



LEGAL ALERT

A review of the Kenyan Supreme Court Decision: Pension Schemes of public bodies are not public entities

Following an Appeal at the Supreme Court in **Association of Retirement Benefits Schemes (ARBS) v Attorney General & 3 others (Petition E017 of 2024) [2026] KESC 36 (KLR)**, where the ARBS, challenged the constitutionality of Section 2(o) of the Public Procurement and Asset Disposal Act (PPADA) classifying pension schemes under public bodies as public entities subject to the PPADA. The Supreme Court, by a majority decision (Koome CJ, Mwilu DCJ, Lenaola and Ouko SCJJ; Ndungu SCJ dissenting), in contrast to the decisions by the High Court and Court of Appeal, declared the provision unconstitutional.

We examine the Court's reasoning and its impact on two government-administered pension schemes: the National Social Security Fund (NSSF) established under the National Social Security Fund Act and the Public Service Superannuation Scheme (PSSS) established under the Public Service Superannuation Scheme Act. Our focus is on these two schemes because, unlike other pension schemes sponsored by public entities (such as the CBK, KPA, and KRA) their administration and operation remain under the control of boards that qualify as state

corporations under Section 3(b) of the State Corporations Act and therefore public entities under the Public Finance Management Act (PFMA). The former schemes typically operate using individual trustees or private corporate trustees.

The Court's Judgement, by way of a majority decision, was premised on the following findings:

- i. The legal personality of a pension fund is that of an irrevocable trust which involves contributions from both the employee and an employer.
- ii. The Government's contributions cease being public property once made into an employee's account and become part of a private trust fund for the benefit of employees.
- iii. The contributions to pension schemes are not public money under Article 227 of the Constitution, PFMA and PPADA as they comprise basic salary which constitutes compensation for work rendered.
- iv. The trustees, managers, administrators and

custodians of the schemes do not execute Government functions and are not remunerated from the Consolidated fund. Additionally, their functions and powers are, by provisions of the Retirement Benefits Act (the RBA), defined and governed by the terms of the trust deed.

- v. The regulation of pension schemes under the RBA does not equate to state ownership or control.

Justice Njoki Ndungu dissented and in concurrence with the High Court and Court of Appeal holdings opined that all retirement benefit schemes are public entities established to perform public functions which is to provide social security and serve broad social policy. She also stated that the regulation by RBA signifies pervasive government control. However, since her views are in minority, the majority decision prevailed.

Impact of the Judgement

The decision aligns with Sections 34(3) and 25 of the of the NSSF Act and PSSS Act, respectively, which provide for immediate vesting of employer contributions upon contribution in the member. It further aligns the Section 32 of the RBA Act that mandates the formation of a separate scheme fund except for pensions funded from the Consolidated Fund. Currently only the Inua Jamii Senior Citizens' scheme a tax financed social pension, administered by the State Department of Social Protection, Pensions and Senior Citizens' Affairs, offering universal pension coverage for all citizens of Kenya once they reach 70 years of age, qualifies for exclusion from the requirement to separate or segregate scheme assets.

We review below the impact of this decision.

i. Amendments to the PFMA to affirm that the Board of Trustees' are distinct from the Pension Scheme and retain their public character

An obvious mischaracterization of the nature of the schemes is the characterization of the Fund established under Section 3 of the NSSF Act rather than the Board of Trustees established under Section 5 of the NSSF Act as a National Government Entity

under the PFMA operating under commercial principles. It is necessary that the relevant regulations under the PFMA are amended to properly classify the Board of Trustees as a National Government Entity rather than the Scheme or the Fund. The same position will apply to the PSSS upon the designation of its Board of Trustees as a National Government Entity under the PFMA.

ii. Organisational reforms to affirm that the Boards of Trustees are distinct from the Pension Scheme and retain their public character

The boards of trustees of the two schemes will need to conduct a review of their policies, organizational and operational structures to ensure a clear distinction between their functions as Administrator and Controller of the schemes and the scheme's investment activities ensuring alignment with the relevant provisions in the schemes' constituent Acts that define the nature and type of these expenses.

