



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA – NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NUMBER 241 OF 2015

BETHWEL OMONDI OKAL.....PETITIONER

VERSUS

BOARD OF TRUSTEE TELPOSTA PENSION.....1ST RESPONDENT

TELKOM KENYA LIMITED.....2ND RESPONDENT

RETIREMENT BENEFIT AUTHORITY.....3RD RESPONDENT

JUDGMENT

1. **Bethwel Omondi Okal**, the petitioner herein, is a Pensioner having retired from the defunct Kenya Posts and Telecommunications Corporation where he worked as a technician before Kenya Posts and Telecommunications Corporation were split into Telekom Kenya Ltd and Postal Corporation of Kenya. The petitioner is a member of the Teleposta Pension Scheme which was established to Manage Pension Savings for retired employees and falls under the supervision of the Retirement Benefits Authority (RBA) as the regulator.

2. In his amended petition dated 22nd February 2016 and the supporting affidavit, the petitioner stated and deposed that during his period of employment wherever the employer awarded a salary increase, the practice was that the lowest cadre would get a higher percentage increase than those in hire bracket to allow the principle of equitable sharing to apply. The petitioner stated that the increase has been declared at a flat rate of 3% with the result that the lower bracket of say 1500/- per month would get Ksh45 per year while those in the high bracket say of Kshs100, 000/- per month would get Ksh3000/- per year bringing a serious disparity thus violating Articles 201(a)(b) and 203(1) and 204(4) of the Constitution.

3. The petitioner stated that the Board of Trustees of Teleposta Pension Scheme had not appreciated the direction of Article 7 part 2 of the 6th schedule to the constitution which has precipitated a violation of Article 201(a) of the Constitution and has in turn caused suffering to majority of pensioners and a such the Board of Trustees has engendered discrimination, in contravention of Articles 201, 203, 10, 20 and 21 of the Constitution.

4. The petitioner complains that the violations alluded to above violate the principle of public participation and in particular that the flawed manner of constituting annual general meeting is causing serious loss to the fund which negatively impacts on the members of the pension scheme.

5. The petitioner urged that the court takes action and appropriate orders for the removal of the Board of

Trustees as a way of redressing previous violations of the pensioners' fundamental rights. The petitioner therefore prays for the following reliefs;

- 1) A declaration of the invalidity and unconstitutionality of the consolidated Trust Deed and rules as its construction it infringes the right dictated under Article 201, 203, and 227(1) of the constitution. The Trust Deed and rules derogate every tenet of a democracy accountability inclusivity and natural justice I (sic) far as Annual General meeting is held disallowing making, passing adopting meeting and approving or disapproving management policy.**
- 2) A declaration that the policy to receive annual benefit statement and schemes audited account statement does not qualify the principle of public participation, transparency and accountability which is an entitlement under Article 201 of the constitution.**
- 3) An Oder of mandamus to direct 1st and 2nd respondents to carry out bonus and pension increase payment subject to Article 203(g) and (h) of the constitution.**
- 4) An order of structure injunction directing 1st and 2nd respondent to review the member's pension to conform to legal notice No 24 (bill No 6) of 1996 and sessional paper No 3 of 1985.**
- 5) A declaration to hold that RBA and Telkom (K) Ltd are liable for aiding and abetting violation of basic rights and fundamental freedom due to the practical assistance through advisory roles and actual control of process of AGM, election of Board of Trustees and payment of increased and bonus.**
- 6) Order of certiorari to quash the arbitrary bonus and increases which does not adhere to the principle of equity and equitable sharing under public finances.**
- 7) An order of certiorari to quash the offending discriminatory election rules as used to enlist members nominate trustee.**
- 8) An order of mandamus to direct the 1st, 2nd and 3rd respondent to the supremacy of AGM and to adhere to AGM common principle of making, passing, approving or disapproving resolutions.**
- 9) An order of Structural injunction to stop and recovery moneys misappropriated during the last 10 years of carrying out corrupted AGMs.**
- 10) In view of complicity (directly or indirectly) to the violation of fundamental freedom and basic right entitled and protected in the constitution RBA ought to charged 10 million global Award to mollify the punitive damages suffered by the petitioner.**
- 11) An order of 10 million compensatory damages must be penalized for discriminatory actions, abuse of democratic, equity, human right and accountability principles arising due to Telkom Kenya LTD divisive or non-inclusive maneuvers leading to misappropriation of funds due to authorizing Non transparent AGM, non-equitable payment of pension increase and bonuses and disregarding the pension review policy as set by sessional paper No 3 of 1985 and Legal Notice No 24(Bill No 6) of 1996.**
- 12) An order of Ksh15 million towards the constitutional malpractices of Board of trustee of the scheme for general damages arising from the liability to disregard the rules of Law, Human rights, inclusiveness, public participation, Accountability and Transparency entitled under Articles 10, 201, 203, 226(5), 227(1) of the constitution.**
 - a) An order of compensation of loss of saving from violations of Basic rights and Public Finance & Board in the Constitution.**
 - b) A structured injunction order to consider the principle of proportionality test and bring payment of Bonus to the framework of Article 10, 201, 203 and 204 of the Constitution.**

