deed and Rules in relation to the definition of pensionable salary and respondents' entitlement to both lumpsum

and monthly pension. The appellants and or their successors were ordered to pay the respondents from the Scheme on the following terms:

a. Ksh. 201, 981,424.50 being the aggregate pension arrears to all the claimants as at July 2012 plus further accruals till payment in full which were occasioned by the impugned Remedial Pension Plan.
b. Lumpsum and monthly pension arrears for Kiara Kiarie, Apollo O. Ogwambo, Michael N. Rai, Christine Mbuja Oloo and Jacob Kaburu Kiaria occasioned by the error of failure to apply the correct salary after the salary increment to them on 1/7/2007.

[26] The respondents were also awarded costs and interests at court rates from the date of the judgment. The reason for the choice of effected date of interest is that some of the awards accrued after the filing of the suit and continue to accrue in future until they are settled.

(c) In the Court of Appeal

[27] Aggrieved by the findings and the decision of the Employment and Labour Relations Court, the appellants proffered an appeal to the Court of Appeal at Malindi and laid out the following nine grounds of appeal:

i. *The learned judge erred in law by failing or refusing to decide whether he had jurisdiction or not and he erred in hearing and determining the suit when he had no jurisdiction; he erred in failing to hold that the proper forum for the determination of the dispute was the forum provided for in the Retirement Benefits Act;*

ii. *The learned judge erred in law and fact when he delivered an irrational, unreasonable and contradictory judgment;*

iii. *The trial court erred by failing to properly and correctly interpret and apply the Trust Deed and Rules governing the Scheme;*

iv. *That having held the respondents were not employees of the appellants, the judge ought to have found that the Industrial Court had no jurisdiction in the absence of an employer/employee relationship between the parties;*

v. *The court erred by allowing claims that were not pleaded thereby denying the appellant the opportunity to be heard and prepare for hearing on the un-pleaded claims;*

vi. *Having declared the 2002 Deed of Amendment and Rules and the subsequent remedial plan as fraudulent, wrongful, illegal and unconstitutional and null and void ab initio, the trial judge erred in law and fact in making awards based on the said Deed of Amendments and Rules as well as the Remedial Plan;*

vii. *The court erred in law by reaching conclusions on fraud without any evidence; the court erred in failing to hold that based on totality of the evidence on record, the appellants had not committed any fraud;*

viii. *The learned judge erred by attributing the defaults of Kenya Ports Authority as the Sponsor of the Pension Scheme to the appellants;*

ix. *The appellants urged this Court to set aside the judgment by the trial court and declare the same to be a nullity, strike out the re-re-amended plaint and award costs of the suit both at the Employment and Labour*

Relations Court and in this Court to be paid by the respondents jointly and severally."

[28] Collaterally, the respondents also filed a cross appeal faulting the trial court for failing to award interest on the decretal sum at court rates from the date of filing suit and further for failing to award interest at commercial rate of 20% per annum. In addition, they impugned the findings of the trial court for failing to make an order that the respondents' monthly pension be adjusted and paid together with the annual increments in respect thereof.

[29] When the parties appeared before the Court of Appeal for oral submission, both parties' arguments centred on one single issue - to ascertain the proper forum with original jurisdiction to hear and determine the dispute between the parties i.e. whether it is the High Court of Kenya, the Employment and Labour Relations Court or the Chief Executive Officer of the Authority.

[30] It is the appellants' case that the proper forum with original jurisdiction is the Chief Executive Officer of the Authority under **section 46(1)** of the **RBA Act** with appeals from his decision to be pursued at the **Retirement Benefits Appeals Tribunal** established under **section 48** of the said Act. It was the appellants' contention that both the High Court and the Employment and Labour Relations Court had no jurisdiction to hear and determine the dispute between the parties in the first instance.

[31] Conversely, the respondents charged that the proper forum with original jurisdiction at the time of filing the suit was the High Court pursuant to **section 60** of the repealed Constitution and the jurisdiction now lies with the Employment and Labour Relations Court by virtue of **Article 162 (2) (a)** of the

2010 Constitution and **section 12(1)** of the Employment and Labour Relations Court Act.

[32] After considering the grounds of appeal and counsels submissions, the law pertaining thereto and the authorities cited by rival counsel, the Court of Appeal warned itself correctly that as a first appellate court in exercise of its appellate jurisdiction, that it must reconsider the evidence, evaluate it and draw its own conclusions while not being bound to follow the trial judge's findings of fact if it appeared that the trial court failed to take into account particular circumstances or if its decision is inconsistent with the evidence on record.

[33] The Court of Appeal thereafter crystallised the critical issue for determination in this appeal which was to ascertain the proper forum with original jurisdiction to hear and determine the dispute between the parties in this case, in the first instance. The appellate court then proceeded to address itself on the following issues: Jurisdiction; natural justice, optional jurisdiction and **section 46(1)** of the **RBA Act**; remedial plan approved by the Authority; fraud, non-disclosure of deficit in the Sponsor contribution to the pension scheme; backdating of the 2002 deed of amendment of the Trust Deed; lump sum monthly arrears and the cross appeal.

[34] On jurisdiction and the failure of the trial court to address itself to the issue of the proper forum for initiating the litigation of such disputes, the Court of Appeal found that the trial court erred in law in failing to consider and determine the issue of jurisdiction that had been raised in the defence and it did not matter that parties had by consent agreed to the transfer of the suit from the High Court to the Employment and Labour Relations Court.

[35] On the issue of respondents' position that the proper forum to initiate and litigate the dispute in this case relating to the violation of respondents' property rights under **section 75** of the repealed Constitution could only be the High Court or Employment and Labour Relations Court and not before the Chief Executive Officer of the Authority or the Retirement Benefits Authority Appeals Tribunal, the learned Judges of Appeal while placing reliance on its decision in the case of **Judicial Service Commission v Gladys Boss Shollei & Another,** Civil Appeal No. 50 of 2014 [2014]eKLR and this Court's decision in **Communication Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others** Petition No. 14 as consolidated with Petition Nos. 14 A, 14 B and 14 C of 2014 [2014]eKLR, disagreed with the respondents' position affirming that the RBA Act does not preclude parties from raising constitutional issues touching on their complaint. Relying on **section 58** of the **RBA Act**, Articles 3 and 10 of the Constitution, the appellate judges held that the Chief Executive Officer of Retirement Benefits Authority (hereinafter "CEO") and the Appeals Tribunal are public officers and or state organs and are bound to implement the Constitution.

[36] As to whether a dispute relating to amendment of the definition of pensionable emoluments could be referred to the CEO for review when it was the same Authority that approved implementation of the new definition, the Court of Appeal was of the view that the principle of natural justice debarred the CEO as an arbiter in such disputes, the Authority having played an active part and given approval to the implementation of the Remedial Plan and that the provisions of **section 46 (1)** of the **RBA Act** are to be invoked when there is no conflict of

interest and any active or perceived role by RBA in relation to the decision that is subject to review.

[37] The Court concurred with the trial court that the remedial plan submitted by the trustees to the Authority was premised on the amendments to the Trust Deed which amendments were not in accordance with Rule 15 (c) of the 1998 Trust Deed Rules.

[38] The Court disagreed with the findings of the trial court on the issue of fraud and non-disclosure holding that there was no evidence on a balance of probability to prove that the non-disclosure was fraudulent, intentional or motivated by malice and that the specific non-disclosure could have been an oversight, negligent or in advertent. It also held that the backdating of the effective date of the Deed of Arrangement was unconstitutional and contractually null and void because the was no consent of the respondents and other members of the Scheme as required and protected under the proviso in clause 15(c) of the 1998 Trust Deed.

[39] As to the lump sum monthly pension arrears, the appellate court held that it was the responsibility of the employer to reflect the increment as the last pay and the increment should have been reflected as the last salary to achieve fairness.

[40] As regards the ground of appeal on an un-pleaded issue, the Court of Appeal reiterated that it has in several decisions found support in the cases of **Odd Jobs - v- Mubia** [1970] EA 476 and in **Nkalubo -v- Kibirige** [1973] EA 102 and held that a court may base a decision on an un-pleaded issue if it appears from the course followed at the trial that the issue had been left to the court for

its determination. In this case, un-pleaded issue had been made part of the record and the appellant was given an opportunity to address the issue and no prejudice had been demonstrated.

[41] The respondents' cross appeal was also found to lack merit as it had not been demonstrated that the trial court erred in the exercise of its discretion to award interest at court rates from the date of judgment.

[42] The totality of the first appellate court's re-evaluation of the evidence and the relevant law was that the appeal and the cross appeal had no merit and were dismissed with each party ordered to bear its own costs before the Employment and Labour Relations Court and in the appeal.

III. APPEAL BEFORE THE SUPREME COURT

[43] Undeterred, the appellants filed this appeal. They also filed a notice of motion application under certificate of urgency dated 14th July 2016 seeking conservatory orders namely; stay of execution of the amended decree in Industrial Court Cause No.116 of 2013 now industrial cause No 1162 of 2015. This application was heard on the 18th July 2016 by Hon. Justice Prof. J. B. Ojwang SCJ who certified the matter as urgent and granted conservatory orders inter alia staying the decision of the court of appeal and the decree of the Industrial court until the appeal is heard and determined.

[45] The respondents conversely filed a cross-appeal seeking to vary or reverse the judgment of the Court of Appeal to the extent that the first appellate court failed to award interest on the decretal sum from the date of filing the suit and also for not awarding interest at commercial rate of 20% per annum on the decretal sum. They also fault the Court for ordering each party to bear its own

costs before the Employment and Labour Relations Court and in the Court of Appeal.

[46] When parties appeared before us for the prosecution of this appeal, Senior Counsel Mr. Ojiambo assisted by Mr. Mohamed Nyaoga and Mr. Mbuthia Gachuhi appeared for the appellants while Mr. Tindika appeared for the respondents.

(i) Appellants' case

[47] Mr. Ojiambo SC, the lead counsel for appellants opened his agitation for the appeal by stating that the appeal before the Court raises only one single but fundamental question, that is, whether the High Court has jurisdiction to hear appeals arising from the kind of dispute between the appellants and the respondents. He argued that both the High Court and the Employment and Labour Relations court are divested of original jurisdiction where such Jurisdiction has been donated or specifically given to another body or person by a statute. In his view, **section 46(1)** of the **RBA Act** provides that any member of the Scheme who is dissatisfied with the decision of the manager or administrator, custodian or trustees of the Scheme may request in wiring that such decision be reviewed by the CEO with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules under which the Scheme is established.

