REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION E024 OF 2021

KENYA COUNTY GOVERNMENT WORKERS UNION.....1ST PETITIONER

HON. ROBA DUBA.....2ND PETITIONER

VERSUS

BOARD OF TRUSTEES LOCAL ..

AUTHORITY PENSION TRUST.....1ST RESPONDENT

THE COUNTY PENSION FUND.....2ND RESPONDENT

THE COUNTY PENSION FUND

FINANCIAL SERVICES LIMITED.....3RD RESPONDENT

AND

RETIREMENT BENEFITS AUTHORITY.....1ST INTERESTED PARTY

COUNCIL OF GOVERNORS.....ND INTERESTED PARTY

RULING

1. The 1st Petitioner, Kenya County Government Workers Union, and the 2nd Petitioner, Hon. Roba Duba, filed their petition dated 19th January, 2021 together with a notice of motion application of the same date. Through the application they seek orders as follows:

> **a. This matter be certified as urgent and dealt with on a priority basis.**
>
> **b. The Court be pleased to issue a conservatory order restraining the 1st and 2nd Respondents or their agents from using the LAPTRUST and/or CPF resources and carrying out any construction development of the LAPTRUST Chaka Plot or in any anyway engaging in the development of G47 Ugatuzi Towers pending the hearing and determination of this application.**
>
> **c. The Court be pleased to issue a conservatory order restraining the 1st and 2nd Respondents or their agents from using the LAPTRUST and/or CPF funds and carrying out any construction development of the LAPTRUST Chaka Plot or in any way engaging in the development of G47 Ugatuzi Towers pending the hearing and determination of the petition herein.**
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> **d. The cost of this application be borne by the Respondents.**

2. The petitioners assert that the 1st Respondent, Board of Trustees Local Authority Pension Trust; 2nd Respondent, the County Pension Fund ("CPF"); and the 2nd Interested Party, Council of Governors, have embarked on a mega-multibillion project ("the Project") of constructing "G47 Ugatuzi Towers" to be undertaken on the plot of Local Authorities Pension Trust (LAPTRUST) in Hurlingham, Chaka Road, Nairobi.

3. The petitioners assert that the decision to develop the G47 Ugatuzi Towers has been made without public participation or members' engagement and the 1st and 2nd respondents have unilaterally decided to engage in a joint venture with the sponsors.

4. The petitioners further complain that the 1st and 2nd respondents have violated the 1st Petitioner's members' right to property under Article 40 of the Constitution by investing for the benefit or in consideration of employers.

5. Additionally, it is averred that the 1st and 2nd respondents have acted *ultra vires* both substantively and procedurally. The petitioners insist that unless conservatory orders are issued the rights of members or workers and the general public will be violated. It is contended that the subject matter of the petition which is violation of human rights and *ultra vires* investments will be overtaken by events if the conservatory orders are not issued pending the hearing and determination of the case. Moreover, the rights of LAPTRUST pensioners will be prejudiced if the development is not suspended pending the hearing and determination of the petition.

6. The application is supported by the affidavit of the 2nd Petitioner sworn on the date of the application.

7. The 1st and 2nd respondents together with the 3rd Respondent, the County Pension Fund Financial Services Limited, opposed the application and petition through the notice of preliminary objection dated 25th January, 2020. They contend that this Court has no jurisdiction to entertain the petition and application as the petitioners have not exhausted the alternative special dispute resolution mechanism established under sections 46 and 48 of the Retirement Benefits Act No. 3 of 1997 ("RB Act)

8. The respondents further claim that the petition and the application are incompetent and irregular to the extent that they have been filed without authority as there is no valid resolution of the 1st Petitioner's members or governing organ.

9. Finally, the respondents contend that the petition and application are based on the legally untenable premise that pensions scheme funds are public funds, contrary to the provisions of, *inter alia*, Rule 20 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Rules, 2000.

10. The respondents also filed a replying affidavit sworn on 29th January, 2021 by Kili Hosea Kimutai who introduces himself as the Secretary of the 1st and 2nd respondents and the Managing Director of the 3rd Respondent.

11. Through the replying affidavit, the respondents argue that Parliament has established sufficient specialised alternative statutory mechanisms, forums and remedies for resolving disputes relating to decisions made by managers, administrators, custodians or trustees of pension schemes. It is the respondents' case that these alternative statutory remedies should be exhausted before invoking the jurisdiction of the Court.