c) An injunction order removing Board of Trustees as currently constituted due to lack of legitimacy (based on the principles of non-discrimination and refusal to work within constitutional framework and hold them accountable for misappropriations and ensuring losses (based on non-discrimination principles).

d) Further orders as may be first and appropriate.

e) Costs of the petition.

1st Respondents Response

6. The 1st respondent filed a replying affidavit sworn by **Peter K Rotich** the Administrator and Trustee Secretary of 1st respondent on 1st July 2015 and filed in Court on 2nd July 2015. Mr. Rotich deposed that the 1st respondent is a registered pension scheme with a registered Trust Deed and Rules which regulate the affairs of the 1st respondent.

7. Mr Rotich further deposed that according to the Trust Deed and Rules, any dispute between the pension scheme, Board of trustees and members on issues regarding the construction or effect of the Trust Deed should be referred to an arbitration. It was deposed that from the petition and affidavits the petitioner is complaining about increment of pension which falls within the construction of the Trust Deed and Rules made there under.

8. The deponent further deposed that the petitioner had previously complained through petition No 377 of 2013 which was on similar issues as those in the present petition but in the judgment of 18th December 2012, the Court dismissed the petition and directed the petitioner to use mechanisms provided for in the Trust Deed since the issues he was raising were non-constitutional. However, the petitioner went on to lodge an appeal to the Court of Appeal (Appeal No 191 of 2014.)

9. Mr Rotich deposed that the petitioner has never complained through the available avenue in the Trust Deed and Rules as required hence he is abusing the court process by initiating another petition, thus the petition is *rejudicata*. He also stated that the petition did not raise any constitutional issues and that the Articles of the Constitution relied on were irrelevant to the petition before Court.

2nd respondent's response

10. The second respondent filed grounds of opposition dated 29th September 2015 and filed in court on 2nd October 2015. The 2nd respondent stated that the petition is frivolous and vexatious as it sought no relief against it, that the petition is ***res judicata*** as the issues were the subject of petition No 377 of 2013 which was dismissed on 18th December 2013, that the petition lacks merit, is misconceived and discloses no cause of action, that the petition raises no constitutional issues, specifies no violation of fundamental rights and that it is an abuse of the process of the Court.

Petitioner's Submissions

11. In his submissions dated 10th July 2015, 12th October 2016 and further submissions dated 12th October 2016, the petitioner who acted in person is opposed to the pension scheme and the manner of its operations. The petitioner submitted that Teleposta Pension Board and the Retirement Benefit Authority have institutionalized corruption in the eighth (8) Annual General Meetings of the scheme, hence derogating the Principle of Public participation, accountability, democracy equity and the rule of law, non-discrimination and have thus entrenched impunity. According to the petitioner, a lot of money has been lost due to non-accountable expenditure.

12. The petitioner contended that any public officer charged with management of Public resources has a constitutional responsibility and or obligation to protect the resources in accordance to Articles 10, 201,

203 and 204 of the Constitution, but contends that this has not happened in the case of the 1st respondent pension scheme, given that it has engaged in non-equitable and discriminative practices against constitutional principles.