[48] Counsel also pointed out that there exists an appellate mechanisms and that **Section 48 (1)** of the **RBA Act** provides that any person aggrieved by the decision of the Chief Executive Officer under the provisions of the act or any

regulations made there under may appeal to the tribunal within 30 days of the receipt of the decision.

[49] Placing reliance on this Court's case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others** SC Application No. 2 of 2011 [2012] eKLR, Counsel faulted the Court of Appeal and pointed out that jurisdiction is conferred either by the Constitution, or laws made by Parliament and that a court of law cannot by judicial craft divest a tribunal of its jurisdiction vested upon it by Parliament. In his view, the Court of Appeal extended the Jurisdiction of the High Court by its own craft of interpretation.

[50] Counsel also referred us to a persuasive decision of the High Court in the case **Tom Kusienya & 11 Others v Kenya Railways Corporation & 2 Others,** Constitutional Petition No. 353 of 2012 [2013]eKLR, the Court of Appeal cases of **Narok County Council v Transmara County Council & another,** Civil Appeal No. 25 of 2000 [2000]eKLR, **Speaker of National Assembly v James Njenga Karume,** Civil Application No. 92 of 1992 [1992]eKLR and the English case of **Wilkinson v Barking Cooperation** [1948]1 KB 721 for the proposition that where there is a clear procedure for redress of any grievance, prescribed by the Constitution and Acts of Parliament, that procedure should be strictly followed.

[51] Counsel faulted the Court of Appeal for misapplying the principle of natural justice and the provisions of the **Fair Administration Actions Act, 2015** in an inimical manner to justify the Court's introduction and application of a strange and unknown jurisdictional principle they called the *"optional jurisdiction"* with a view to conferring on the High Court a jurisdiction not vested

on it by the Constitution. Further, they argue that this argument had not been pleaded or raised by the parties. They referred to the Court of Appeal case of **Dakianga Distributors (K) Ltd v Kenya Seed Company Limited** Civil Appeal No 168 of 2011 and the High Court case **Ann Wangui & 2,222 others v Edward Odundo, CEO Retirement Benefits Authority** Petition No 57 of 2014.

[52] The appellants submitted that the legislature restricted the hearing and determination of disputes relating to employment and labour relations to the Employment and Labour Relations Court as set out under **section 12(1)** of the Employment and Labour Relations Court Act as read with **Article 162 (2)** of the Constitution. They argued that there is no employer-employee relationship between the appellants and respondents, that the only relationship that exists is one of trustee and beneficiaries of a trust a relation that is governed by the Trustee Act Cap 167 Laws of Kenya and the general common law on the law of trust.

[53] They submit that a judicial or quasi-judicial hearing before a body that has no jurisdiction or authority to determine a matter cannot result in a lawful process and is a violation of a person's constitutional rights to a fair hearing under **Article 47(1) and 50(1)** of the Constitution. As such the taking of evidence and the determination following the hearing before a court or tribunal that has no jurisdiction cannot be a basis of a lawful finding by way of re-appraisal of that evidence by the Appellate Court

[54] The appellants submit that the cross-appeal is improper before this Court as it does not raise a constitutional question and/or involve any matter of general

public importance to warrant a determination by the Supreme Court. Further that no certification has been sought or obtained. They submit that the award of costs is a matter of judicial discretion. To support this argument they cited the case of **Daniel Kimani Njihia v Francis Mwangi Kimani & Another** Sup. Ct. Civil Application No. 13 of 2014 [2015]eKLR.

[55] In conclusion, we were urged to remit the matter back to the body or persons provided for under **section 46** of the **RBA Act** for exhaustion of administrative remedies provided for under the Act in the first instance and further to make a declaration that the appellants' rights to a fair hearing under **Articles 47(1)** and **50(1)** were violated as a consequence of the legal proceedings before the trial court and the Court of Appeal. The effect of the declarations sought is that the instant appeal be allowed, the judgment and orders of both the Court of Appeal and the Employment and Labour Relations Court dated 26th February, 2016 and 14th February 2014 respectively be set aside save for the order on costs.

(ii) Respondents' Case

[56] Mr. Tindika, learned counsel for the respondents, on the strength of grounds of opposition filed on behalf of the respondents attacked the appeal for being incompetent and one which does not deserve the invocation of this court's jurisdiction under Article **163(4)(a)** for the interpretation and application of the Constitutional provisions cited by the appellants.

[57] Counsel reiterated that the dispute herein concerned a decision which was made by the Trustees of the Scheme which was contrary to the provisions of Rule 15 of the Trust Deed and Rules made thereunder dated 1st April, 1998, whose

provision had a mandatory requirement that any amendment to the Trust Deed which had an effect on the members benefits had to be effected with the consent of the members and beneficiaries of the Scheme.

[58] He argued that the unilateral decision of the Trustees to amend several provisions of the Trust Deed was not only in disregard to the express provisions of the Rules of the Scheme but was also a violation of constitutional rights of the pensioners and their defendants to property in their pension benefits which was protected under **sections 60, 70** and **75** of the repealed Constitution. The effect of the amendments was that the 7.5% of the respondents accrued earnings in salary and house allowances were being deducted and paid to the Scheme by the Trustees without their consent.

[59] In regards to the jurisdiction question, Counsel urged that the proper judicial forum for adjudication of such disputes such as the one between the appellants and the respondents was the High Court which had the original and unlimited jurisdiction.

[60] On the issue of initial exhaustion of administrative remedies provided for under **section 46** of the **RBA Act**, Counsel contended that there is no provision in the Act that bestows on the CEO the powers to interpret the violations of constitutional or fundamental rights of the pensioners. According to the respondents, the provision of **section 46** had two words "*may request*" meaning that proceedings in that matter was not only optional but a "*request*." Counsel asserted that even if the CEO had jurisdiction in the circumstances of this case, then he would not have been a proper person to adjudicate the matter because he was conflicted *a priori*. To qualify this point, our attention was drawn to the case

of former Hon. Deputy Chief Justice **Kalpana H. Rawal, Philip Tunoi & David A. Onyancha v. Judicial Service Commission**, Supreme Court Civil Application No. 11 of 2016 [2016] eKLR

[61] While referring to **section 49** of the **RBA Act**, the respondents submitted that the Retirement Benefits Appeals Tribunal has jurisdiction of the subordinate court of the first class, effectively meaning that the jurisdiction of the CEO was much lower. As such, no mechanism under the Act had constitutional power and jurisdiction to hear claims of the breach of fundamental rights and the statute did not extend powers to the Authority to order payments to the respondents. The only way the RBA Act could have ousted the jurisdiction of the High Court and that of the Employment and Labour Relations Court was if there were specific provisions either in the Constitution or the RBA Act limiting the jurisdiction of the courts on matters touching on pension disputes and fundamental rights with regard to the properties therein. To buttress this argument, the respondent cites the case of **Judges and Magistrates Vetting Board & others v Centre for Human Rights and Democracy & others** [2015] 1 EA 337.

[62] In Counsel's view, the only relevant provision applicable at the time was **section 60** as read with **sections 75** and **80** of the repealed Constitution. He further argued that the CEO was an active participant in crafting the impugned statutory remedial plan and could not therefore be a neutral arbiter due to conflict of interest and apparent appearance of bias.

[63] On the question as to which of the superior courts, that is the High Court and Employment and Labour Relations Court had jurisdiction over the matter, counsel submitted that the dispute between the parties arises out of employment

relationship. The dispute was about pension that was earned during the period of employment and therefore it is purely and squarely an employment and labour relations dispute. The competent court would in the circumstances have to be the Employment and Labour Relations Court.

[64] In regards to the cross-appeal, counsel urged us to set aside ,vary or reverse the judgment of the Court of Appeal to the extent that the Court failed to award interest on the decretal sum from the date of filing the suit and also for not awarding interest at commercial rate of 20% per annum on the decretal sum.

[65] On the issue of the un-pleaded issue of increment of salaries, which the appellant has brought about in the appellant's submissions and was not in the petition and thus not before this court, the respondents submit that the trial court had jurisdiction to address and decide on the same. In their evidence, the appellants agreed and even produced documents as proof of the said increments having been effected, a major factor in assessing payments to the named five respondents. The respondent relies on the case of **Agro Industries Ltd v Attorney General** [1990-1994] EA 1.

[66] Counsel further faulted the Court of Appeal for ordering each party to bear its own costs before the Employment and Labour Relations Court and in the Court of Appeal while the respondents were already paid costs assessed by the trial court at the time of filing of the appeal before the Court of Appeal.

IV. ANALYSIS

[67] This is another juridical moment when this Court is called upon to adjudicate and give guidance as the court of last resort on a matter having a central bearing in the daily lives of our senior citizens and the general work force.

The subject dispute does not only bring into sharp focus the controversies surrounding the mismanagement of pension schemes but also beckons for settlement by this court of the constitutional questions as to the right adjudicatory fora and the jurisdictional limits of the superior courts in the resolution of disputes between pensioners or members, beneficiaries of a pension scheme, the Registered Trustees of the pension schemes, and the Sponsors of the schemes or employers in regard to the management of the pension schemes.

[68] Despite the abundance of arguments on other issues in this appeal, we shall for the purpose of this appeal restrict ourselves within the contours of the following issues for determination:

(a) Supreme Court's Jurisdiction over the dispute;

(b) Which is the forum with original jurisdiction in the first instance to hear and determine the dispute between Pensioners and the Trustees of a Pension Scheme;

(c) Whether in the circumstances of this case the appellants' constitutional right to a fair hearing was violated;

(d) Cross appeal;

(e) Reliefs to be awarded if any.

(a) Supreme Court's jurisdiction

[69] We have time and again determined the question whether a litigant has properly invoked this Court's jurisdiction under **Article 163(4)(a)** of the Constitution. The established guiding principles were settled indeed in the cases of **<u>Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others</u>**, SC Petition No. 10 of 2013; [2014]eKLR and **<u>Erad Suppliers & General</u>**

Contractors Ltd v National Cereals & Produce Board SC Petition No.5 of 2012; [2012]eKLR where we stated that an appeal lies to this Court under Article 163(4)(a) if the issues placed before it revolved around the interpretation and application of the Constitution, and that the interpretation or application of the Constitution had formed the basis for the determinations at the superior Courts below this Court and the same issue had therefore progressed through the normal appellate mechanism to reach this Court.

