



**Okoti v Cabinet Secretary for Treasury & 2 others (Petition E021 of 2019)
[2023] KEHC 2707 (KLR) (Constitutional and Human Rights) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2707 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E021 OF 2019

HI ONG'UDI, J

MARCH 30, 2023

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

CABINET SECRETARY FOR TREASURY 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RETIREMENT BENEFITS AUTHORITY 3RD RESPONDENT

JUDGMENT

1. The petitioner filed the petition dated January 14, 2019 seeking the following prayers:
 - i. A declaration that the 1st and 3rd respondents' decision not to subject the Retirement Benefits (occupational Retirement Benefits Scheme) (Amendment) Regulations, 2015, Legal Notice No 111 of June 11, 2015 to public participation, was contrary to the letter and spirit of Article 10(2), 47, 73(1)(b), and 232(1)(d), (e) &(f) of the Constitution and, therefore, invalid null and void ab initio.
 - ii. A declaration that paragraph 2 of the Retirement Benefits (Occupational Retirement Benefits Scheme) Amendment) Regulations, 2015, Legal Notice No 111 of June 11, 2015 is unconstitutional and, therefore, null and void ab initio.
 - iii. An order quashing the Retirement Benefits (Occupational Retirement Benefits Scheme) Amendment) Regulations, 2015, Legal Notice No 111 of



June 11, 2015 in its entirety, and in particular of Paragraph 2 thereof for being unconstitutional and, therefore, null and void ab initio.

- iv. An order that the costs of this suit be provided for.
 - v. Any other relief the Court may deem just to grant.
2. The Petitioner claims violation of various Articles of the Constitution namely; Articles 1(1), 2(1) & (2), 4(2), 10(2), 19 – 22, 24, 40, 47, 73(1)(b), 232(1) (d) (e) & (f) and 259(1) & 3. He relied on his affidavit sworn on January 14, 2019, supplementary affidavit sworn on July 19, 2019 and written submissions dated February 12, 2020.
 3. The Petition is opposed by all the respondents. The 1st and 2nd respondents filed grounds of opposition dated April 4, 2019 and submissions dated January 15, 2021. The 3rd respondent filed a replying affidavit sworn on March 18, 2019 by Nzomo Mutuku, plus submissions dated January 27, 2021.

The Petitioner's case

4. It is the petitioner's case that the 2nd respondent acted ultra vires his powers under section 55 of the Retirements Benefits Act (No 3 of 1997) by issuing Legal Notice No 111 of June 11, 2015, the Retirement Benefits (Occupational Retirement Benefits Scheme) (Amendment) Regulations, 2015.
It's his pavement that effectively from June 11, 2015 Trustees will hold office for a maximum period of six (6) years broken into two terms of three (3) years each. He states that Regulation 7(g) is silent on when the continuous period of six (6) years begins. It does not state whether one could be re-appointed after a break from the board. Generally he complains that Regulation 7(g) is vague and not clear on the issue of the term of service for the trustees.
5. He argues that implementation of the term limits will result in high arbitrary attrition of trustees, which is financially wasteful and detrimental to members retirement savings especially when it comes to training of the Trustees which is mandatory. He states that having a high turnover of Trustees in view of the term limit is not good for the scheme, and neither does it serve any useful purpose for it.
6. His other argument is that the impugned Regulations were not subjected to public participation and this was in breach of Articles 10(2), 47, 73(1)(b) and 232 (1)(d), (e) & (f) of the Constitution, Sections 3, 5 & 5 of the Fair Administrative Action Act & Section 56 of the Statutory Instruments Act. Thus the affected members were not given an opportunity to air their views.
7. In his supplementary affidavit he reiterated his arguments in the Petition saying the upper limit for service of Trustees is detrimental to the RBA scheme. That Trustees would all retire at once making succession tricky, which is not good governance. He stressed that the respondents had failed to show that there was public participation prior to enacting the impugned Regulations. He dismissed the replying affidavit and grounds of opposition as lacking merit.