13. The petitioner contended that each member of the pension scheme pays close to Ksh750,000 annually without disclosure of the necessity of this payment, that RBA the 3rd respondent has never demanded that operations of the 1st respondent meet constitutional requirements of public participation, that a lot of money is used to hold 8 fictitious Annual General Meetings of the 1st respondent though done in the presence of the 3rd respondent, thus the respondents have disregarded the principle of equitable sharing of resources a violated socio-economic and cultural rights.

14. The petitioner is of the view that these administrative misdemeanors are widespread and there is systematic discrimination leading to infringement of the principle of participation of members. The petitioner further contended that the present petition is different from petition No 377 of 2013 and urged the Court to adopt an interpretation that will do away with discrimination. He submitted that the eligibility clause for those who want to stand for election as trustees is discriminatory and against the rules of natural justice. He relied on the case of **Republic v the Chief Justice of Kenya and 8 others** [2011]eKLR on this submissions as well as the definition of discrimination in **Black's Law Dictionary**.

15. He contended that the eligibility clause which determines who is to stand for election as trustee pursuant to clause 12 of the Trust Deed is to that extent discriminatory. The petitioner further contended that the respondents are aware of their constitutional obligations and relied on the case of **Satrose Ayoma and Others v Registered Trustees of the Kenya Railways Staff Retirement Scheme (Pet No 65 of 2010)** for the submission that public bodies established to provide services of public nature are bound by constitutional obligation.

16. The petitioner went on to contend that the limitation of trustees' liability violates Articles 201 and 203 of the Constitution and asked the Court to look at all areas of discrimination including the manner of holding AGMs and find that the eligibility clause is illegal He submitted that the petition has a compelling constitutional demand on social security by dint of Article 43(1) of the Constitution. He urged the court to access fairness in pension administration and overall justice, in that the principle aim of the pension scheme is to make retirees lead a healthy life, that social security is in the economic domain of the Kenyan state as it is a right to protect workers and a basic means to provide income to all in need. He therefore contended that failure by the respondents to implement review of pension is a violation of social security rights.

1st Respondent's Submissions

17. Mr. Bundotich, Learned Counsel for the 1st respondent, submitted that the petition does not raise constitutional issues to warrant invoking any of the constitutional provisions. Counsel contended that the petitioner did not place before Court evidence to show that he was being discriminated against, learned counsel relied on the case of **James Muchene Ngei v Republic** [2008]eKLR quoting **Anarita Karimi Njeru v Republic** [1979]1KLR submitting that a person seeking redress from the High Court or an order which invokes the Constitution should set out with reasonable degree of precision that of which he complains provisions said to be infringed and the manner of infringement.

18. Learned counsel went on to submit that the petitioner had not presented evidence over violations of constitutional rights, that rule 7 of the 2nd schedule to the Consolidated Trust Deed and Rules provide which benefits are paid to members and where a member is aggrieved, he ought to refer the dispute to arbitration, and pointed out clause 36 of the Consolidated Trust Deed to that effect. Counsel submitted therefore that both the consolidated Trust Deed and Retirement Benefits Act provide for procedures and avenues through which disputes relating to pension can be adjudicated upon and not through the Courts.

19. Counsel relied on the case of **William Lonanaghena v The Medical Research International** [2012]eKLR for the proposition that the fact that the court has unlimited jurisdiction does not defeat

arbitration process guided on statute law. Mr. Bundotich further submitted that the petition is *res judicata* in view of the decision in **Bethwel Omondi Okal v Telkom (K) Ltd and 9 Others (Petition No 377 of 2013)** and relied on section 7 of the Civil Procedure Act for that submission. Counsel relied on the case of **v Attorney General & Another** [2012] eKLR to support this position. Mr. Bundotich contended that the issues raised in the present petition are similar to those raised in petition No. 377 of 2013 and which upon dismissal the petitioner filed an appeal to the Court of Appeal being Civil Appeal No 191 of 2014.