[70] Further, in **Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another** SC Petition No. 3 of 2012; (2012) eKLR we pronounced ourselves as follows:

> *"The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an Appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation."* (Emphasis ours)

[71] The above position was even more succinctly explained in **Gatirau Peter Munya v Dickson Mwenda & 2 Others** SC Application No. 5 of 2014; [2014] eKLR and **Hassan Ali Joho** (supra) where it was stated that the lower Court's determination of an issue appealed must have taken a trajectory of constitutional application or interpretation and an appeal within the ambit of **Article 163(4)(a)** is one founded on cogent issues of constitutional controversy.

[72] In the case before us, the issue is the correct interpretation to be accorded to **Articles 162(2)(a)** and **162(3)** of the Constitution as read together with **section 12** of the Employment and Labour Relations Court Act, 2011 on one hand and whether **Article 165** of the Constitution and **section 60** of the 1963 Constitution (repealed) conferred the High Court with original Jurisdiction to hear and determine dispute between the appellants and the Respondents.

[73] A review of the record before us reveals that these legal questions were subject of litigation before the trial court and on the first appeal. Consequently, we are persuaded that this case is in accord with the laid down jurisprudence cited above and worthy of our admission and considering under the court's jurisdiction reposed under **Article 163(4)(a)** of the Constitution. We accordingly proceed to exercise our jurisdiction as sought.

(b) ***Which is the forum with original jurisdiction in the first instance to hear and determine the dispute between Pensioners and the Trustees of a Pension***

[74] Our critical examination of the recent decisions before the courts and quasi-judicial bodies in regard to disputes between members and beneficiaries of pension schemes and Trustees of the pension schemes reveals that despite the existence of **sections 46 (1)** and **48(1)** of the **RBA Act**, the High Court, the Employment and Labour Relations Court, the Retirement Benefits Appeals Tribunal and the CEO have heard and determined pension disputes involving retired employees.

[75] For instance, in **Director of Pensions -v- Cockar (**2000) 1 EA 37**,** a pension dispute arose between the appellant and respondent; a suit was filed at

the High Court and a subsequent appeal was heard and determined by the Court of Appeal. In **Teachers Service Commission -v- Simon P. Kamau & 19 Others,** Civil Appeal No. 300 of 2009, the respondents were retired teachers and the High Court and Court of Appeal heard and determined a pension dispute between the parties. In the High Court case of **The Trustees of Teleposta Pension Scheme -v-Mackenzie M. Mogere, N**airobi HC Civil Appeal No. 141 of 2012, Mr. Mackenzie complained that the appellant had calculated and paid him a retirement benefit using a wrong pension method, period or formula which led to a lower pension sum being offered to him. Mr. Mackenzie complained to the Chief Executive Officer of the Authority who dismissed the complaint and he appealed to the Appeals Tribunal which found merit in his complaint. The Court of Appeal in **Kenya Ports Authority -v- Industrial Court of Kenya & 2 others,** Civil Appeal No. 236 of 2012 held that pension disputes are not trade disputes and the Labour Court has no jurisdiction to hear pension disputes which is a jurisdiction reserved for the Authority.

[76] In **Stephen Wahome Ihiga & 16 Others v. Retirement Benefits Authority & Kenya Airports Authority Staff Superannuation Scheme**, **Retirement Benefits Appeals Tribunal (RBAT)** at Nairobi Civil Appeal No. 3 of 2013, the members had appealed to the Tribunal alleging that the Authority and the Trustees of the pension scheme had failed to give the members annual pension increases as required by the law and for unlawfully and wrongfully applying 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. The RBAT at Nairobi Civil Appeal Number 4 of 2013, **Christopher Wachira**

Gathiteri & 2 Others v. **Retirement Benefits Authority & Kenya Airports Authority Staff Superannuation Scheme,** except for few allowances, this case bears a similarity with **Stephen Wahome Ihiga & 16 Others** (supra). Other similar cases from the **RBAT** are Appeal No. 5 of 2013 **SMEP Staff Retirement Benefits Scheme v. Retirement Benefits Authority**, RBAT Appeal No. 3 of 2010 **Anne Wangui Ngugi & Others v. Retirement Benefits Authority, Kenya Commercial Bank Staff Retirement Benefits Scheme & Kenya Commercial Bank DC Scheme**, RBAT Appeal No. 8 of 2010, **Elias Maina Murigi & 133 Others v. Retirement Benefits Authority, National Bank of Kenya Staff Retirement Benefits Scheme, Bank of Kenya Staff Pension Fund Registered Trustees & Alexander Forbes Financial Services (East Africa) Limited**, and many others.

[77] What is emerging from the above observations is a situation where disputing parties have options to choose the forum to approach in the quest for justice which in our view is an injustice in itself and a mortification of our judiciary and the jurisdictional competence set by the Constitution in our judicial hierarchy. Such bridled state of events leaves the powers of the courts to the whims of judicial forum seeking litigants who practise before our courts to decide and choose at their own will the fora for dispute resolution in total disregard to the jurisdictional limits set out in the Constitution. It portends an imitable case of judicial forum shopping and an abuse of the court process.

[78] The blowback to this is the uncertainty in law created by the discordant and inharmonious manner in which similar disputes related to pensioners and

Trustees of pension schemes have been adjudicated before our courts, tribunals and statutory bodies with quasi-judicial authority. Certainty in law enables planning of human affairs in reliance on the law, and the realization of expectations based on such planning. It makes for uniformity in the administration of justice, and prevents the unbridled discretion of the state organs mandated to perform judicial and quasi judicial functions.

[79] The place of certainty in law was explained in the decision of Sir Charles Newbold, P in **Dodhia v National & Grindlays Bank Limited and Another** [1970] EA 195, where he pronounced himself in the following terms, thus:

> *"A system of law requires considerable degree of certainty and uniformity and such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision of its own."*

[80] As a basic principle, as a neutral arbiter, it should not be for the Court to enter into the litigation forum and advise litigants in an adversarial system such as ours on how, when and where to ventilate their grievances, save for the Court to speak through its judgment. This Court, as the ultimate judicial forum and whose decisions are binding on all the courts as provided for under **Article 163(7)** of the Constitution and with an obligation under **section 3(a)** of the Supreme Court Act 2011 (Act No. 7 of 2011) to "*assert the supremacy of the Constitution and the sovereignty of the people of Kenya and to provide authoritative and impartial interpretation of the Constitution*, this Court therefore must safeguard the processes of administration of justice in this

Country and by dint of **section 3(d)** to improve access to justice and to ensure that the administration of justice and judicial processes in the Country are in compliance with the Constitution and the primary laws regulation such processes.

[81] On the other hand**, Article 259(1)** of the Constitution introduced a new approach to the interpretation of the Constitution. It decrees the Courts to interpret the Constitution in a manner that "*promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights, permits the development of law and contributes to good governance.*" [Emphasis ours]

[82] The inference to be drawn from the above Constitutional provisions and case law is that in its constitutional mandate to develop the law, the Supreme Court will be occasionally and in momentous occasions called upon, as in this case, to settle the inconsistencies in the lower courts and thereby bring clarity, uniformity and certainty such as may stand as a constraint to the growth of the law. It is on the above legal principles and the constitutional mandate of this court that we have stated above that we undertake to settle the law in this regard.

[83] As already noted, it is imperative to consider each of these fora and its attendant jurisdiction over disputes.

a) **Jurisdiction under the Retirement Benefits Act**

[84] In determining the jurisdiction under the RBA Act, it is imperative to interpret the relevant provisions of the Act. In the course of interpretation of the provisions of the RBA Act, we are minded that the court should give life to and not stifle the intention of the legislature. We have no difficulty in interpreting the

above provisions in view of the well-established principle of presumption of the constitutionality of a statute and of its provisions and that Courts must give due respect for a coordinate branch of government which entails assuming that parliament's legislative product was intended to pass constitutional muster.

[85] In this case, we are not being called upon to evaluate the constitutionality or legality of the provisions but rather their applicability. For that purpose, regard must be made to the enactment as a whole, to its objects, effects, purpose, true intention and the scope and effect of these provisions or what they are directed against and what they are aimed at.

The Chief Executive Officer, Retirement Benefits Authority

[86] Section 11 of the **RBA Act** establishes the office of the CEO and **section 11(4)** sets out his responsibility in the following terms:

> *"(4) The Chief Executive Officer shall, subject to the directions of the Board, be responsible for the day to day management of the affairs of the Authority."*

[87] Section 46 (1) of the **RBA Act** on the other hand provides as follows:

> *"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."* [Emphasis ours]

[88] A reading and interpretation of the provisions of the **section 46(1)** poses no difficulty and leaves no doubt that the section requires that any member,

beneficiary or dependents of the Scheme who is aggrieved or dissatisfied by any decisions made by a manager, administrator or trustees of the Scheme while exercising their powers under the provisions of the relevant scheme rules or the Act under which the scheme is established, may if he or she wishes make a written request to the CEO to review such decisions with a view to ensuring that such decisions are in accordance with the provisions of the relevant Scheme Rules or the Act under which the Scheme is established and above all lawful.

[89] It is clear that the powers of adjudication given to the CEO under the said provision 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, in this case the Deed of Trust establishing the Kenya Ports Authority Pension Scheme.

[90] It is evident from the RBA Act that pursuant to **section 11** and **section 46**, the CEO has a dual or a two-fold mandate under the Act. The powers vested under **section 11 (4)** of the Act as the accounting officer or the operational head of the Authority responsible for the day to day management of the affairs of the Authority while under **section 46 (1)** of the Act, the CEO is vested with a quasi-judicial mandate in adjudication of disputes arising under the RBA Act, in the first instance. **Section 5** of the **RBA Act** in any event provides for the objects and functions of the Authority which include the regulation and supervision of the management of retirement benefits schemes and the protection of the interests of members and sponsors of retirement benefits sector;

[91] The CEO is therefore obliged while performing his quasi-judicial functions 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. The CEO is required when exercising discretionary power to maintain a proper balance between any adverse effects which his decision may have on the rights, liberties, or interests of persons and the purpose which he pursues.

[92] The above renditions are not just flowery norms but are imperative constitutional commands under **Article 10** of the Constitution binding the CEO to observe the values and principles of governance in the discharge of quasi-judicial functions in the application and interpretation of the RBA Act.