The Respondents' case

The 1st & 2nd Respondents case

8. In their response the 1st and 2nd respondents filed several grounds of opposition dated April 4, 2019. A summary of them is that the petition as drafted is imprecise and cannot attract this Court's intervention; the wording of Regulation 7(g) is not ambiguous and the interpretation assigned to it by the petitioner is erroneous and misleading; there is nothing to show the unconstitutionality of the impugned regulations; no constitutional question or issue has been raised; the orders sought will



armstrong the operations of the 3rd respondent's execution of its regulatory mandate; good governance is not necessarily guided by long service.

The 3rd respondent's case

9. The 3rd respondent filed a replying affidavit dated March 18, 2019 and sworn by Nzomo Mutuku its Chief Executive Officer (CEO). He deponed that the amendment to the (7th & 32nd) Regulations took effect on June 11, 2015 as per the Gazette Notice. That the amendment is in certain and unambiguous terms, and it only added a cap on the terms of trustees hence creating more certainty.
10. He adds that trustees who had previously been appointed as such but were not trustees at the time the regulations came into force are still eligible for appointment for the total six years after which they cannot be appointed. Those who were serving would complete the first term and remain eligible for the 2nd term, of three years. He further depones that there was public participation and all relevant stakeholders were involved in the process. He annexed a copy of the letter with proposals from Teleposta Pension Scheme dated December 18, 2014 (NM-1 page 6) and list of Attendees (NM-1 page 3 – 6). It's his disposition that change of trustees after serving for six (6) years is good for the pension scheme, and it will not be costly as suggested by the petitioner.
11. He further avers that those who required any clarification on the amendment did so through letters as can be seen at page 30 – 35 of NM-1. That had the petitioner written to the 3rd respondent he could have received the necessary clarification. He avers that if the regulations are suspended, the 3rd respondent will be greatly prejudiced as it will not be able to offer proper leadership to the schemes and members will be negatively affected.

The Parties submissions

The Petitioner's submissions

12. The Petitioner's submissions are dated February 12, 2020. It's his submission that the impugned Regulations were enacted without public participation and are therefore null and void. He argues that there was no public notice of any manner issued prior to the meeting held on January 14, 2015 at Crown Plaza. That this meeting is the one that discussed the impugned amendments. For public participation which is key before any such enactment he referred to Articles 1(2), 10, 4(2), 47, 73 of the Constitution, Sections 2, 3, 4, 5 of the Fair Administrative Action Act 2015 and section 12 of the Public Service Act.
13. To support the element of public participation entrenched in the law the petitioner cited very many decisions among them:
 - (i) Republic vs Ministry of Finance & another Expate Nyong'o Nairobi HCMCA No 1078 of 2007 (HCK [2007] KLR 299 (ii) Kenya Union of Domestic, Hotels Education & Allied Workers (Kudhebia Workers) v Salaries & Remuneration Commission, Pet No 294 of 2013, (iii) Doctors for Life International v The Speaker National Assembly & others (CCT 12/05/2006) ZACC 11 (iv) Republic v Independent & Boundaries Commission (IEBC) – Exparte National Super Alliance (NASA) eKLR.
14. Relying on the above decisions he submitted that public participation is not a mere cosmetic venture or public relations exercise. That the respondents have not demonstrated that there was sufficient public participation. He therefore urged the court to annul the Amendment Regulations 2015, Legal Notice No 111 of June 11, 2015.