2nd Respondent's Submissions

20. Mrs. Mbaabu, learned for 2nd respondent, submitted through her written submissions dated 17th December 2015 and filed in Court on the same day that the petition seeks no relief against the 2nd respondent and was therefore frivolous. Learned Counsel agreed with counsel for the respondent that any complaint the petitioner may have had should have been referred to arbitration being the dispute resolution mechanism provided for under the Trust Deed and Rules.

21. Learned counsel submitted that the issues raised in the present petition are *res judicata* since they formed the substance of petition No 377 of 2013 and any issues that the petitioner did not raise are deemed to have been in the knowledge of the petitioner and failure to raise them in the previous proceedings does make the petition tenable and the petitioner should not be allowed to introduce new causes of action to defeat the doctrine of *res judicata*.

Determination

22. I have considered the petition, responses thereto, submissions by parties and authorities relied on. The petition in principle challenges the Trust Deed of the 1st and 2nd respondents and the rules made thereunder. The petitioner contends that the Trust Deed and rules violate the petitioner's rights and therefore, violate his social security rights arguing that increment of pension has remained at a constant level which means the lower cadre of pensioners gets a raw deal while those in the high category are favoured, The petitioner gave an analogy that one earning say Kshs 1,500 per month would get 45 shillings per year while a person earning Kshs100,000 per month takes home Ksh3000/-per year which he considers discrimination.

23. The petitioner's other complaint is that there is discrimination on those who should want to participate in elections for Trustees, contending that any people in senior positions are allowed to participate while those in the lower cadre are not and again terms it discrimination among other grievances.

24. The respondents have opposed the petition terming it an abuse of the Court process and further that it is *res judicata*. According to the respondents, the petitioner had filed petition **No 377 of 2013 Bethwel Allan Omondi Okal v Telkom Kenya Limited and 9 others** which raised similar issues as those raised in the present petition. The respondents further contended that the concerns by the petitioner are catered for in the Trust Deed and Rules as well as Retirement Benefit Authority Act hence there is no constitutional issue raised in the petition.

25. This petition and the manner the petitioner has conducted it deserves some comment. The petition was filed in 2015 and there appears to have been several hearings and dates set for judgment but no judgment was delivered due to the petitioner's insistence on filing many but unnecessary applications. For instance, according to the record, the petition was heard on 15th January 2016 and judgment reserved for 8th April 2016. On that day the matter was mentioned before **Mumbi Ngugi J** who directed that it be mentioned on 26th April 2016 before **Lenaola J** (as he then was) who had heard the petition.

26. On 12th April 2016, the matter appeared before **Lenaola j** because there was an application and the Judge directed that the application be heard in 17th May 2016. However, on 3rd May 2016 the matter was again in court before **Lenaola J** who again directed that the petition be heard on 17th May 2016 which was the date earlier allocated. On that day the petition was heard and the judge reserved judgment for

22nd July 2016.

27. The record does not show what happened on 22nd July 2016 but the file was back in court on 3rd August 2016 with an application and the judge directed that the application be served for hearing on 5th August 2016. When the matters appeared before the judge on that day, parties were directed to file a responses to the application or hearing on 1st September 2016, When again parties appeared before the Court, the application was adjourned to 18th October 2016 and on that day it was marked for mention on 6th December 2016 because the trial judge was not sitting.

28. The next time the matter came up was on 21st April 2017 with an application dated 21st April 2017 under urgency and I directed that it be served on the respondents. I finally directed that the petition be heard instead of the application and that is what happened. The above history shows how much judicial time was wasted in this matter simply because the petitioner was incessant on filing applications scuttling delivery of judgment which would have brought this matter to a conclusion.

29. That notwithstanding, the petitioner is a member of the 1st respondent pension scheme known as Telkom Kenya Limited under a consolidated Trust Deed dated 5th October 2010 which incorporated amendments made on 21st January 2009. This was supplemental Trust Deed to the one made on 3rd December 2004 (Teleposta Pension Scheme). In this Supplemental Trust Deed, the founder was described as **Telkom Kenya Ltd.**

30. According to the consolidated Trust Deed, a member is defined as an ***employee of the founder who has been duly admitted to the membership of the scheme and who has not cased to be a member in terms of the rules of the scheme.*** The petitioner in claiming that he is aggrieved by operations of the scheme means he is a member of the pension scheme..