[93] The Retirement Benefits Authority is a state corporation or a public entity and the CEO is a public officer and they are both bound by the values and principles of public service espoused under **Article 232** to include (*a*) high standards of professional ethics; (*b*) efficient, effective and economic use of resources; (*c*) ***responsive, prompt, effective, impartial and equitable provision of services***; (*d*) involvement of the people in the process of policy making; (*e*) ***accountability for administrative acts.***

[94] The respondents asserted a possible conflict of interest arising in the CEO carrying out this mandate. Conflict of interest is a matter of law. It is a derivative of the common law principles of natural justice that no man can be a judge in his own cause under the maxim '*nemo iudex in causa sua*'. Indeed, the **Fair Administrative Action Act, 2015** was enacted to illuminate and expand the values espoused under **Article 47** of the Constitution and **sections 4(1) and (12)** thereof imports the principle of natural justice and provides broad parameters which bodies undertaking administrative action have to adhere to.

Section 46(1) on its part provides that "*Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair***,** *w*hile **Section 12** of the Act states as follows:

> "*This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice*"

[95] A decision made by a person, authority, tribunal, a judicial officer or by a court of law authorized by law in exercise of *quasi judicial* or *judicial authority* that is reached in violation of the rules of natural justice cannot be allowed to stand and it matters not that another adjudicatory body could still have recommended the same action that it took.

[96] The case of **General Medical Council v Spackman** [1943] 2 All E.R elucidated the effect of violation of the rules of natural justice as follows:

> "*If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision.*"

The truism of conflict of interest and its linkages to the principles of natural justice will also be found in ***Halsbury's Law of England, Vol. 1. 4th Edition*** paragraph 97 where it is stated:

> "*It is a fundamental principle that, in the absence of statutory authority or consensual agreement or the operation of necessity, no man can be a Judge in his own cause. Hence, where persons having a direct interest in the subject matter of an inquiry before an inferior tribunal take part in adjudicating upon it, the tribunal is improperly constituted.*"

[97] Conflict of interest presupposes *bias*, whether it is perceived or actual, undermines the public confidence in a judicial officer's ability to dispense justice. In the words of Lord Goff in the case of **R vs Gough,** [1993] 2 All CR 724:

> *"Justice must be rooted in confidence, and confidence is destroyed* *when right-minded people go away thinking 'the judge was biased"* (Emphasis ours)

[98] The Oxford English Dictionary defines bias *"**as an inclination or prejudice for or against one thing or person**"* while **Black's Law Dictionary** defines the word bias as follows:

> *"Inclination, bent, prepossession, a preconceived opinion, a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. Condition of mind, which sways judgment and renders a judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of judge, refers to mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved."*

[99] From the above definition, it is clear that the issue of bias negates the twin virtues of impartiality and independence of a person, tribunal, authority or a court of law mandated to adjudicate and resolve disputes between contesting parties.

[100] Having affirmed elsewhere in this judgment that an issue of conflict of interest is a matter of law, the interpretation of contestations of such a profound principle must be left to the bodies established by law to determine and

pronounce themselves on such legal issues first subject to any other alternative or appellate remedies provided for by law.

[101] Consequently, in this case, it was not within the powers and whims of the respondents to decide that the CEO having been an active participant in crafting the impugned statutory remedial plan was therefore conflicted. Parties cannot apprehensively or arbitrarily decide and choose which adjudicator is conflicted in a cause before them**.** The respondents should have, in this case, sought review before the CEO where the issue of conflict of interest would have been canvassed, a decision made by the CEO and an appeal preferred in any event on that issue to the Retirement Benefits Appeals Tribunal.

[102] The instructive statement from **section 46** of the **RBA Act** is that the CEO is mandated to adjudicate "*any dispute*" set out therein. The section does not exclude issues of conflict of interest with the Retirement Benefits Authority or the CEO as those controversies are outside the CEO's adjudicatory jurisdiction. Secondly, in enacting the provision, Parliament envisaged and contemplated that disputes of legal nature will in the normal cause of transactions with the Retirement Benefits Authority arise between members of the Schemes and the Authority and its officers and that such disputes would be taken up by the CEO for administrative resolution in the first instance.

Optional jurisdiction

[103] It is on the basis of perceived conflict of interest on the part of the CEO that the Court of Appeal resorted to the *"optional jurisdiction"* rule in its contested judgment. This court has had an occasion to address itself in a similar matter in the case of **Communication Commission of Kenya case** (supra)

where it expressed on the issue whether a Tribunal can hear and consider contentions relating to violation of constitutional rights in the following manner:

> "*341. Although the 1st, 2nd and 3rd respondents have argued that a party cannot reasonably be expected to raise constitutional claims before the Public Procurement Administrative Review Tribunal, and therefore a petition in the High Court regarding their constitutional rights was in order, we find nothing to suggest that the matters raised in the High Court could not have accompanied the fundamentals of the grievance the very item before the Tribunal. The Public Procurement and Disposal Act, indeed, does not preclude parties from raising constitutional issues touching on their complaint. We note, besides, that administrative bodies, such as the Tribunal in question, are bound by the Constitution.*" [Emphasis ours]

[104] In the circumstances, we find and hold that the issue of conflict of interest of the CEO and the impugned decision by the appellants to amend the 1998 Trust Deed and Rules made there under should have been brought to the attention of the CEO by way of a request for review under **section 46** of the **RBA Act** in the first instance and such decision would have been amenable to an appeal to the Retirement Benefits Appeals Tribunal under **section 48** of the **RBA Act**. The CEO's *quasi- judicial* determinations under the **section 46 (1)** of the **RBA Act** commands the same force of law as judicial pronouncement subject to any further appeal. In **Communications Commission of Kenya *(supra)*** we stated at paragraph 335 that:

"It remains to determine, however, the question whether the process before the Tribunal was a "judicial proceeding". Although there are differences of substance and of form, ***between judicial and administrative forums, traditionally, when a non-judicial tribunal acts in a quasi-judicial capacity, its determinations are entitled to the same effect as a duly-rendered judicial determination***. [Emphasis ours]

[105] In the High Court case of **Anne Wangui Ngugi & 2,222 Others v Edward Odundo, C.E.O Retirement Benefits Authority** Petition No.57 of 2014 [2015]eKLR; the petitioners sought to have **section 46(1)** of the **RBA Act** declared unconstitutional on the grounds that the CEO would not give them a fair hearing. In dismissing the appeal, the Court held as follows:

"in any event, the decision of the respondent (CEO) is not final. It is subject to appeal before the Retirement Benefits Tribunal established under Section 48 of the RBA Act. Thus, the RBA Act establishes a mechanism for accessing justice, and provides a system of appeal where one is unhappy with a decision reached at first instance."

This assuages the respondents' fears of any perceived conflict since by its composition under **section 47(2)** of the **RBA Act**, the Tribunal comprises five members chaired by an Advocate of not less than 7 years standing. In any event, the CEO, just as the respondents would be a litigant before the Tribunal as the CEO is not a member of the Tribunal.

[106] In Speaker of National Assembly vs Njenga Karume (2008)1 KLR 425 the Court of Appeal expressly stated that where there is a clear procedure for

the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

[107] Where an Act of Parliament confers administrative power to an authority or a person, there is a presumption that it will be exercised in a manner which is fair. The Court's role in such matters was explained in ***Judicial Review Handbook*** by **Michael Fordham** (Third Edition) p.249- 256 as hereunder:

> "*Every public body has its own role and has matters which it is to be trusted to decide for itself. The courts are careful to avoid usurping that role and interfering whenever it might disagree as regards those matters.*"

[108] A similar position was taken in **<u>Council of Civil Service Unions vs. Minister for the Civil Service</u>** [1985] AC 374 HL to the effect that:

> *"It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show."*

[109] As we have illuminated above, the record of proceedings and the judgment of the Court of Appeal at paragraph 59 indicates that it is on the basis of the perceived conflict of interest on the part of the CEO that the Court of Appeal resorted to the rule of natural justice to apply a jurisdictional norm the court called *"optional jurisdiction",* whose effect was to give disputing parties options to seek refuge in other judicial forums in the event of any perceived conflict of

interest with the Authority despite the peremptory review and appellate mechanisms established under **sections 46** and **48** of the **RBA Act**.

[110] On our part and with due respect to the learned Judges of Appeal, we do not agree with such a judicial innovation and resist the temptation for the Court resorting to a jurisdictional principle and concept which is quite novel and not known in our legal system and has never been applied by any courts in this country. In fact, such a foundation is akin to derogating and deviating from the principles of assumptions of jurisdiction we enunciated in the precedent setting case of **Samuel Kamau Macharia** (supra) whose application is binding on all courts under **Article 163(7)** which commands that *"All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.*

[111] Accordingly, jurisdiction cannot be *"optional"* unless such parallel avenues are provided with certain limitations by any written law (*see* **Samuel Kamau Macharia** (supra) and neither can jurisdiction be acquired or exercised depending on the unique facts and circumstances of each particular case. Jurisdiction is not an equitable remedy.

The Retirement Benefits Appeals Tribunal

[112] On the other hand, the Retirement Benefits Authority Appeals Tribunal is established under **section 47** of the **RBA Act**. Its mandate is to hear appeals from the decision of the Authority or the CEO. The jurisdiction of the tribunal is donated by **section 48** of the **RBA Act**. The section provides that:-

> *"(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."

Section 49 of the Retirement Benefits Act provides for *powers of appeals tribunal;*

"(1) On the hearing of an appeal, the Tribunal ***shall have all the powers of a subordinate court of the first class*** *to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.* [Emphasis ours].

(2) where the Tribunal considers it desirable for the purpose of avoiding expense or delay or any other special reason so to do, it may receive evidence by affidavit and administer interrogatories and require the person to whom the interrogatories are administered to make full and true reply to the interrogatories within the time specified by the Tribunal

(3) In its determination of any matter, the Tribunal may take into consideration any evidence which it considers relevant to the subject of an appeal before it, notwithstanding that the evidence would not otherwise be admissible under the law relating to admissibility of evidence."

[113] By dint of **sections 46, 47** and **48** of the **RBA Act**, the jurisdiction of the Retirement Benefits Appeals Tribunal arises only after a matter has been acted on by the Authority or its CEO in the first instance. The tribunal exercises appellate jurisdiction.

[114] It is plain to us, that the architecture, design and engineering of the impugned provision in the Act was aimed at ensuring that disputes as in this case are in the first instance to be adjudicated by the CEO or the Authority with an appeal of such decision lying to the Retirement Benefits Appeals Tribunal. **Section 49** of the Retirement Benefits Act provides for *powers of Appeals Tribunal being all the powers of a subordinate court of the first class* to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents. The foregoing provisions go well ahead to show that the Act provides for the mechanisms and procedure to be followed should a dispute/grievance arise between members of a pension scheme and trustees of the scheme escalate on appeal.