15. The next issue raised by the Petitioner is whether the impugned Regulations are void for having been enacted in violation of the [Statutory Instruments Act](#) 2013. The Petitioner argued that the Cabinet Secretary's power to enact regulations is not unlimited and it is subject to the [Constitution](#) and national legislation. On this he referred to Articles 2, 3(1), 10(1), 47, 73 94(5), 129 & 232(1) of the [Constitution](#) and Sections 3(1), 5, 6, 11 (1) (2) (4), 4, of the [Statutory Instruments Act](#) 2013. It is his further submission that having failed to comply with the [Statutory Instruments Act](#), 2013 the Cabinet Secretary acted arbitrarily and made unlawful policy changes.
16. The petitioner further submitted that the six year term limit is unnecessary considering that there are many ways on how a trustee may leave office, hence no need for term limits. Further that the well serving trustees should be allowed to stay on. He did not approve of the regular change of trustees as this interferes with good governance, and undermines the accountability of these service providers. That these being corporate trustees their frequent movement will have a negative impact on their businesses. In a nutshell he finds the impugned amendments to be unreasonable and unnecessary.
17. It's his submission that the impugned amendments violate property rights under Article 40 of the [Constitution](#). That there is no justification for limiting this right. He also argues that the impugned regulations are vague and that Mr Nzomo Mutuku in his replying affidavit had admitted that the impugned regulations were vague. On vagueness he relied on Section 4(b) of the [Statutory Instruments Act](#) 2013, *Richard Grayned v City of Rockford, 1872 SCC*.
18. He additionally submitted that the imposition of the six (6) year tenure is to ensure continued training of new trustees at Kshs 60,000/= per student for 5 days, which is a very expensive affair. He claims this to be 'Regulator Capture', and the Regulation is acting at the behest of third parties contrary to Article 73(2)(b) of the [Constitution](#). Relying on the case of *Republic v Kenya Revenue Authority and another Ex parte Tradewise Agencies [2013] eKR* among others, the petitioner argued that by their actions the respondents violated the petitioner's legitimate expectations under the law.
19. The petitioner has urged the court to intervene and grant the orders sought, as was held in the case of [Republic v Kenya National Examination Council, Miscellaneous Civil Application No 328 of 2015](#). On costs he submitted that being a private citizen, if he wins the Court should award him costs but if the respondents win then he should not be condemned to pay costs. Reliance was placed on [Kenya Human Rights Commission v Communications Authority of Kenya & 4 others \[2018\] eKLR](#). He thus asked the Court to grant any other appropriate remedy in the interest of justice.

The 1st & 2nd respondents' submissions

20. These were filed by Moimbo Momanyi for the Attorney General and are dated January 15, 2021. On whether the Regulations as amended are unconstitutional counsel submits that since they went through all the parliamentary steps before promulgation they are presumed to be constitutional. To support this position he cited the cases, (i) *Kenya Union of Domestic Hotels, Education Institutions and Hospital Workers (supra)* (ii) *Ndyanabo v Attorney General [2001 2 EA 485 a*.
21. Separately counsel submitted that the Regulations were done in June 2015 and have been in force ever since. That there was inordinate delay in filing the petition, and the petitioner has not explained the cause of the delay. To support this he cited the cases of;
 - (i) [Wellington Nzioka Kioko v Attorney General \[2016\] eKLR](#),
 - (ii) [Maurice Oketch Owiti v Hon. Attorney General \[2016\] eKLR](#);
 - (iii) [Michael Maina Kamami & another v Attorney General \[2017\] eKLR](#) among others.



22. On whether Regulation 7 (g) is vague/ambiguous Counsel submitted that a reading of the Regulation does not reveal any ambiguity or vagueness. That the Regulation requires that trustees serve a maximum of two terms, which should not exceed six (6) years.
23. He next submitted that the petition is imprecisely pleaded and hinges on speculation, making it fatally defective and deserving to be dismissed. He points out the inadequacies of the petition as follows:
- (a) It is not enough to urge that Regulation 7(g) is vague, without explaining its vagueness;
 - (b) It is not enough to state that the Respondents are acting at the behest of third parties;
 - (c) The implementation of the term limit will lead to high attrition of trustees;
 - (d) The limitation is not in tandem with principles of good corporate governance;
 - (e) That the Regulations are an artificial cause of attrition of trustees (this is made before implementation);
 - (f) The schemes will be compromised due to lack of experienced trustees;
 - (g) A regular change of trustees will not necessarily bring about good governance;
 - (h) The Regulations were enacted to achieve an undisclosed collateral purpose;
 - (i) There was no public participation prior to the promulgation of the Regulations and
 - (j) That there is no need of these Regulations.
24. He argues that it has not been shown how the impugned Regulations violate Articles 2, 4, 10, 19, 20, 21, 22, 23, 24, 40, & 47 of the Constitution. He further submits that the Petitioner has not pleaded as to whether he is acting in the public interest or representing trustees of any given pension scheme or acting in his own interest. He submits that in view of this the petitioner falls outside the purview of Article 22 of the Constitution. He therefore urged the Court to dismiss the petition with costs.