A clear distinction will be required between the Fund's administrative costs and expenses and investment expenses. To illustrate this in its FY 2025 Financial Statements, NSSF sets out a key summary of transactions conducted in the year, among these are the procurement of an Electronic Document Management System (EDMS), an administrative cost and a project labelled Kenyatta Avenue which we assume relates to the development of the Fund property. Properly the procurement of the EDMS is an administrative cost, incurred by the Board as a state corporation, and should be undertaken under the PPADA but not necessarily the procurement of the Kenyatta Avenue EPC Contract funded by pension funds where the board retains flexibility.

For the Board of Trustees, therefore the question is, is it easier to have a unitary procurement policy apply across or are there burdensome provisions embedded in the procurement policies by virtue of the PPADA that on a cost benefit analysis and in line with the board's fiduciary duties should be dispensed with.

iii. Governance reforms to affirm that the Board of Trustees is autonomous and distinct from the Pension Scheme while preserving their public character

The Board of Trustees remains subject to governance requirements governing state corporations such as the Mwongozo Code unlike the Pension Scheme which is a private trust. The respective Boards therefore need to review existing policies, procedures and processes to ensure alignment with this approach ensuring operations continue running seamlessly and member interests are protected.

In exercising their mandate, the Board of Trustees should remain alive to the role of the Government as Guarantor of public interest under Section 70(b) of the NSSF Act which may include use of taxpayer funds where the scheme is in financial distress.

iv. Financial Reporting and Oversight

From a financial reporting perspective, it is generally anticipated that the boards maintain separate bank accounts in respect of the administrative expenses and member funds. For this purpose, the NSSF Act carves out 2% of the total Fund's assets which should be reduced to 1.5% in the sixth year. For PSSS, the administrative fee is determined by the Cabinet Secretary but capped at 10% of the investment income.

The Judgement essentially means that while the Board of Trustees, in its capacity as a corporation, will continue to be subject to audit by the Office of the Auditor General, in respect of their administrative and operating expenses, the pension schemes will need to appoint auditors from the private sector. Clear delimitation of these costs and expenses will be crucial.

v. Stamp Duty Exemption Implications

The NSSF Act exempts the Fund from stamp duty and income tax on the property vested in the fund. Specific to the NSSF, its designation as a private fund may lead to a review of its exemption from stamp duty to ensure parity with other pension schemes.

vi. Review of the Capital Market Act to clarify the meaning of public funds

In 2020, Section 11 g (a) of the CMA was amended to mandate the CMA to regulate and license private equity and venture capital companies that have access to public funds. The RBA Regulations allow pension funds to invest up to 10% of their funds in private equity. Noting that the Judgement declared that pension funds are not public funds, CMA should review this position and provide clarity on who the target entities are for licencing purposes.

Conclusion

Pension funds play a vital role in social security and economic growth through capital formation, infrastructure financing, capital market development, and overall stability. The judgment clarified the legal nature of pension funds in the public sector and exposed gaps in the implementation of existing laws governing them.

While the Judgement provided much needed clarity, a review of the general legal framework is required to align with this position. For the state administered schemes, a review of existing policies, procedures and systems is necessary. Ultimately and across the pension sector, key is to ensure public interest is protected given the critical role pension schemes play in ensuring the right to live with dignity. For the Public Procurement Regulatory Authority, this presents an opportunity to reflect on the continued efficiency and effectiveness of the PPADA given the push to exclude pension schemes from its application.

*This Article is for general informational purposes only and is not intended to constitute legal advise. If you have any questions or require clarification, please feel free to contact the authors **Doreen Onwong'a, Partner Corporate Commercial** (onwonga@gallp.co.ke) and **Celestine Chweya, Associate** (cchweya@gallp.co.ke) for legal advise.*



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