[115] In our considered view, the purpose of the RBA Act as a whole would be best served by reading the words as imperative terms that require, in the absence of any contrary laws, a strict interpretation of its provisions and that the administrative resolution mechanisms and the appellate processes by the Retirement Benefits Appeal Tribunal is exhausted in the first instance before recourse can be taken to the superior courts. This position was well set out in the case of **<u>Tom Kusienya</u>** (supra), in which the High Court expressly recognized the dispute resolution mechanism under the RBA Act in stating the following.

> *"………. the purpose of the Act as a whole and the specific dispute resolution provisions would be best served by reading the word "may" as an imperative term that requires that the appeal mechanism of the Tribunal is exhausted before recourse can be had to the High Court."*

It went on to state:

> *"the Court must exercise restraint in exercising its jurisdiction under Article 165. Where there exist alternative methods of dispute resolution, the Court must exercise deference to the bodies statutorily mandated to deal with specific disputes in the first instance."*

[116] The foregoing verdict also finds support in an adage principle in administrative law of ***"Exhaustion of Administrative Remedies"*** and from the jurisprudence emanating from this Court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by the constitution and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance. *see* **Alphonse Mwangemi Munga & 10 Others v African Safari Club Ltd** [2008] eKLR **Narok County Council case v Trans Mara County Council** [2000] 1 EA 161 **Kones vs Republic & Another ex parte Kimani wa Nyoike & 4 Others** (2008)3 KLR (EP); **Speaker of the National Assembly vs Njenga Karume** (2008)1 KLR (EP) 425, **Francis Mutuku vs Wiper Democratic Movement - Kenya & Others** [2015] eKLR **David Ochieng Babu v Lorna Achieng Ochieng & 2 others** [2017] eKLR among other cases not referred to. The Court of Appeal in **Geoffrey Muthinja & Another Vs Emanuel Muguna Henry & 1756 Others** [2015] eKLR held that:

"We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside of courts. This accords with Article 159 of the constitution which commands Courts to encourage alternative means of dispute resolution."

[117] Of precise relevance to this case is **Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others** [2017] eKLR. In that case, the appellants who were former employees of Telkom (K) Ltd felt aggrieved and discriminated against following the implementation of what was referred to as "*Trivial Pension Payout",* by the Authority which they accused of fraud, corruption and mismanagement and for paying some categories of retirees less increments in their pension payments than others. The trial court made a finding that since the complaints were against the Authority, that there were other statutory inbuilt administrative dispute resolution mechanisms under the RBA Act that ought to have been followed before recourse to the High Court. He opined that any dispute should have been referred to arbitration in the first instance pursuant to Rule 36 of the Consolidated Deed of Trust and Rules, made under the RBA Act and that if the appellant was dissatisfied with the decision of

the arbitrator, then he could appeal to the Retirement Benefits Appeals Tribunal established under the RBA Act. On Appeal, the Court of Appeal dismissed the appeal stating that:

> *"The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See* **International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others**, *Petition No. 552 of 2012, and* **Speaker of National Assembly vs Njenga Karume** *[2008] 1KLR 425.*
>
> *We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant's petition lacked merit and was for dismissal."*

[118] In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other *quasi-judicial* authorities and organs to deal with the dispute as provided for in the relevant parent statute.

[119] Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action.

[120] On the foregoing basis, we are in agreement with the submissions of the learned counsel for the appellants, and further fault the learned Judges of Appeal and hold that the in-built review and appellate mechanisms established under **sections 46** and **48** respectively of the **RBA Act** should have been exhausted first by the respondents before any other recourse is taken to the superior courts. In our view, **section 46** of the **RBA Act** therefore vests original jurisdiction upon the CEO; thus, the proper forum for the respondents to launch their case was to first write to the CEO then if dissatisfied with the decision of the CEO appeal to the Retirement Benefits Appeals Tribunal.

(c) ***Jurisdiction of the High Court or the Employment and Labour Relations Court***

[121] The Constitution and several statutes prescribe the jurisdictional limits and scope of exercise of such powers by various courts, tribunals and agencies exercising *quasi-judicial* functions.

[122] The jurisdiction of the High Court has been elaborately set out in **Article 165(3)** in the following wording:

> "*(3) Subject to clause (5), the High Court shall have —*
>
> *(a) unlimited original jurisdiction in criminal and civil matters;*
>
> *(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;*
>
> *(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;*
>
> *(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*
>
> *(i) the question whether any law is inconsistent with or in contravention of this Constitution;*
>
> *(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court."

[123] Article 162(2) on the other hand empowers Parliament to "*establish Courts with the status of the High Court to hear and determine disputes relating to:*

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

By dint of Clause (3) thereof Parliament is authorized to *"determine the jurisdiction and functions of the Courts contemplated in clause (2)."*

[124] Pursuant to **Article 162(3)** of the Constitution, Parliament enacted the Employment and Labour Relations Court Act. **Section 12(1)** thereof further provides for the jurisdiction of the Employment and Labour Relations Court (ELRC) in the following terms:

"(1) The Court shall <u>have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other</u>

written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee; [Emphasis ours]

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organisation and a trade union organisation;

(d) disputes between trade unions;

(e) disputes between employer organisations;

(f) disputes between an employers' organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements."

[125] This Court has had occasion to set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit. **In the Matter of the Kenya National Human Rights Commission,** Sup. Ct. Advisory Opinion Reference No. 1 of 2012;[2014] eKLR, this Court [paragraph 26] thus remarked:

"...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. ***It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances****. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result"* [emphasis supplied].

[126] In **Speaker of the Senate & Another v. Attorney-General & 4 Others**, Sup. Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR, [paragraph 156], this Court further explicated the relevant principle:

"The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; ***and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents.*** *The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize*

vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitutions borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly [capture] express the minds of the framers, and the minds and hands of the framers may also fail to properly mind the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras" [Emphasis supplied].

[127] These principles have featured in this Court's later decisions; **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others**, Sup.Ct. Petition No. 2B of 2014; [2014] eKLR; **In the Matter of the Principle of Gender Representation in the National Assembly and Senate,** Sup. Ct. Application. No. 2 of 2012; [2012] eKLR and **Jasbir Singh Rai and 3 Others v. Tarlochan Singh Rai and 4 Others** Sup. Ct. Petition No. 4 of 2012; [2013] eKLR.

[128] Our construction of the above referenced provisions is that Employment and Labour Relations Court was established by the Employment and Labour Relations Act pursuant to **Article 162(2)(a)** which grants that Court, the status of the High Court, and confers upon that Court the jurisdiction in

matters concerning employment and labour relations, and environment and the use, occupation of and title to land.

[129] Pursuant to **Article 162(3)** of the Constitution, Parliament enacted the Employment and Labour Relations Court Act. **Section 12(1)** of the Employment and Labour Relations Court Act further provides for the jurisdiction of the Employment and Labour Relations Court (ELRC) in the following terms:

> *"(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—*
>
> *(a) disputes relating to or arising out of employment between an employer and an employee;"* [Emphasis ours].

[130] It is clear to us that **Article 165(5)** of the Constitution ousts certain questions from the jurisdiction of the High Court on matters of employment and labour relations, and matters of environment, use, occupation and title to land by providing thus:

> *"(5) The High Court shall not have jurisdiction in respect of matters— (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or*
>
> *(b) falling within the jurisdiction of the courts contemplated in Article 162 (2)."*

[131] The clear wording of the debarment of the High Court by the Constitution is that *"**shall not have** jurisdiction in respect of matters falling within the*

jurisdiction of the courts under Article 162(2)". On the other hand the ouster of its Jurisdiction under **section 12(1)** of the primary statue is that the Labour Relations and Employment Court "*shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—disputes relating to or arising out of employment between an employer and an employee;*

[132] Had the framers of the Constitution intended to restrict the power of Parliament to enact legislation enlarging the scope of jurisdiction of the High Court and at the same time limiting the jurisdiction of the Employment and Labour Relations Court with respect to certain disputes relating to employment and labour relations, it would have done so in express terms in the same way that the High Court is expressly barred, under **Article 165(5)**, from exercising jurisdiction in respect of matters *"falling within the jurisdiction of the courts contemplated in Article 162(2)."*

[133] The choice of language in **Article 165(5)** is also instructive. It provides:

> *"(5) The High Court shall not have jurisdiction in respect of matters—*
>
> *(a) <u>reserved for the exclusive jurisdiction</u> of the Supreme Court under this Constitution; or*
>
> *(b) <u>falling within the jurisdiction</u> of the courts contemplated in Article 162 (2)."*

[134] This Court's amplification in **<u>Republic v Karisa Chengo & 2 others</u>** SC Petition No. 5 of 2015 [2017] eKLR on the issue of distinct jurisdiction of the

High Court and the specialized courts established under **Article 162(2)(3**) of the Constitution is illuminating. We thus stated therein:

> *"[50] It is against the above background, that Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts.*
>
> *[51] Flowing from the above, it is obvious to us that* status *and jurisdiction* are *different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court's operation. Courts can therefore be of the same status, but exercise different jurisdictions. That is why this Court has reaffirmed its position that the jurisdiction of Courts is derived from the Constitution, or legislation (see* **In Re the Matter of the Interim Independent Electoral Commission***, at paras. 29 and 30; and* **Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others**, *Sup.Ct. Civil Application No. 2 of 2011 [para. 68]). In this instance, the jurisdiction of the specialized Courts is prescribed by Parliament, through the said enactment of legislation relating, respectively, to the ELC and the ELRC.*
>
> *[52] In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated*

above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with suis generis *jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court."*

[135] By jurisdiction, it is clearly meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. 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 cognizance, 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 a nullity. Jurisdiction, therefore, must be acquired before judgment is given.

[136] This is clear from the following passage in this Court's ruling in **Samuel Kamau Macharia case** (supra):

> "[68] *Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents . . . that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.....Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution."*

[137] To give a prescriptive answer to the jurisdictional question, the first port of call is to determine the nature of the dispute. Whether in the circumstances of the case, it is a dispute contemplated to be adjudicated by the High Court under **Article 165** of the Constitution or it revolves around those disputes reserved for resolution by the Employment and Labour Relations Court pursuant to **Article 162(2)** and **Section 12** of the Employment and Labour Relations Court.

[138] At the risk of repetition, it is not in dispute that the controversy is between members, beneficiaries and dependants of a pension scheme on one hand and the Trustees of the Scheme on the other hand. What then is a pension scheme?