31. According to section 5 of the consolidated Trust Deed, the main purpose of the scheme is ***provision of pension and other retirement benefits to members upon their retirement from employment and relief for dependents of deceased members.*** It further provides that ***funds paid to the scheme will be dealt with in accordance with the Trust Deed and Rules.*** That implies that funds in the scheme cannot be utilized otherwise than in accordance with the Trust Deed and rules made thereunder.

32. The Consolidated Trust Deed further provides that expenses for administration of the scheme will be paid from the fund and that Trustees are to be remunerated in accordance with the Trust Deed. Section 20 of the Trust Deed protects Trustees against personal liability for actions taken by employees or agents or anything done by them in good faith. On the other hand, Section 24 allows amendments to the Trust Deed in the manner provided for in the Deed ***but such amendment may not be for purposes of defeating the main purpose of the scheme or that may diminish or invalidate pension already being paid in accordance with the rules or interest or right already accrued to a member of the scheme.*** Section 27 provides that the period of the ***Trust Deed shall last to the death of the last member of the scheme who dies as a member or such longer period as the law may allow.***

33. I have deliberately referred to the above provisions to show that the 1st respondent is a self-regulating pension scheme with clear provisions on how to deal with the scheme, funds and issues affecting the scheme. It is important, however, to observe that section 35 of the Trust Deed states in no uncertain terms that ***“no person whether a member or otherwise shall have any claim right or interest upon to or in respect of any lump sum payment or other benefits or any contribution made to the scheme or any interest therein or any claim upon or against the Trustees or the founder except under and in accordance with the provisions of this Deed.”***

34. Section 36 is also important and states that where a dispute arises between the founder, the Trustees, the members, the dependents, pensioners or other persons or their personal representatives touching on the construction, meaning or effect of the Trust Deed or any cause or thing therein contained or rights or liabilities of any of them under the Trust Deed or in relation to the scheme ***such dispute should be***

referred to arbitration.

35. Reading the Trust Deed *visa vis* the petition, there is no doubt that the petitioner raises issues that touch on the operations of the scheme in one way or another and claims of violation of his rights and that of liabilities of the **Trustees** bring the petition within the ambit of clauses 35 and 36 of the Trust Deed. Clause 36 requires that any dispute on issues relating to the scheme be taken for arbitration.

36. A glance at the Rules also shows that under rule 4 a member acknowledges that he/she is bound by the Trust Deed and Rules made there under. This means that the petitioner as a member of the scheme is bound by the Trust Deed and rules and must operate within the rules.

37. Rule 7(a) also states that contributions by a member vests immediately in that member which means a member is entitled to what he contributes to the scheme. Rule 7(d) (iv) states that pension shall be paid by equal monthly instalments during the pensioner's lifetime, commencing from the time of retirement. Where there is an extra payment from the Founder, Trustees may decide how to pay the additional benefit to members. The Trust Deed and rules are therefore central on the management and operations of the scheme and leave no room for disputes outside the Trust Deed and rules governing the scheme.

38. Looking at the petition against the Trust Deed and rules, there is no doubt that the petitioner's complaints are not sustainable outside these instruments. The petitioner wants the court to grant orders that would in essence dissolve the scheme. That would be the same thing with regard to orders on elections of Trustees and even amendments to the Trust Deed and rules. That can only be done in accordance with the rules governing the scheme because claims of rights and liabilities fall within the Trust Deed.

39. The Retirement Benefit Authority Act is also relevant to pension schemes and their management. **Part IV** of the Act (sections 32 to 40) deal with regulation and supervision of retirement benefit schemes including the petitioner's pension scheme. The sections deal with management of the contributions, investment of the funds and accountability by Trustees. Section 39 in particular, prohibits unsafe and unsound practices and provides that

1) "Where, in the opinion of the Chief Executive Officer, a trustee, manager, custodian or administrator of a scheme is pursuing an act or course of conduct which the Chief Executive Officer considers to be an unsafe or unsound practice, or in any way detrimental to the scheme, the Chief Executive Officer shall, by notice in writing direct such trustee, manager, custodian or administrator to refrain from pursuing such act or course of conduct.

2) A trustee, manager or custodian who acts in contravention of a direction under this section commits an offence and shall be liable, on conviction, to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding two years, or to both"

40. The provision is clear that there are sanctions against Trustees who act in violation of the Trust Deed and the Act. Indeed in the documents filed by the petitioner is a letter from the 3rd respondent dated 16th May 2014 addressed to the petitioner regarding the 1st respondent's Annual General Meeting. The letter informed the petitioner that Trustees are required to hold AGM for members to raise any issues relating to their Scheme. The petitioner was in fact advised that **a member who wishes to have a specific issue considered as agenda for discussion should consult with Trustees who have been given the responsibility of convening AGMs.** He was also informed how elections for Trustees are conducted but despite this clear advice from the 3rd respondent, the petitioner ignored it and opted to file this petition in clear violation of the Trust Deed and the Rules.

41. The respondents also argued that this petition is *res judicata*. They contended that the petitioner had filed Petition No377 of 2013 which was dismissed and, in their view, the current petition is in all respects the same as the former petition that was dismissed. The respondents relied on section 7 of the Civil Procedure Act to support their position. Section 7 provides as follows-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been substantially raised and has been heard and finally decided by such Court.”

42. The doctrine of ***res judicata*** demands that there be a final judgment or decree on merit by a competent Court to try the case in determination of rights of the parties. The later suit should have semblance of the former suit, be about the same and against the same parties and should relate to the same subject matter. (See ***Uhuru Highway Development Limited v Central Bank of Kenya 2 Others*** [1999]eKLR.)

43. The rationale for the doctrine of ***res judicata*** is used as a means of ensuring that there is finality in litigation so that a party who has had a case against him adjudicated upon and concluded should not once again be dragged back to court over the same subject matter. The Court of Appeal deciding in the case of ***Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 others v Permanent Secretary Ministry of Energy & 17 others*** [2016] eKLR restated the principles underlying ***resjudicata***. Quoting the Supreme Court of England in ***Virgin Atlantic Airways Limited v Zodiac Seats UK Limited*** [2014] 1AC 160; [2013] 4 All E R 715, the Court of Appeal stated;

“The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is “cause of action estoppel”. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant’s sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as “of a higher nature” and therefore as superseding the underlying cause of action...Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties...Finally there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.”(emphasis)

44. The above principles assist in determining whether a matter is ***res judicata*** or not but there is a general proposition that the doctrine of ***res judicata*** does not apply in constitution petitions. The rationale for ***res judicata*** as a basis for bringing litigation to a close was stated by the Court of Appeal in the case of ***John Florence maritime Services Limited & another v Cabinet Secretary of Transport and Infrastructure & 3 others*** [2015]eKLR which shows that ***res judicata*** as a principle of general application can be raised as a defence in constitutional petitions. The Court of Appeal stated thus-

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle

of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process... [Emphasis]

45. Applying the above principles, have looked at the pleadings in petition no 377 of 2013. Parties are the same and the issue relates to the same pension scheme. That is what is before this court. There is no doubt therefore that the petitioner is re-litigating the same issue in the guise of an amended petition but wants the court once again to pronounce itself on issues that were substantially in issue in the previous petition.

46. Moreover, the petitioner filed an appeal against the judgment in petition No 377 of 2013 being ***Civil Appeal No 191 of 2014. Bethwel Allan Omondi Okal v Telkom Kenya Limited & others***, and even before the appeal had been determined, the petitioner filed the present petition. That appeal was eventually dismissed by the Court of Appeal.. There is no better situation to apply the doctrine of ***re judicata*** that in the present petition to stop the abuse of the court process.

47. Finally the respondents contended that this is not a proper constitutional petition. They argued that this is a matter that should have been dealt with in the manner provided for in the Trust Deed and Rules but has instead been disguised as a constitutional petition.

48. I have carefully read through the petition and submissions by parties. There is no doubt that this in a normal civil dispute that has been camouflaged as a constitutional petition. The test of what is a constitutional petition was stated in the oft quoted case of ***Anarita Karimi Njeru v Republic*** [1979]1KLR where the Court stated that a party who wishes the Court to find in his favour must plead with a reasonable degree of precision the rights he claims to have been violated the constitutional provisions allegedly violated and the jurisdictional basis for it.

49. This principle was reiterated in the case of ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*** [2013] eKLR thus;

‘...The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle....’

50. The petitioner attempted to rely on some constitutional provisions constitution including Articles 43, 10, 20, 23 201, 203 and 227(1) to show that this is a constitutional petition. He did not however demonstrated that his was a constitutional petition challenging real or threaten of violation of constitutional rights and fundamental freedoms and how these rights have been violated or are threatened. What he has complained of are, in my view, issues that can easily be resolved in a different forum under the applicable law.

51. Moreover, if the court was to grant the reliefs sought such as declaring the Trust Deed invalid, such a declaration would amount to dissolving the pension scheme and there would be no reason for granting the rest of the prayers since Trustees would simply have to wind up the scheme. Such a declaration would not only affect the 1st and 2nd respondents but also all other Pension schemes in the country and would in effect render Retirement Benefit Authority Act inoperative.

52. Pension schemes are formed for a purpose with clear provisions for their termination. They are not ordinary bodies to be sued in the ordinary courts because their membership is limited to a particular group of persons. That is why their operations are governed by the Trust Deeds and rules made thereunder. Any disputes must be resolved in accordance to the constituting instruments and not otherwise.

53. In this respect I agree with **Lenaola J** (as he then was), when he stated in his judgment in petition 377

of 2013 that ***it is not in every situation where there is allegation of failure by an organ to act that amounts to violation of fundamental rights.*** The learned judge found that the petitioner had not raised constitutional matters to warrant intervention by the Court in exercise of its constitutional jurisdiction under article 165(3) (a).

54. In the case of **Benard Murage v Fine serve Africa Limited & 3 others** [2015] eKLR the court again stated that;

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.

55. The same position was taken in the case of **Damian Delfonte v The Attorney General of Trinidad and Tobago** CA 84 of 2004 where the court that:

“Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which at least arguably, indicates the means of legal redress otherwise available would not be adequate. To seek constitutional reliefs in the absence of such a feature would be a misuse or abuse of the Court’s process. A typical but by no means exclusive example of such a feature would be a case where there has been arbitrary use of state power. Another example of a special feature would be a case where several rights are infringed. Some of which are common rights and some of which protection is available only under the Constitution it would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights.”

56. I entirely agree with the above observations. For my part, I have carefully examined this petition and the concerns raised by the petitioners. I do not think they fall within the constitutional mandate of this court exercising its jurisdiction under Article 165(3) (b) of the constitution. In this regard, I am guided by the observation by the Court of Appeal in the case of **Rich Productions Limited v Kenya Pipeline Company & Another** [2014] eKLR where the Court stated that;

“[14] The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies...such supervision is limited in various respects which I need not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not.” (Emphasis).

57. The petitioner has a remedy under the Trust Deed and the rules made there under. If he has an issue to raise against Trustees on the manner they manage the scheme, he surely should follow the procedure laid down in the instruments that govern pension schemes including the Retirement Benefit Authority Act which is clear that pension schemes must be managed subject to the provisions of that Act and provides penalty for mismanagement of pension schemes.

58. Any failures by Trustees must be dealt with as provided for under the Act and applicable Trust Deeds and Rules but not through the court as the petitioner has been attempting to do. If the petitioner wants to stand for elections, he must also follow the procedure laid down but the court cannot prescribe procedures for running pension schemes which are subject to their own legal instruments. This would invariably interfere with proper management of pension schemes by subjecting them to micromanagement by courts. Management of pension must left to those who have been entrusted to manage it les the whole purpose of pension schemes is lost if subjected to unnecessary court disputes.

59. From the analysis above and having given due consideration to the amended petition, submissions by parties the law and precedent, I am not satisfied that this petition has merit. Consequently, the amended petition dated 22nd February 2016 is declined and dismissed with costs.

Dated, Signed and Delivered at Nairobi this 29th November 2017

E C MWITA

JUDGE