The 3rd respondent's submissions

25. The same were filed by Tripple Ok Law LLP and are dated January 27, 2021. On the issue of whether the amendments are Constitutional counsel submitted that it is now a matter of settled law that there is an undisputed presumption that any legislative action is constitutional until the contrary is proven. Reference was made to the case of *Ndyanabo vs Attorney General* (supra) and *Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR*. He submitted that the petitioner had failed to rebut the presumption as his claim for constitutional violation amounts to mere generalities and does not enumerate in any clear manner the alleged violations.
26. Counsel referred to the Court of Appeal decision in the case of *Mumo Matemu v. Trusted Society of Human Rights Alliance [2013] eKLR* and *Zubeda Waziri v Speaker of the National Assembly & 4 others [2017] eKLR* and submitted that any claims of constitutional violations must be pleaded with sufficient clarity and precision. He argued that the petitioner had not demonstrated how the right to property under Article 40 of the Constitution was violated. Reference was made to the case of *Richard Dickson Ogendo & 2 others v Attorney General & 5 others [2014] eKLR*.



27. He next submitted that the enactment of the Regulation clarifying the term limits for trustees under the Retirement Benefits (Occupational Retirement Benefits Scheme) Regulations, 2015 cannot be deprivation of property. He referred to Section 55 of the *Retirement Benefits Act* and the cases of (i) *Murang'a Bar Operators & another v Minister of State for Provincial Administration & Internal Security & others [2011] eKLR* (ii) *Republic v Big M Drug Mart Ltd [1985] 1 SCR 295*. Counsel was of the view that the amendments were made to bring clarity, accountability and transparency in the manner of running retirement benefit schemes. Additionally it was to ensure lack of undue dominance by older trustees over the younger ones.
28. On vagueness of the amendments as stated by the petitioner counsel submitted that from the object and wording of the amendment the intention of the drafters was clear. Further that the law on the retrospective application of legislation is well settled as derived from Francis Bennion's *Statutory Interpretation*, 2nd Edition, (Butter Works, 1984) where the position was put thus:
- ' The essential idea of legal system is that current law should govern current activities. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. The true principle is that *lex prospicit non respicit* (law looks forward not backward). As Willes, J said retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transaction carried on upon the faith of the then existing law.'
- Also see *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR*.
29. On public participation counsel submitted that the requirements for public participation for the making of statutory instruments ought to be differentiated from those requirements for pure legislative actions and processes. Citing section 5(1 & (3) of the Retirement Benefits Act Counsel submitted that public participation and consultation is deemed to have been adequately conducted where the individuals most likely to be affected by the amendment are consulted directly or by advertisement. In the present case he states that there was public participation and consultation, through all stakeholders, followed by a discussion at a forum held at Crowne Plaza Hotel on January 15, 2015.
30. On what constitutes consultation and public consultation counsel referred to the case of *Magoma v Sebe and another 1987 (1) SA 483* and *Doctors for Life International (supra)* respectively. It's his contention that the consultation was not for the entire public since it was sector specific and all the relevant stake holders participated. Further that what amounts to adequate participation was discussed in the case of: *Moses Munyendo & 908 others vs Attorney General and another [2013] eKLR*. Additionally he submits that the Regulations went through the parliamentary process of approval and the same are presumed to be constitutional which has not been overturned by the petitioner.
31. While referring to section 9 of the *Retirement Benefits Act*, he submitted that a regulatory impact statement is not mandatory when the amendment is of administrative nature which was the case here. Further that there cannot be a legitimate expectation against clear provisions of the law or statute. Reference was made to the case of *Republic v Principal Secretary, Ministry of transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO [2019] eKLR*.
32. On whether the impugned amendments are unreasonable and unnecessary Counsel, argued that the reasons given by the petitioner for challenging the amendments are not good enough to make the Court set them aside. That doing so would amount to the Court legislating from the bench which



would be against the doctrine of separation of powers. He referred to the Mumo Matemu case (supra) and the case of *Ram Jwawaya Kapur v. State of Punjab AIR 1955 SC 459*.

33. Finally counsel submitted that under Section 55 of the Retirement Benefits Authority Act the 3rd respondent is clothed with authority to make regulations, guidelines and policies for the better working of the sector. He therefore stated that vetting equipping the trustees with the relevant knowledge and skills was key for the services they render and there can never arise conflict of interest.

Analysis and determination

34. Upon careful consideration of the petition, affidavits, grounds of opposition, parties submission and cited authorities I find the issues for determination to be as follows:
- i. Whether the petition has been precisely pleaded.
 - ii. Whether the impugned Regulations are unconstitutional.
 - iii. Whether Regulations of the *Retirement Benefits Act* 7(g) and 32(1) of the *Retirement Benefits Act* Regulation 2015 are vague.
 - iv. Whether the Court should grant the reliefs sought.

Issue No (i). Whether the petition has been precisely pleaded.

35. The 1st and 2nd respondents in their grounds of opposition and submissions argued that the petition was unprecise and did not meet the threshold set out in the case of Mumo Matemu (supra). The Court of Appeal in the celebrated case of *Anarita Karimi Njeru v Republic [1976 – 1980] KLR 1272* stated this:

' We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed. The same was reiterated in the Mumo Matemu case.'

36. The petitioner's claim of violation of the named Articles of Constitution is based on the alleged absence of public participation and adherence to the provisions of the law, absence of a transition period in effecting the changes, and limiting the Trustees enjoyment of property rights under Article 40 of the *Constitution*. In all this he referred to the Articles in the *Constitution* of Kenya. The Petitioner set out his grievances and what rights he believes have been violated. It is now for the Court to analyse them to see if they have been proved. I will therefore not strike out the petition based on that finding.

Issue No (ii) Whether the impugned Regulations are unconstitutional.

37. One of the main grounds raised by the petitioner for wanting to have the impugned regulations declared unconstitutional is the alleged lack of public participation. The tenets of public participation have been well captured in the *Constitution* and a plethora of decisions. Under Article 10 the *Constitution* it is listed as one of the National values and principles of governance. Article 10(2)(a) provides:

' (2) The national values and principles of governance include-



- (a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;'

38. Article 201(a) provides;

' 201. Principles of public finance

The following principles shall guide all aspects of public finance in the Republic-

- a. There shall be openness and accountability, including public participation in financial matters;'

39. Section 12 of the Public Service (Values & Principles) Act (No 1A of 2015) provides for public participation. It states that:

' 12. Public participation in policy-making

- (1) The public service shall develop guidelines for the involvement of the people in policy-making.
- (2) the guidelines developed under subsection (1) shall ensure that the public is given-
 - (a) Adequate opportunity to review a draft policy;
 - (b) Adequate opportunity to make comments on a draft policy;
 - (c) And opportunity to be heard by the makers of a policy; and
 - (d) Notification of the final draft of the policy and whether or not it incorporates their views.'

40. I have considered the parties' submissions and read the decisions cited by counsel for the parties. The principles of what would constitute meaningful public participation were settled by the Supreme Court of Kenya in the case of *British American Tobacco Kenya, PLC v Cabinet Secretary for the Ministry of Health & others [2019] eKLR* where the Court stated as follows:

' (96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court's mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation;'



41. The guiding Principles for public participation are;

- ' (i) As a constitutional principle under Article 10(2) of the [Constitution](#), public participation applies to all aspects of governance.
- (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- (v) Public participation is not an abstract notion; it must be purposive and meaningful.
- (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- (ix) Components of meaningful public participation include the following:
 - a. Clarity of the subject matter for the public to understand;
 - b. Structures and processes (medium of engagement) of participation that are clear and simple;
 - c. Opportunity for balanced influence from the public in general;
 - d. Commitment to the process;
 - e. Inclusive and effective representation;
 - f. Integrity and transparency of the process;
 - g. Capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter;'



42. In the replying affidavit of Nzomo Mutuku the CEO of the 3rd respondent dated March 18, 2019 he stated that section 55(1) of the Retirement Benefit Act gives the Cabinet Secretary, National Treasury powers to amend. The said Section provides:

' The Minister may, in consultation with the Authority, make regulations generally for the better carrying out of the provisions of this Act.'

43. He explained that views were sought from stakeholders who submitted their proposals. He annexed a proposal from Telposta Pension Scheme dated December 18, 2014. The providing of proposals was followed by a discussion of the same at a forum held at Crown Plaza Hotel on January 14, 2015 (copy of the list of attendees at the forum NM-1 page 3 – 4). Thereafter a memorandum was prepared and duly submitted to the National Treasury.

44. It is noted that the impugned amendments were in respect of regulations and not a section of the Act. The list of the attendees reveals a wide representation of stake holders, with 5 out of 23 being from the 3rd respondent, plus other pension schemes. Those who may have had issues and required clarification did so, and there is evidence on record to that effect. The issue then is whether there was meaningful public participation before the impugned amendments were enacted into law. Just how far should public participation go especially where the amendment does not entail substantive change?

45. In the case of Moses Munyendo & 908 others v Attorney General and another [2013] eKLR. The Court observed thus;

' As concerns the pre-parliamentary or consultative stage, the Permanent Secretary has given evidence on how different stakeholders were consulted. Some of the organisations consulted include the following; Kenya National Federation of Cooperatives, National Cotton Growers Association, Meru Central Dairy Co-operative Union Limited, Cereal Growers Association and the Horticultural Farmers and Exporters Association. The organisations consulted are, in my view, broadly representative of agricultural interests in the country. This evidence is not controverted by the petitioners. Furthermore, I do not think it is necessary that every person or professional be invited to every forum in order to satisfy the terms of Article 10. Thus the contention by the first petitioner that, 'I am aware that majority of Kenyans producers, processors, professionals or policy makers have not been invited to any stakeholders meetings to enrich any of the law' is not necessarily decisive of the lack of public participation.'

46. The petitioner dismissed stakeholder consultation as not being equal to public participation. Who then is a stakeholder? A stakeholder is one who has an interest or stake in an issue such as an individual, interest, group, community etc. On the other hand public participation affords stakeholders the opportunity to influence decisions that affect their lives.

47. Section 5(1) of the Retirement Benefit Acts provides:

' Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to-

- a) Have direct, or a substantial indirect effect on business; or
- b) Restrict competition;



The regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.'

Section 5(3) goes further and provides that:

' Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall –

- a. Involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or
- b. Invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

48. Was it therefore proper for the respondent to handle this matter the way they did? The Act which gives guidance under section 5 shows clearly what ought to be done. From the replying affidavit and annexures by Nzomo Mutuku its clear that stakeholders were engaged in this exercise, proposals were made and a consultative forum was held at Crowne Plaza Hotel on January 14, 2015. A list of the attendees was annexed to the replying affidavit. The attendees represented a wide range of stakeholders and the 3rd respondent was represented by five (5) people.

49. Among the annexures are three documents, namely:

- i. ' A letter dated May 31, 2018 from Kenya Forestry Research Institute seeking clarification on the Legal Notice No. 11 of June 11, 2015.
- ii. A response to Kefri DC RBS dated June 5, 2018 in response to their letter dated May 31, 2018. The letter is by the Chief Manager Supervision of the 3rd Respondent.
- iii. A letter by the CEO of the 3rd respondent dated December 1, 2016 to the General Manager Legal Services/Corporation Secretary Postal Corporation of Kenya. It's a response to a letter of inquiry by the Postal Corporation dated November 29, 2016 in respect of the amended regulations.'

All these go a long way to show that those who had issues till raised them with the 3rd respondent and they were assist.

50. I have also perused the Memorandum that was sent to the National Treasury, of the year 2015/2016 after the forum at Crowne Plaza Hotel. It contains proposals and recommendations touching on the Retirements Benefits Act among others. If it was an issue of lack of public participation then the petitioner should have challenged all the amendments in the Memorandum since they were undertaken under the same forum. He only picked on the one for the [Retirement Benefits Act](#).

51. Upon considering material before this Court I am satisfied that there was sufficient public participation in the making of the statutory instrument herein. By virtue of Section 9 of the [Retirement Benefits Act](#), there was no need for preparation of a Regulatory impact statement.

52. Every statute enjoys a presumption of constitutionality. It is therefore presumed that the legislature in enacting the statute did so in a constitutional and fair manner. It is therefore, the petitioner's duty to convince the court otherwise. See the case of the Kenya Union of Domestic Hotels (supra).



53. I further find that the petitioner has not satisfactorily shown that there was any lapse in the process of public participation and /or stakeholder engagement to lead to the unconstitutionality of the enactment of the impugned Regulations. I therefore find that the said Regulations are constitutional.

Issue No (iii) Whether Regulations 7(g) and 32 (1) are vague.

To start with I wish to point out that the petitioner never said nor submitted anything meaningful on Regulation 32(1) of the Act.

54. The initial Regulation 7(g) of the Retirement Benefits (Occupational Retirement Benefits Scheme) Regulations, 2000 read as follows:

' Every scheme shall have rules which shall be written in English and shall provide the following:-

(g) The appointment, term, removal from office, powers and remuneration of trustees and officers or administrator of the scheme;

Provided that, unless otherwise stipulated, the term of office of trustees shall not exceed three years, but shall be subject renewal.'

The amendment provides:

' 7. Every scheme shall have rules which shall be written in English and shall provide the following:-

(g) The appointment, term, removal from office, powers and remuneration of trustees and officers or administrators of the scheme: Provided that, unless otherwise stipulated, the term of officer of trustees shall not exceed three years, but shall be subject to renewal for a further term of three years'.

55. The petitioner has submitted the following about the said impugned regulations.

- i. 'The implementation of the term limit will lead to high attrition of trustees.
- ii. The limitation is not in tandem with principles of good corporate governance.
- iii. The schemes will be compromised due to lack of experienced trustees.
- iv. A regular change of trustees will not necessarily bring about good governance.
- v. The Regulations was enacted to achieve an undisclosed collateral purpose. At the same time he submits that the Regulation is vague.'

56. The word 'vague' means uncertain, indefinite, unclear, unfocused. From the above allegations as identified by the petitioner, if backed with evidence then one can say the Regulation is vague. Unfortunately for the petitioner he has not demonstrated by way of evidence all that he has described of the impugned Regulation. In his written submissions he has stated that the limitation of a six (6) year term for the trustees is not fair. He would have wished it to remain open ended as was the case before.

57. A reading of the amended regulation reveals that a Trustee may only serve two terms of three years each. Prior to this one served a term of three years subject to renewal. The then Regulations did not state how many times one would renew, the contract. It did not even state the period of the renewable term.



58. The 3rd respondent has in the replying affidavit and in the annexures explained that those who were serving when the Regulation was enacted, would complete their term and were still eligible for renewal for one more term. This Regulation is as clear as that and can't be said to be vague as claimed. Furthermore, parties were at liberty to seek clarification where necessary. Those who cared sought clarification. The petitioner did not.
59. The Regulations came into effect on June 11, 2015 vide Legal Notice No.111. At the time of filing the petition on January 17, 2019 the Regulations had been in force for 3 ½ years and as at now they have been in force for 7 years 9 months, with no complaints. If indeed the Regulations had been vague as claimed they would not have lasted this far without the management taking action. It is not for this court to dictate to the 3rd respondent what should be good for its members.
60. The stakeholders passed what was good for their operations. The same were then approved by the 1st respondent. It has nowhere been shown that the Authority over stepped its mandate, and/or did not do what it was supposed to do. The same goes for the 1st respondent.
61. Section 26(3) of the Retirement Benefits Act provides that notwithstanding the provisions of subsection (2), the appointment of any person as a trustee shall be subject to approval by the Authority. Regulation 7(g) came in to reinforce that provision and I do not see anything wrong with that. Trustees cannot remain in the Board forever just because training them is mandatory and expensive. It is for the good of the members that the Trustees are well equipped in order to carry out their assignments. My finding therefore is that the impugned Regulations are not vague.

Issue No (iv). Whether the Court should grant the reliefs sought.

62. Upon evaluating all the material herein my finding is as follows:
- i. The petitioner has failed to demonstrate how his rights were violated as far as the impugned Regulations are concerned.
 - ii. He has not shown that the 3rd respondent acted outside its mandate while proposing impugned Regulations. He has also not shown that the 2nd Respondent's actions were ultra vires his mandate.
 - iii. There is nothing vague about Regulations 7 (g) and 32(1) of the Retirement Benefits (Occupational Retirement Benefits Scheme) (Amendment) Regulations, 2015.
 - iv. The impugned Regulations are constitutional since the necessary processes to their enactment were adhered to.
63. The upshot is that the petitioner has failed to demonstrate that he is deserving of the reliefs sought. The petition is dismissed, with no order as to costs this having been a public litigation case.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF MARCH, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