[139] ***The Law Dictionary*** defines a pension scheme as: *A retirement plan offered* ***by an employer****. Funds come* ***from both employee and employer****. The* ***employers' managers*** *make sure the funds are in there upon retirement. They do this by investing in fixed income or equity securities.*[Emphasis ours]. ***Miriam Webster Dictionary*** defines a pension scheme as***:*** *an arrangement made* ***with an employer*** *to pay money to* ***an employee after retirement*** [Emphasis ours].

[140] The above comparative broad definitions leave no iota of doubt that at the core of a pension scheme is a relationship between an employer and an employee. It is apparent in this case that the savings to the Scheme were from the deductions of proceeds of the employment relationship between the respondents and the Authority.

[141] More so, according to the RBA Act, *"Sponsor"* is defined to mean "*a person who establishes a scheme."* In this case, the Sponsor is the Kenya Ports Authority which established the Kenya Ports Authority Pension Scheme and was the former employer of the respondents.

[142] An uncontested argument was made that the establishment of the Trustees and Trust Deed and Regulations made thereunder were as a result of a Collective Bargaining Agreement between the employees and the employer Kenya Ports Authority. The record before us contains an agreement titled *"Agreement Between the Kenya Ports Authority and Dockworkers Union in respect of Unionisable Employees (The Collective Agreement)."*

[143] Clause 27 on **RETIREMENT** provides that:

"27.1 *An **employee** of the **Authority** may opt to retire at the age of 50 years and qualify for **Pension** provided he has a minimum of ten(10) years qualifying period of **continuous service**.*

27.2 ***The Authority** will take appropriate administrative action to improve on computation of final dues for **retirees**.*

Clause 28 on **PENSION**

*28.1 The Kenya Ports Authority (Pension Regulations 1983) as a mended from time to time will continue to apply to persons who are **employees** of **the Authority** as at 31st December 1985*

28.2 ***Ex**-Kenya Cargo Handling Services Limited **employees**, will on implementation of the terms and conditions of service, qualify for **pension**, gratuity as hereinafter provided depending on their Retirement Scheme in the Company as at 31st December 1985 and as at 1st January 1986."*

[144] From the above excerpts of the Collective Agreement, the relationship between the employees, former employees, the employer - Kenya Ports Authority cannot be disengaged from each other in the establishment of the Scheme. It was on the basis of the Collective Agreement between the employer and the employees that the Scheme was established by the Sponsor. The terms of the collective agreement on pension at Rule 28 and Retirement at Rule 27 were to be effected through the Scheme.

[145] On the other hand, **section 2** of the Employment and Labour Relations Court Act defines the term an "**employee**" to mean a person employed for wages or a salary and includes an apprentice and indentured learner. The provision

further defines **"employer"** to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. Thus, whereas a dispute between a Trustee and a beneficiary may well fall within an employment dispute, the meaning of a Pensioner is nowhere near the meaning of an employee neither can the scheme of organisation fit in the meaning of an employer.

[146] In our view, once a member leaves the employment of a Sponsor, by becoming a pensioner, there is no longer a relationship of employer-employee that exists between such a pensioner and the sponsor. The relationship that exists in that case becomes that of trustee and beneficiaries (members) of a trust and that relationship is governed by the Retirement Benefits Act, Trustee Act Cap 167 of the laws of Kenya and the general common law on the law of trusts. It is important to note that nowhere in the Employment and Labour Relations Court Act is there jurisdiction conferred on the Employment and Labour Relations court to resolve issues between trustees of a pension scheme and members of the scheme (pensioners).

[147] In **Abdalla Osman & 628 others v Standard Chartered Bank (K) Limited & 11 others** ELRC Cause No. 59 of 2018 [2018] eKLR, a case with factual similarities to the instant case, the trial court made the point clear by stating that:

> *"In the case of the suit herein is between former employees of the first respondent and their former employer on one hand and also between pensioners and their respective pension schemes. Under section 12 of the*

ELR Act this Court has jurisdiction to determine disputes between employers and their employees and by extensions, former employees and their former employers. The said jurisdiction is donated by the said Act pursuant to provisions of Article 162 (2)(a) of the constitution of Kenya. There is therefore an inherent jurisdiction of this court to entertain any sort of dispute which arise from the context of employer employee relationship."

However, the Court of Appeal in Civil Appeal No.236 of 2012 **Kenya Ports Authority** (supra), held that pension disputes are not included within the definition of a trade dispute consequently the then Industrial Court did not have jurisdiction to hear and determine pension disputes. That the then Industrial Court acted in excess of its jurisdiction in determining the dispute involving the Scheme, a jurisdiction that was reserved for the Authority.

[148] From the foregoing, we are inclined to agree with the Court of Appeal based on our understanding of **section 12(2)** of the Employment and Labour Relations Court Act which states:

"An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

We do not see how a pensioner falls within the listed category of persons and parties that can make an application or institute proceedings before the court. From the foregoing it is thus clear that the Employment and Labour Relations

Court had no jurisdiction to hear and determine a dispute that relates to trustees of a pension scheme and members of the scheme particularly where the said members are no longer employees of the Sponsor. Besides, the trust so established as a pension scheme retains autonomy from both the Sponsor and the employees hence its regulation by the Authority.

[149] On the place of the suit which was filed on 27th November, 2007 in the High Court pursuant to **section 60** of the repealed Constitution, in our view, there is clear merit in the arguments by the appellants' counsel that even though the proceedings were filed before the new Constitution was promulgated, such legal processes were saved under the new Constitution. We say so because when the **Employment Act** was enacted in **2007**, and the case was filed, the Constitution 2010 had not been promulgated and there was necessarily a need to align the provisions of all statutes enacted prior to it, with the said Constitution.

[150] On the effective date, it is only the repealed Constitution that fell into disuse, save for the various sections saved by the Sixth Schedule. The existing legislative regime, on the other hand, remained in force, as decreed by **section 7** of the Sixth Schedule in the following terms:

> *"(1) All law in force immediately before the effective date continue in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution"* [emphasis ours].

[151] The rationale of the foregoing constitutional provision is that, if a state organ is allocated responsibility which was previously under another organ, the

new organ shall exercise the power held by the previous organ in order to carry out the responsibility allocated under the new Constitution.

[152] In that light, the pronouncement by Lenaola J (as he then was) in the case of **Gichuru & another v Attorney General & 3 others** [2015] eKLR bears repetition:

> *"Further, constitutional change is a revolution and as such, it comes with the shedding of old rules. Such a change in a constitutional manner is in the form of realignment of duties and obligations within the government structure.* ***New institutions are created that take over powers and obligations from existing institutions. Some existing institutions and state organs are split, while others are abolished all together****. This revolutionary nature of our Constitution was well noted by the Chief Justice in his concurring opinion in the* **Re Senate***, Advisory Opinion when he stated thus;*
>
> > *"[160] The Constitution of [Kenya] 2010 was a bold attempt to restructure the Kenyan State. It was a radical revision of the terms of a social contract whose vitality had long expired and which, for the most part, was dysfunctional, unresponsive, and unrepresentative of the peoples' future aspirations. The success of this initiative to fundamentally restructure and reorder the Kenyan State is not guaranteed. It must be nurtured, aided, assisted and supported by citizens and institutions. This is why the Supreme Court Act imposes a transitional burden and duty on the Supreme Court. Indeed,*

constitutional relapses occur in moments of social transition, when individual or institutional vigilance slackens.

The Supreme Court has a restorative role, in this respect, assisting the transition process through interpretive vigilance. The Courts must patrol Kenya's constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order…" (Emphasis added)

[153] In that context, the purposive reading and interpretation of **Article 162** together with **Article 165(5)** of the Constitution leaves no doubt that the original and appellate jurisdiction over disputes related to Employment and Labour relations was transferred from the High Court to the Employment and Labour Relations Court. Prima facie, that meant that, any dispute subject to any other statutory or constitutional limitations emanating from the disputes contemplated under **Article 162(2)** *supra*, must be determined by the Employment and Labour Relations Court. This is what may have informed the consent by parties through respective counsel to transfer the matter from the High Court to the Employment and Labour Relations Court.

[154] However, as it was well elucidated in the case of **Kagenyi v Musiramo & Another** (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.

As already found that this dispute does not fall within the scope of the Employment and Labour Relations Court despite the transfer, we now look at the jurisdiction of the High Court under the repealed Constitution.

[155] Once the parties became wary of the new constitutional dispensation after the year 2010 and sought to comply with it in purporting to transfer the case from the High Court, this should not have been done in isolation. The RBA Act was enacted in the year 1997 and was in existence by the time the suit was filed. It is our view, as already stated earlier in this judgment that the RBA Act mechanism was applicable. We add that that mechanism falls within the constitutional ambit as stated in **Article 165(5)(b)** of the Constitution for which the High Court cannot usurp the jurisdiction of a specialized mechanism provided for by statute and the Constitution. In a nutshell, we conclude that the High Court whether under the repealed or new constitution does not have jurisdiction.

(d) Whether in the circumstances of this case the Constitutional Rights of the appellants' to a fair hearing under Articles 47 (1) and 50 (1) were violated?

[156] We have beforehand in this judgement set out the test and attributes that must be linked to an appeal to the Supreme Court under **Article 163(4)(a)** involving the interpretation and application of the Constitution, see **Hassan Ali Joho** (supra), **Erad Suppliers** (supra), **Lawrence Nduttu** (supra), **Gatirau Peter Munya** (supra).

[157] Central to this case is the principle and the question as to whether in the case at hand, the appellant's grievances on the violations of constitutional right to fair hearing under **Articles 47(1) and 50(1)** of the Constitution were subject of the litigation in the lower superior Courts leading to the present appeal?

[158] We have painstakingly perused the record of appeal and find no pleadings, evidence, submissions or a determination made in the trial court and taken up to the first appellate court on any of the grounds of violations of the appellants' rights to a fair hearing under **Articles 47(1)** and **50(1).** In the trial court, the applicants' objection was on the issue of jurisdiction and on the ground that the suit was prematurely filed before the Employment and Labour Court. In the Court of Appeal, the central issue was the contestation on which superior court between the High Court and the Employment and Labour Relations Court was seized of Jurisdiction and whether the dispute should have been first subjected to the review mechanism under **section 46** of the **RBA Act**.