12. Turning to the question as to whether this Court should allow the application for conservatory orders, the respondents contend, *inter alia*, that the petitioners have not established a case for the grant of conservatory orders as the question whether denial of orders would result in serious prejudice and render the petition nugatory does not arise. Moreover, the respondents aver that the petitioners have not adduced any evidence or any credible evidence to prove any wrongdoing on the part of the respondents or any of the serious allegations set out in the petition and the application.

13. It is further contended that the issuance of conservatory orders would be tantamount to injunction of the performance of trustees' statutory and fiduciary duties and would have the unintended consequence of hurting the interests of the persons that the petitioners claim to represent namely members of the LAPTRUST and the CPF.

14. The 1st Interested Party, the Retirement Benefits Authority, did not file any response to the application.

15. The 2nd Interested Party filed a notice of preliminary objection dated 25th January, 2021 on grounds that the Court does not have jurisdiction to hear and determine the dispute as it is not the appropriate forum to deal with the issues raised by the petitioners. The 2nd Interested Party claims that it would be premature for this Court to exercise its jurisdiction on matters that fall within the jurisdiction of other authorities specifically mandated under the Retirement Benefits Act.

16. It is further asserted that the petition fails to give accord to the provisions of sections 46, 47 and 48 of the Retirement Benefits Act. Moreover, they claim that the petitioners have not demonstrated which of their rights have been infringed upon by the respondents.

17. The 2nd Interested Party therefore assert that the petition lacks merit, is misconceived, frivolous, embarrassing, scandalous, vexatious, and an abuse of the process of this court warranting dismissal with costs.

18. The 2nd Petitioner filed a supplementary affidavit sworn on 5th February, 2021 by the 2nd Petitioner in response to the preliminary objections. The petitioners assert that the Court has jurisdiction to hear and determine the matter for reasons that the alternative dispute resolution mechanism under sections 46 and 48 of the RB Act does not grant the 1st Petitioner locus to invoke the alternative dispute resolution mechanism provided therein. Further, that both the High Court, and the Chief Executive Officer of the Retirement Benefits Authority and the Retirement Benefits Appeals Tribunal have concurrent jurisdiction and therefore a party can elect to move any of them for relevant reliefs but not both at the same time.

19. Regarding the averment that the petitioners did not obtain authority to institute these proceedings, it is averred that the allegation is misguided as it would require adduction of evidence and is thus incompetent. The petitioners aver that there exists a resolution dated 25th January, 2021 by the 1st Petitioner's 16 NEC members authorizing the institution of this petition. Additionally, that the petitioners received

authorisation to take all actions necessary to pursue all matters in connection with the retirement scheme funds.

20. I have carefully considered the arguments raised by the parties in their pleadings and submissions. A question has arisen as to whether this Court has jurisdiction to hear and determine this matter.

21. The petitioners filed submissions dated 5th February, 2021 and submit that Section 46 of the RB Act anticipates that only members of a pensions scheme have *locus standi* to request for review by the Chief Executive Officer of the Retirement Benefits Authority of a decision of the manager, administrator, custodian or trustee of the pensions scheme. It is urged that the 1st Petitioner is, however, not a member of the 1st and 2nd respondents and therefore has no standing to request for review.

22. The petitioners further contend that the requirement under Section 46 of the RB Act to have a decision first reviewed by the Chief Executive Officer is optional and not mandatory. Reliance is placed on the decisions in **Karen Blixen Camp Limited v Kenya Hotels and Allied Workers Union [2018] eKLR**, and **Republic v Firearms Licensing Board & another Ex parte Boniface Mwangi [2019] eKLR** where the courts found that the use of the word "may" in a statute means that the provisions are permissive and not mandatory.

23. On whether the letter by the seven members of the 1st Petitioner divests this Court of jurisdiction, it is submitted that the request for the petition to be dismissed is misguided as the seven officials did not cite any provisions of the law that allows a court to strike out pleadings based on a mere letter. They further contend that the preliminary objection which is based on the letter dated 22nd January, 2021 militates against the established principles governing preliminary objections as advanced in **Oraro v Mbaja [2005] 1KLR 141.**

24. The 1st, 2nd and 3rd respondents in their submissions dated 15th February, 2021 assert that this Court lacks jurisdiction to hear and determine the dispute in view of the provisions of sections 5, 46 and 48 of the RB Act. The respondents submit that the petitioners have not exhausted the alternative or special dispute resolution mechanism generally established under Article 159(2)(c) of the Constitution. Reliance is placed on the decision of the Supreme Court of Kenya in **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 Registers Trustees of Kenya Ports Authority Pensions Scheme) v 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) [2019] eKLR.**