[159] We find that by no means was the issue of the violations of appellants' constitutional rights to a fair hearing subject of litigation and determination in both the trial court and the court of appeal. In **Daniel Kimani Njihia** (supra), this Court thus held (paragraph 21):

> *"We are in agreement with the Court Appeal. For a party to be granted leave to appeal to this Court, there must be a clear demonstration that such a question of law, whether explicit or implicit, has arisen in the lower tiers of Courts, and has been the subject- matter of judicial determination."*

[160] In **Gladys Wanjiru Munyi v Diana Wanjiru Munyi** Sup. Ct. Petition No. 31 of 2014 [2015]eKLR, the Court stated at para 12 that:

> *"In Peter Ngoge v. Francis Ole Kaparo & 5 Others, Sup. Ct. Petition No. 2 of 2012 [2012] eKLR, we signalled the guiding principle that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, do indeed have the competence to resolve all matters turning on the technical complexities of the law,*

As is really apparent from the record of appeal, this ground of appeal does not conform to the guiding principles we have laid down for this Court's assumption of jurisdiction under **Article 163(4)(a)** of the Constitution.

[161] Moreover, the violation of the right to fair trial in the instant case is attributed to the Court. Once the central issue in dispute was determined by the Court in excess of its jurisdiction, the proceedings together with the outcome are rendered a nullity. No cause of action can arise from such proceedings as the parties herein seek. The upshot is that this ground of appeal must fail.

(e) Cross-Appeal

[162] Before delving into the merits of the cross appeal, it is incumbent upon us to address ourselves to the place of a cross appeal, this being the first time the Court is faced with a cross appeal.

[163] By its definition, a cross appeal is an appeal by an appellee, usually heard at the same time as the appellant's appeal (see **Black's Law Dictionary 9th edition p.113**). A cross-appeal is also defined as a request filed by an appellee (respondent) requesting that a higher court review a decision made by a lower court. The difference between an appeal and a cross-appeal is essentially

arbitrary and dependent only on who filed the request for a higher court's review first. The first party to file is called the Petitioner or appellant, and its request for review is an appeal. If an opposing party (called the respondent or appellee) also wishes to request review of a lower court's decision, that request is called a cross-appeal. (See ***Cornell Law School, Legal Information institute accessed at https://www.law.cornell.edu/wex/cross-appeal***)

[164] A cross appeal is therefore distinguishable from an appeal. The latter is preceded by a notice of appeal under **rule 31** of the Supreme Court Rules 2012 and instituted by lodging a petition of appeal, record of appeal and the payment of the prescribed fee within the specified timelines set out under **rule 33** of the Supreme Court Rules.

[165] We note that the cross appeal herein is in the same form and substance as a cross appeal filed before the Court of Appeal by the respondent. Unlike this Court, the place of cross appeal in the Court of Appeal is a non-issue as it emanates from that Court's jurisdiction to hear and determine appeals from the High Court as a first or second appellate court.

[166] Rule 93 of the Court of Appeal Rules 2010 deals with notice of cross appeal and it explains it under **rule 93(1)** thus – *A respondent who desires to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of his contention and the nature of the order which he proposes to ask the court to make, or to make in that event, as the case maybe.*

[167] The Supreme Court Rules on the other hand deal with the notice of cross appeal differently under **rule 38** which provides as follows:

> *"(1) A respondent who intends to cross-appeal shall specify the grounds of contention and the nature of the relief which the respondent seeks from the court*
>
> *(2) The respondent shall –*
>
> *a) Provide contact details, including the names, postal address, telephone number and email address of any persons intended to be served with the notice; and*
>
> *b) Lodge eight copies of the memorandum of appeal and record of appeal in the registry within 30 days of service on the respondent or not less than 30 days before the hearing of the appeal, whichever is later.*
>
> *(3) An application for notice to cross appeal under sub-rule (1) shall be in Form F set out in the First Schedule."*

[168] The said Form F of the First Schedule provides:

> *" NOTICE OF CROSS-APPEAL*
>
> *TAKE NOTICE that <u>on the hearing of this appeal</u> the above named – respondent will contend that the above-mentioned decision ought to be varied or reversed to the extent and in the manner and on the grounds hereinafter set out, . . ."* (Emphasis supplied)

This form is in material respect similar to the Form G set out in the First Schedule of the Court of Appeal Rules 2010, applicable in respect of Cross Appeals before the Court of Appeal.

[169] In determining the place of cross appeals therefore, the following questions, in our view, arise for consideration. Is a cross appeal a separate appeal or independent appeal? Is it automatic that once an appeal is admitted the admission extends to the cross appeal? Is it contemplated that the cross appeal may invoke a different jurisdiction of the court from that of the main appeal? Must the cross appeal be heard and determined alongside the main appeal? Can the cross appeal be heard and determined before the main appeal? And, can there be a cross appeal to the Supreme Court if there was no cross appeal to the Court of Appeal?

[170] In answering the above questions, we make various observations. From the definitions referred to above, it is apparent that a cross appeal is not an independent appeal but rather a 'reverse appeal' by a respondent against an appellant who has already filed an appeal against the respondent. This connotes that in the absence of the appeal having been filed against a respondent, no cross appeal arises. The form in which the notice of cross appeal is worded makes it clear that a cross appeal is filed at the instance of the respondent and the respondent contends certain issues of the decisions being appealed from.

[171] A cross appeal is a corollary cause of action that is distinguishable from a response to petition of appeal which is made in the form of a grounds of objection and/or an affidavit contemplated under **section 11** of the Supreme Court Act. Thus an appellee who does not take a cross appeal may "urge in support of a decree any matter appearing before the record, although his argument may involve an attack upon the reasoning of the lower court" (see **United States v American Railway Express Co.,** 265 U.S. 425, 435 (1924)). But an appellee

who does not cross appeal may not "attack the decree with a view of either to enlarging his own rights thereunder or lessening the rights of his adversary" (As per the Supreme Court of the United States in **<u>Jennings v. Stephens</u>** 574 U.S.1, 4 (2015).

[172] In the United States, there is a rule that cross appeals are necessary only when an appellee (respondent) seeks to change the judgment of the lower court and not when he wishes to advance in support of the judgment arguments rejected or not considered by that court. When a judgment disposes of separate claims, cross-appeals are necessary to present arguments relating to a different claim than that covered by the initial appeal. This necessity would be apparent when different clauses in the judgment deal with each claim. But the requirement seems warranted even if the decision as to various claims merges into a single provision of the judgment, such as an order that the plaintiff recover a single sum. (See **Robert L. Stern, (1974) "When to Cross-Appeal or Cross Petition-Certainty of Confusion",** ***87 Harv.L. Rev. 763*** **at p.767**). The Supreme Court of the United States has so held in two tax cases, **<u>Helvering v. Pfeiffer</u>,** 302 U.S. 247, 250-51 (1937) (Stone and Cardozo JJ., dissented) and **<u>Alexander v. Cosden Pipe Line Co</u>.,** 290 U.S. 484 (1934).

[173] In the American State of Kansas, their legislation in **K.S.A. 60-2103 (h)** pertains to cross-appeals and provides as follows:

> *"When a notice of appeal has been served in a case and the appellee desires to have a review of rulings and decisions of which he complains, he shall within twenty (20) days after the notice of appeal has been served*

upon him and filed with the clerk of the trial court, give notice of his cross-appeal."

Based on the above provision, a cross appeal was filed heard and determined by the Supreme Court of Kansas in the case of **In Re Waterman** 212 Kan.826 (1973) 512 p.2d 466.

[174] Having established that a cross appeal is not an independent appeal, it automatically follows that the cross appeal must be heard and determined alongside the substantive appeal to avoid any absurdity, judicial embarrassment and awkwardness that may accompany any other way of hearing and determination. We do not think that it should matter whether or not the cross appeal was filed at the Court of Appeal for a cross appeal to be made at the Supreme Court. Nevertheless, as was observed by the Supreme Court of India in **Sahadu Gangaram Bhagade v Special Deputy Collector, Ahmednagar and Anr** [1971] 1 SCR 146 that the right given to a respondent in an **appeal** to file **cross** objection is a right given to the same extent as is a right of **appeal** to lay challenge to the impugned decree if he can be said to be aggrieved thereby. It is common that cross appeals can be filed and even successful in other instances as was held in our neighbouring country, Uganda, in the case of **Attorney General v Uganda Law Society** Constitutional Appeal No. 1 of 2006 [2009] UGSC 2.

[175] As we proceed to answer the rest of the questions we raised, we remain alive to the fact that the Court can only be seized of a matter where the Court's jurisdiction is properly invoked. It is trite law, as we already emphasized, that jurisdiction is everything. Our jurisdiction is specific and is granted by the

Constitution. We are not an automatic appellate court to hear and determine all appeals from the Court of Appeal.

[176] Articles 163(4)(a) and **163(4)(b)** of the Constitution relate to our jurisdiction to hear appeals from the Court of Appeal as of right on cases involving the interpretation or application of the Constitution and in any other case as may be certified to be of general public importance, respectively. The jurisdiction is distinct and cannot be exercised concurrently as was aptly put by two judges of this Court in **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others** [2015] eKLR thus:

> *"[39] The two avenues of the appellate jurisdiction of this Court are distinct…*
>
> *[41] Suffice it to say that the path that a litigant takes is determined on the basis of the subject matter, as has been held by the superior Courts. Once the Court of Appeal renders its decision, the litigant is able to elect which course to follow. This decision is taken in advance, as it is the basis of determination on whether to seek certification first, or proceed straight to the Supreme Court. Thus, the decision on how to proceed, rests on **the character of the issues involved in the subject matter**, rather than on such procedural shortfalls as may have afflicted a litigant's progress. It follows that where a party has elected the path to the Supreme Court "as of right", that matter cannot be 'converted' to one where certification is required, just because time for filing "an appeal as of right" has lapsed.*
>
> *[42] In* **Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others**, *Application No.15 of 2014 (2014) eKLR, this Court disallowed counsel's*

argument that an intended appeal comprised a blend of "appeal-as-of-right" matters on the one hand, and "appeal-by-certification" matters, on the other hand [at paras.21-22]: (Emphasis supplied)."

[177] This jurisdiction is replicated in the statutes, and in our case the Supreme Court Act. No further jurisdiction can be coined out of judicial craft or activism. Where the Statute or even rules have purported to extend our jurisdiction, the same has, and in our view rightly so, been found to be unconstitutional to that extent. This is the import of our earlier decision in **Samuel Kamau Macharia case** (supra) as follows:

"(71) Flowing from the foregoing, we hold that Section 14 of the Supreme Court Act is unconstitutional insofar as it purports to confer "special jurisdiction" upon the Supreme Court, contrary to the express terms of the Constitution. Although we have a perception of the good intentions that could have moved Parliament as it provided for the "extra" jurisdiction for the Supreme Court, we believe this, as embodied in Section 14 of the Supreme Court Act, ought to have been anchored under Article 163 of the Constitution, or under Section 23 of the Sixth Schedule on "Transitional Provisions."