25. The respondents further submit that the petition and application are invalid as they were commenced without the necessary authority. It is asserted that legal proceedings instituted by or on behalf of a corporate body must be authorised through a valid resolution from the members or the governing organ. The respondents refer to the letter from the 1st Petitioner's Governing Council dated 22nd January, 2021 and submit that the 1st Petitioner did not authorise the institution of the instant proceedings. The respondents buttress this argument by citing the decision of the case of **East African Portland Cement Limited v Capital Markets Authority & 4 others [Petition No. 600 of 2013].**

26. Whenever an issue is raised about this Court's jurisdiction, it is important to start by noting the provisions of Articles 23 and 165 of the Constitution. The cited provisions disclose that the High Court has the jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Furthermore, the High Court has jurisdiction to determine questions on whether anything said to be done under the authority of the Constitution or any law is inconsistent with, or in contravention of the Constitution.

27. In this matter, the petitioners claim that the respondents acted in violation of their constitutional rights and fundamental freedoms and that they have also acted *ultra vires* their statutory mandates under the RB Act. These are questions that the High Court is entitled to answer given its constitutional mandate and therefore there is no dispute that the petitioners have raised these questions in the correct Court.

28. However, the question raised by the respondents and the 2nd Interested Party on the doctrine of exhaustion of alternative dispute resolution mechanisms has not been answered. On this issue, the petitioners have raised two interesting points, which require my indulgence. The first is that the 1st Petitioner does not have the requisite locus to invoke the alternative dispute resolution mechanism under the RB Act. Secondly, they claim that the wording of sections 46 and 48 of the RB Act imply that the invoking of the alternative dispute resolution mechanism is optional and not mandatory.

29. According to Section 46(1) of the RB Act:

> **(1) 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.**

30. Section 48 of the RB Act states 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 thereunder 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.**

31. From the foregoing, it is clear that only a member of a scheme can make a request for the review of a decision of the manager, administrator, custodian or trustees of the scheme to the Chief Executive Officer of the Retirement Benefits Authority. According to Section 2 of the Act, a member is defined as a "**member of a retirement benefits scheme and includes a person entitled to or receiving a benefit**

under a retirement benefits scheme."

32. The 1st Petitioner has described itself in the petition as:

> **"[…] a labour union representing all employees of the county governments within the Republic of Kenya. The Petitioner presents this petition on behalf of its members…"**

33. From the foregoing, one thing is clear to the Court; that the members of the 1st Petitioner are also members of LAPTRUST, as the petitioners claim that the members of the 1st Petitioner are also entitled to the retirement benefits held by the trust. Therefore, the members of the 1st Petitioner have filed these proceedings through the 1st Petitioner, as their representative, against the 1st Respondent who is the trustee of their retirement benefits scheme. It is apparent to me that Section 46 is applicable to this set of circumstances, since the complaint is made against the actions of the trustees as envisioned in the RB Act. Section 46 is therefore applicable to the trade union as it is acting on behalf of its members. A trade union cannot exist without members and its mandate is therefore driven by its membership. Section 48 of the RB Act which provides for the right of appeal to the Retirement Benefits Appeals Tribunal will therefore come into play where members of pensions schemes who invoke Section 46 are dissatisfied with the decision of the Chief Executive Officer.

34. Now that I have established that the appeals procedures under sections 46 and 48 apply to the petitioners herein, it is necessary to look into the language of the provisions. The petitioners claim that the use of the word "may" implies that invoking the appeals procedure under the RB Act is optional. I do not agree with this interpretation and rely on the decision by the Court of Appeal in **Peter Muturi Njuguna v Kenya Wildlife Service [2017] eKLR** that:

> **"15. <u>The true construction therefore lies in the context. Ordinarily the word *"may"* is permissive and not mandatory but the contextual meaning would vary with the intention of the drafters</u>. In this case, the argument is not so much the meaning of the word but the effect of it; whether it ousts the jurisdiction of the court. The High Court found, correctly in our view, that the decision of the district committee was amenable to challenge by way of Judicial Review and therefore in that sense the jurisdiction of the court is not ousted. Nevertheless, and again we agree, <u>there was compulsion to exhaust the procedure provided under the section before going to court.</u> To that extent therefore, whereas the appellant was under no compulsion to make any claim, once he chose to do so, as he might, he was compelled to lodge it at the appointed forum, being the District Committee."**
>
> [Emphasis added]

35. I am of the opinion that looking at the context of the use of the word "may", it is permissive only to the extent that the members may seek to pursue a complaint through the appeals procedure or they may not pursue their complaint at all. The courts of Kenya are compelled under Article 159(2)(c) of the Constitution to recognise the use of alternative dispute resolution mechanisms.

36. Several courts have deliberated on the necessity of parties to exhaust alternative dispute resolution mechanisms before pursuing their rights through litigation in court. For example, the Supreme Court in **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) v 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) [2019] eKLR** postulated that:

> **"[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."**

37. The Court went further to state that:

> **"[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."**

38. It my conclusion that that the 1st Petitioner is subject to the appeals procedure under sections 46 and 48 of the RB Act as it acts on behalf of and under the instruction of its members who are also members of LAPTRUST. I further conclude that the appeals procedure under the RB Act is a mandatory procedure, which must be exhausted before invoking the jurisdiction of the courts.

39. The authority of the 1st Petitioner to file this petition on behalf of its members has also been called to question by the respondents. The respondents in their preliminary objection dated 25th January, 2021 attached a letter by the National Executive Council of the 1st Petitioner dated 22nd January, 2021. According to the letter, the National Executive Council claims that the Union *"has not authorised the institution of the petition."*

40. The respondents in their submissions rely on the decision in **East African Portland Cement Ltd v Capital Markets Authority & 4 others [2014] eKLR** where the suit was struck out as the petitioner company did not have the proper authority to institute the proceedings. It was found that the resolution to institute the proceedings had not been approved by the minimum number of the directors of the company as required under the company's Memorandum and Articles of Association. Additionally, it was determined that the persons who swore the

affidavits in support of the petition did not have the authorisation to do so.

41. In response, the petitioners have argued that the position in the above decision was overturned by the Court of Appeal in **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** where it was held that:

> **"45. To their credit, the appellant's Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court. The authority is Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000.**
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> **The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the Bugerere case was no longer good law as it had been overturned in the case of United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998.Thelatter case restated the law as follows:-**
>
> **"…. it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company."**
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> **The decision has since been applied in Kenyan courts, for example, in Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR."**

42. I am guided by the decision of the Court of Appeal cited above that there is no need for a general meeting of members or a board resolution before a director of a company can institute proceedings on behalf of the company. In the instant matter, what must be established, however, is whether the executive council member who filed the proceedings had the necessary authority to do so under the Constitution of the trade union. Unfortunately, the petitioners have not provided this Court with a copy of their Constitution and therefore it cannot be affirmed that the 2nd Petitioner, who is the General Secretary of the Union, had the authority to institute these proceedings.

43. In conclusion, I find that this Court does not have the jurisdiction to determine this matter as the same has not gone through the mandatory appeals procedure under the RB Act. Furthermore, this Court is barred from hearing this matter as the petitioners have failed to establish that they have been legally authorised to file this petition before me. This becomes pertinent when one considers the evidence placed before this Court by the respondents that the 1st Petitioner's governing body did not authorise the petitioners to institute the proceedings.

44. Ideally I should have dismissed the application for conservatory orders at this stage. Nevertheless, for completeness of this matter I will proceed to determine the application for conservatory orders. The petitioners have put forward their claims against the respondents and submit that in light of the same and in reliance on the case of **Platinum Distillers Ltd v Kenya Revenue Authority [2019] eKLR**, they have established a *prima facie* case with overwhelming chances of success. Furthermore, they assert that unless the conservatory orders are issued they will suffer prejudice.

45. The petitioners cite the decision in **Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) [2019] eKLR,** and submit that the denial of conservatory orders will mean that the Project goes on despite the threat to the right to social security under Article 43(1) of the Constitution and that it runs counter to Articles 10 and 47. It is further asserted that if the Project is allowed to go on the substratum of the petition will be defeated and thus rendered nugatory. Lastly, it is submitted that the public interest lies in the issuance of the orders sought as what is at stake is the pension of the members of the 1st Petitioner that is being invested in the Project.

46. On their part, the respondents rely on the Supreme Court decision in **Gatirau Peter Munya v Dickson Mwende Kithinji & 2 others, Application No. 5 of 2014** to support their assertion that the petitioners have not met the legal threshold for the grant of conservatory orders.

47. In an application like the one before this Court, precedent always provide good guidance. There are several decisions on matters to do with granting of interlocutory reliefs such a conservatory orders, many of which have been referred to by both parties in this matter. I believe that the holding in **Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) [2019] eKLR** is instructive as the Court stated that:

> **"92. The applicable principles for the grant of conservatory orders were detailed by Onguto J. in Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR. In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether, to grant or deny a conservatory order."**

48. The Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** similarly held that:

> **"[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest.**

Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

49. In line with the above decisions, it is apparent that an applicant seeking conservatory orders must establish a *prima facie* case with the probability of success and that if the orders are not granted the party will suffer prejudice or irreparable loss. The applicant must also establish that the public interest is in favour of the granting of the order.

50. On what amounts to a *prima facie* case I will cite the case of **Kirobon Farmers Co. Ltd v Samuel O. Nyarangi [2017] eKLR** where it was held that:

"8. Explaining the meaning of prima facie case, the Court of Appeal stated in Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR as follows:

"Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:

'In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for a explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.'

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion."

9. For a prima facie case to exist, there must in the first place be a case validly brought before the court by the applicant. Otherwise, there would be no probability of success of the applicant's case upon trial."

[Emphasis added]

51. I have already determined that the 1st Petitioner has not approached the Court with the requisite authority. This is due to the lack of evidence on their part to show that the 2nd Petitioner was authorised under the Constitution of the 1st Petitioner to file the petition. It has also been determined that the statutory remedies provided by the RB Act were not exhausted prior to the institution of these proceedings hence denying the Court jurisdiction to entertain the matter in the first instance. The case has therefore not been validly brought to Court and it follows that the petitioners have not established a *prima facie* case.

52. The petitioners claim that the Project runs contrary to Article 47 of the Constitution and poses a threat to the petitioners' right to social security under Article 43(1)(e) of the Constitution. The petitioners argue the investment of the scheme's funds in the Project breaches sections 32(2) and 38 of the RB Act.

53. Section 32(2) states:

(2) The scheme fund and all monies therein shall at all times be maintained separately from any other funds under the control of the trustees or the manager thereof.

54. Section 38(1) on its part provides that:

(1) No scheme funds shall be—

(a) used to make direct or indirect loans to any person; or

(b) invested contrary to any guidelines prescribed for that purpose; or

(c) invested with a bank, non-banking financial institution, insurance company, building society or other similar institution with a view to securing loans, at a preferential rate of interest or for any other consideration to the sponsor, trustees, members or the manager of such scheme, or in the case of scheme funds which comprise any statutory contributions, be placed in any investment other than Government securities or infrastructure bonds issued by public institutions.

55. The above provisions do not mention any limitations on the investment of pensions scheme funds that would validate the petitioners' allegations. Furthermore, the Court has not been provided with the 1st Petitioner's rules or regulations, so it can determine whether the 1st Respondent has made an investment which is contrary to the guidelines provided for that purpose. The petitioners have therefore failed to show that they are likely to suffer any prejudice if the conservatory orders are not granted.

56. In **OKiya Omtatah Okoiti & another v Nairobi City County Assembly & 5 others; Mike Sonko Mbuvi Gideon Kioko & another (Interested Parties) [2021] eKLR,** Mrima, J cited, with approval, at paragraph 56, the holding by the Supreme Court of India that:

> ***"…. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."***

57. It has already been established that the petitioners do not have the requisite authority to institute these proceedings, and neither have they exhausted the dispute resolution mechanism provided by the law. It therefore follows that the institution of these proceedings has not been done for the benefit of all the members of the 1st Petitioner and the public at large but rather for the benefit of a small number of members within the 1st Petitioner. There does not appear to be any public interest in prohibiting the respondents from continuing with the Project.

58. In conclusion, it is my finding that the application has failed to pass the test for the issuance of conservatory orders. The petitioners have not demonstrated: that they have a *prima facie* case with a probability of success; that if the orders sought are not granted they will suffer prejudice; and that the public interest is in favour of the granting of the orders.

59. Moreover, I have found that this Court does not have the jurisdiction to hear and determine this matter as the petitioners do not appear to have had the requisite authority to file these proceedings, and they have failed to exhaust the appeals mechanism under the RB Act before approaching this Court.

60. It is for the above reasons that I uphold the respondents' and the 2nd Interested Party's preliminary objections and strike out the petition dated 19th January, 2021.

61. Ordinarily in matters of this nature the appropriate order on costs is to direct the parties to meet their own costs. I find nothing in this matter to make me depart from that position. As such, the parties are directed to meet their own costs of the proceedings.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

W. Korir,

Judge of the High Court