This position was reiterated by a full bench of this Court in **Jasbir Singh Rai** (supra).

[178] We addressed ourselves on the place of rules in **Frederick Otieno Outa v Jared Odoyo Okello & 4 others** [2014] eKLR in the following manner:-

"[65] For the proper conduct of administration of justice, the statutory form is generally employed to confer jurisdiction, prescribe form,

substance, process and procedure, governing the administration and dispensation of claims. A statute in this category may prescribe how to formulate a right of action – for instance, by petition, plaint, notice, or originating motion. On procedural aspects, the statute or the rules (as the case may be), may regulate timelines, and other facets of case-management. It may also regulate the confines within which a Court may exercise its adjudicatory powers, by prescribing the category of jurisdictional issues; or questions upon which a Court may make a determination of the case before it. This is the context in which the conduct of proceedings before our Courts is governed by the Civil Procedure Act, the Criminal Procedure Code, the Appellate Jurisdiction Act, the Supreme Court Act, 2011 and the Rules made pursuant thereto, and by many other Acts of special character.

…

[71] . . . On this account, it makes, in our perception, eminent sense that the ordinary rules of procedure, in their full tenor and effect, tend to be ill-suited to the effectuation of substantive aspects of the Elections Act, and the Rules made thereunder. It is clear to us, for instance, that Rule 35 of the Elections Petition Rules, insofar as it makes the Court of Appeal Rules applicable to appeals in election-dispute matters, is to be construed only as a supplement to – and not a substitute to – the provisions of the Election Act. We would state, for the avoidance of doubt, that the importation of the Court of Appeal Rules into the conduct of electoral

appeals via Rule 35 of the Election Petition Rules, cannot oust the clear provisions of Section 85A of the Elections Act."

[179] Applying the above laid down principles to a cross appeal, it is imperative that our consideration of a cross appeal should be done within our special jurisdiction prism. The contentions set out in a cross appeal must at the onset fall within the jurisdictional sphere of the court as set out in the Constitution and must be limited to issues not already addressed by the appeal or those that cannot be argued during the appeal as a response.

[180] Since this Court does not exercise its jurisdiction concurrently and its jurisdiction must be specifically invoked, it is of necessity that any respondent opting to cross appeal must bring the cross petition, through the grounds raised, within the realm of the substantive appeal. Such is easily applicable when an appeal is filed as of right under the provisions of **Article 163(4)(a)** of the Constitution.

[181] Where the appeal requires certification as being a matter of great public importance under the provisions of **Article 163(4)(b)** of the Constitution, it is our position that during such certification, the respondent is at liberty to raise the cross appeal and the grounds applicable for such. In that instance, should the Court of Appeal or Supreme Court dealing with the certification find that the ground raised either in the application for certification and/or cross appeal qualifies as raising great public importance, then the issues and grounds will be framed as such to form the basis of certification of the appeal to the Supreme Court. With such certification, as may be reviewed by the Supreme Court where

necessary, the respondent will be at liberty to file the cross appeal in accordance with the Supreme Court directions.

[182] Where, on the other hand, the main appeal is hinged under **Article 163(4)(a)** of the Constitution as of right and the cross appeal is hinged on grounds that require certification as being of great public importance under **Article 163(4)(b)** of the constitution or the other way round, it is our view that such a cross petition should fail. Entertaining the cross appeal under the circumstances would amount to calling upon the Court to exercise concurrent jurisdiction over one appeal. Moreover, the process and time frames followed from filing to determination of appeals under **Article 163(4)(a)** and **(b)** are different and it is unlikely that the appeals filed and invoking different jurisdictions can be heard concurrently, let alone being consolidated. As we recently held in a ruling on a preliminary objection made in **Synergy Industrial Credit Limited v Cape Holdings Limited** Supreme Court Petition No. 2 of 2017 [2018] eKLR, a matter may be either a constitutional question under **Article 163(4)(a)** or a matter that requires certification under **Article 163(4)(b)** of the Constitution. A litigant however must choose a jurisdictional path and pursue it.

[183] Consolidation of appeals within the confines of **rule 14** of the Supreme Court Rules 2012 can, in our view, only be considered by this court where there are two independent appeals filed arising from the same decisions. This is distinguishable from cross appeals contemplated under Supreme Court Rules 2012.

[184] Examining the cross appeal before us, we note that upon the delivery of judgment by the Court of Appeal, the appellants filed a notice of appeal at the Court of Appeal on 9th March 2016. The respondents on the other hand filed a notice of cross appeal on 21st April 2016 and grounds of opposition to the appeal on 28th June 2016.

[185] The cross appeal is founded on **rule 37** of the Supreme Court Rules *(sic)*. Our perusal of **rule 37** reveals that the said rule deals with default of institution of appeals. The respondents' Advocates in their filed submissions and during the oral highlighting of the same neither addressed themselves to the legal provision invoked nor the basis of the cross appeal within our jurisdiction but instead canvassed the merits of the cross appeal. This in our view fell below our expectation of the respondents as the cross appellants in light of the novelty of their cross appeal before us.

[186] Even if, out of abundance of caution, we were to consider that it was a typographical error on the respondents' part and we nevertheless considered the cross appeal under the applicable **rule 38**, it is apparent that the respondents did not adhere to the provisions of **rule 38(2)(b)**. The respondents have not lodged the memorandum of appeal and record of appeal. There is no evidence that the respondent sought to comply with the above rule even if based on their own understanding of the same. **Rule 55** deals with the effect of non-compliance with the rules which are binding to all parties and the effect includes giving any directions for dismissal of the petition.

[187] Be that as it may, we note that this provision does not lend itself to clarity as there is no provision elsewhere in the Rules or the Supreme Court Act relating

to a memorandum of appeal to be filed before the Supreme Court. An appellant is expected to have filed the record of appeal which contains the memorandum of appeal filed before the Court of Appeal and it makes no sense why the respondents were expected to file the same documents. The **rule 38(2)(b)** as currently drafted calls for review in order to make it clear as to its objective and implementation. There is nevertheless no evidence that the respondents sought to comply with the above rule.

[188] Back to the merits of the cross appeal, we note that the appeal herein is founded on the provisions of **Article 163(4)(a)** of the Constitution, being an appeal as of right. The respondents challenged our jurisdiction in that regard. The cross appeal on the other hand, as earlier noted, is grounded on two main issues – costs and interest. The grounds and arguments proffered in support of the cross appeal do not raise any constitutional questions. At any rate, the subject matter contained in the grounds of the cross appeal is a matter that does not, on the face of it, qualify as constitutional questions.

[189] As to whether the said issues amount to issues of general public importance, we are unable to apply ourselves in that regard since a certification to such effect is required. We cannot at this juncture be called upon to undertake a certification as to whether the issues raised in the cross-appeal amount to being matters of general public importance. There exists a clear procedure to achieve that, which is not the case before us.

[190] Indeed, the appellants in their submissions challenged the issues raised in the cross appeal as being improperly before the court.

[191] The totality of the foregoing leads to an inevitable conclusion that the cross appeal must fail. This is more so in view of our findings on the main appeal on which the cross appeal finds basis.

[192] In any event, award of costs and interest on a decretal sum at court rates are within the discretion of a trial court. **Section 26** of the Civil Procedure Act on payment of money decrees provides as follows:

> *"1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.*
>
> *2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum."*

[193] On the other hand**, section 27** of the Civil Procedure Act on award of costs stipulates that:

> *"1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, <u>the costs of and incidental to all suits shall be in the discretion of the court or judge</u>, and the court or judge shall have full power to determine by whom and out of what*

property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: [Emphasis ours]

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

2. The court or judge <u>*may give interest on costs*</u> *at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."*

[194] The Superior Courts have, over time, come up with several principles derived from this general rule in **section 26** of the **Civil Procedure Act** which have, since acquired stable meanings. One of the principles in this regard relevant to the respondents' cross-appeal is that, at all times a trial Court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial Court with utmost respect and should refrain from interference with it unless it is satisfied that the Lower Court proceeded upon some erroneous principle or was plainly and obviously wrong. (See <u>**New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd**</u> [1988] KLR 380).

[195] The question beckoning our answer on this limb of cross-appeal is whether this Court has jurisdiction to hear an appeal from the decision of a Court of Appeal on the exercise of judicial discretion by a trial court on an issue of award

of interest and costs. We say no. In **Daniel Kimani Njihia** (supra), this Court thus held at paragraph 21:

> *"It is* ***clear to us that this Court had not been conceived as just another layer in the appellate - Court structure. Not all decisions of the Court of Appeal are subject to appeal before this Court****.* ***One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court's mandate****. Such discretionary decisions which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution"* [emphasis ours].

[196] The situation would have been different if the exercise of such a judicial discretion in the award of costs and interests was argued to have been a subject of constitutional interpretation or application and that such constitutional contestations had been adjudicated within the chain of our court system leading to an appeal to this court under **Article 163(4)(a)** of the Constitution.

(f) Reliefs

[197] In the end, the appeal succeeds and the cross appeal fails in entirety. We make the following consequential orders.

i. The Appeal dated 25th March 2016 is allowed;
ii. The Cross-Appeal dated 14th April 2016 is dismissed;
iii. The judgment of the Court of Appeal dated 26th February 2016 is set aside;

iv. We hereby remit the matter for adjudication by the Chief Executive Officer of the Retirement Benefits Authority under the attendant mechanism under the Retirement Benefits Act.

v. There shall be no order as to costs considering the nature of the dispute as that involving members and Trustees of the Kenya Ports Authority Pension Scheme and the weighty points of law that arose in the hearing and determination of the appeal.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **8th** day of **November 2019.**

....

P. M. MWILU
DEPUTY CHIEF JUSTICE &
VICE-PRESIDENT OF THE
SUPREME COURT

....

J. B. OJWANG
JUSTICE OF THE SUPREME
COURT

....

S. C. WANJALA
JUSTICE OF THE SUPREME
COURT

....

NJOKI NDUNG'U
JUSTICE OF THE SUPREME
COURT

....

I. LENAOLA
JUSTICE OF THE SUPREME
COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA