



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO 353 OF 2012

BETWEEN

TOM KUSIENYA1ST PETITIONER
JAMES KANYEKI2ND PETITIONER
RODGERS WASHIKA3RD PETITIONER
ROBINSON KARURI.....4TH PETITIONER
ANN NYAGA5TH PETITIONER
AUGUSTINE OKECHI6TH PETITIONER
MATHEWS NABONGO AMOLO7TH PETITIONER
MURIITHI MAINA GACHANGI8TH PETITIONER

AND

KENYA RAILWAYS CORPORATION1ST RESPONDENT
CORPORATE & PENSION TRUST SERVICES LTD.....2ND RESPONDENT
RETIREMENT BENEFITS AUTHORITY.....3RD RESPONDENT

AND

THE ASSOCIATION OF KENYA RAILWAYS
RETIRES (AKERARE) INTERESTED PARTY

CONSOLIDATED WITH
PETTITION NO. 159 OF 2012

BETWEEN

DANIEL OWUOR OBOP.....1ST PETITIONER

PRISCILLA MUKURIA.....2ND PETITIONER

MOSES NJEKA.....3RD PETITIONER

AND

THE RETIREMENT BENEFITS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. The two petitions before the Court, **Petition No. 159 of 2012** and **Petition No. 353 of 2012**, were consolidated as the issues they raise are closely interlinked. They concern the appointment of trustees and the running of the **Kenya Railways Staff Retirement Benefits Scheme**, which has as its membership former employees of the Kenya Railways Corporation.
2. The first petition, **No. 159 of 2012**, dated 13th April 2012, is brought by three former trustees of Kenya Railways Staff Retirement Benefit Scheme who had been elected trustees of the Scheme on 29th May 2009 for a period of three years. Their petition challenges their removal from the Board of Trustee.
3. **Petition No. 353 of 2012** is dated 15th August 2012 and was filed by 8 members of the Scheme challenging the appointment of the Corporate & Pension Trust Services Ltd, the 2nd respondent, as the sole corporate trustee for the Scheme by the Kenya Railways Corporation (“Kenya Railways”), the 1st respondent. They contend that the appointment of the corporate entity is irregular, illegal and unconstitutional and in contravention of members’ interests.
4. The Kenya Railways Staff Retirement Benefits Scheme (“the Scheme”) is a closed defined benefit scheme established in the year 2005. It draws membership from former employees of Kenya Railways Corporation and has over 9,000 pensioners and 2,500 deferred members. Some of the deferred members comprise of former employees of Kenya Railways Corporation currently working for Rift Valley Railways Ltd.
5. The 1st respondent, the Kenya Railways Corporation, (KRC) is a statutory corporation established under the Kenya Railways Corporation Act (Chapter 397 of the Laws of Kenya) and is the sponsor of the Scheme. The 2nd respondent, Corporate & Pensions Trust Services Limited is a company incorporated under the Companies Act and registered with the Retirement Benefits Authority in 1997 as a Trust Corporation in accordance with section 2 of the Act. It was appointed as the sole corporate trustee of the Scheme by the Board of Directors of the Scheme’s Sponsor commencing 29th June 2012 for a period of three (3) years. The 3rd respondent, the Retirement Benefit Authority (RBA) is a corporate entity established under the **Retirement Benefits Act, No. 3 of 1997** with the mandate, *inter alia*, to regulate and supervise the establishment and management of retirement benefits schemes.

The Facts

Petition No. 159 of 2012

6. The subject of this petition is the letter dated 8th March 2012 from the RBA served on the petitioners requiring them to vacate their offices as trustees forthwith. The sequence of events leading up to the impugned decision dates back to 20th September 2011, when the RBA sent five of its officers to inspect the Scheme. The letter read in part as follows;

“It has come to our knowledge that certain events that are unusual, unsafe and detrimental to the management of the Scheme have taken place.

In order to ascertain the veracity of this information, we have deputized our officers to call at your office today Tuesday, 20th September 2011 at 2.30 pm, to carry out an inspection of the scheme in the manner directed by the law.”

7. The letter went on to name five RBA employees who would carry out the inspection. The inspection was carried out over the two day period between 20th and 21st September 2011 culminating in a report entitled, ***“Report on the Findings of the Inspection of the Kenya Railways Staff Retirement Benefits Scheme”*** dated 14th November 2011(“the inspection report”).
8. According to the inspection report, there were a number of irregularities in the running of the Scheme. It stated that most of the Scheme’s assets were sold at values lower than the market rates, and that some transactions were marred by irregularities and questionable and flawed procedures. The inspection report further revealed that there lacked permanent staff to manage the operations of the scheme resulting in lack of accountability and ownership of the scheme.
9. Following receipt by the petitioners of the inspection report, the petitioners submitted a Response dated 17th February 2012 in which they dealt with the concerns raised in the inspection report.
10. The RBA afterwards wrote a letter dated 8th March 2012 dismissing the trustees from office alleging that the course of conduct taken by them and other trustees was unsafe and detrimental to the scheme. The letter addressed to the trustees from the RBA and copied to the Administrator of the Scheme and the Managing Director of the Scheme sponsor read as follows;

“RE: REMOVAL FROM OFFICE OF TRUSTEE OF THE KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME

We have received and considered your reply to the Inspection Report of the above Scheme prepared further to an inspection carried out on 20th and 21st September 2011.

After due consideration of your reply, we are satisfied that the course of conduct undertaken by you and other trustees is unsafe and detrimental to the interests of the Scheme.

Your continued occupation of office of trustee is, pursuant to Section 26(2)(d), considered by the Authority as being detrimental to the Scheme.

As a direct consequence, the Authority has disqualified you from holding office of trustee of the Kenya Railways Staff Retirement Benefits Scheme or any other scheme registered under the Retirement Benefits Act. In the circumstances, therefore, you are hereby required, upon delivery of this letter to you, to hand over all the Scheme assets, books, cheques, mandates, trust documents or others, instruments etc of the scheme to the Administrator of the Kenya Railways Staff Retirement Benefits Scheme.

This letter will be delivered to you by hand to avoid delay or mis-delivery.

Yours faithfully,

Charles M. Machira

Manager; Supervision Department

11. It is this letter that triggered the filing of the petition dated 13th April 2013. The petition is supported by the affidavit of Daniel Owuor Obop, the 1st petitioner.
12. The petitioners complain that they unsuccessfully registered their reservation to the inspection being conducted by the team since one of the inspectors from the RBA was being investigated by the trustees for allegedly colluding with some staff members of the Scheme to defraud the Scheme of its assets. It was their contention therefore, that the report was not objective and was biased and ill-motivated.
13. The petitioners also complained about the haphazard manner in which the inspection was done without giving them due notice, alleging that the inspection was carried out within hours of receipt of the letter. They contend that pursuant to section 43 of the **Retirement Benefits Act, Chapter 197 of the Laws of Kenya** (“RBA Act”), they were entitled to at least 7 days’ notice to produce documents that the inspectors required for the purposes of the inspection and that such request for documents must be in writing. It was their case that failure to accord them due notice was unconstitutional and in breach of their right to fair administrative action.
14. The petitioners complain that based on the hurried manner in which the inspection was done, they were denied ample opportunity to respond comprehensively to some of the questions put to them by the inspectors during the inspection exercise.
15. The trustees attributed their woes to ulterior motives stating that since they assumed office following their election as trustees, they noticed a lot of malpractices and fraudulent activities involving top management of the Scheme with regard to one of the Scheme’s property known as Railways Club, hence vide a Board resolution, they sent the acting CEO and the Finance Manger on leave to give room for proper investigations. It was also deposed that some of the documents asked for by the RBA officers touched directly and indirectly on the investigations concerning Matumbato Estate which the trustees were at the time investigating the inspector(s) with regard to irregular allocation of property.
16. It was their case that the respondent’s conduct of removing them from office despite the fact that the alleged unsafe conduct complained of was a decision of the entire Board of Trustees comprising nine people was discriminatory and unconstitutional. Further, that the summary manner in which the trustees were sent out of office without considering their reply to the allegations made and evidence tendered is unconstitutional for being in breach of their right to fair administrative action guaranteed under Article 47 of the Constitution.
17. They contend further that their mode of removal from office is well stipulated by **Rule 12** of the Trust Deed and Rules pursuant to which they were elected and that the respondent acted **ultra vires** in purporting to remove them from office. They also complain that the RBA’s decision to bar them from offering themselves for re-election on 27th April 2012, the date set for election of new trustees, was illegal.
18. The petitioners believe that their ‘being hounded’ out of office is rooted in their efforts to bring sanity to the Scheme by tracing and recovering all assets of the Scheme which had been fraudulently taken away or that were being taken away by individuals including members of the RBA and that it had completely nothing to do with the alleged malpractices alleged by RBA.
19. They therefore, in their petition **No. 159 of 2012**, seek the following orders:
0. ***A declaration that the removal of the petitioners from office without conducting proper***

investigations and without considering their response dated 17th February 2012 is unconstitutional for offending your petitioners' right to fair administrative action;

0. *A declaration that the haphazard manner in which the respondent carried out their investigations without giving your petitioners due notice, it illegal and unconstitutional for offending your petitioners' right to fair administrative action;*
0. *A declaration that subjecting your petitioners to inspection by people whom they were investigating for alleged fraud against the scheme, by relying entirely on the report made the said inspectors and ignoring your petitioners' reply was malicious, unfair, actuated by ulterior motive hence unconstitutional;*
0. *A declaration that by barring your petitioners from offering themselves for re-election as trustees is unconstitutional for contravening your petitioners right to participate in a free and fair democratic process;*
0. *A declaration that your petitioners are entitled to remain in office until their term of office expires;*
0. *A declaration that your petitioners are entitled to offer themselves for re-election as trustees of the scheme and that it is upon the electorate to reject r re-elect them; and*
0. *A declaration that your petitioners are entitled to the costs of this petition.*

Petition No. 353 of 2012

20. The series of events precipitating this petition date back to Thursday 5th April, 2012 when the RBA's acting Chief Executive Director published in the *Daily Nation* newspaper a Notice stating that there would be elections of members representatives to the Board of Trustees in its Special General Meeting to be held at the Railway Training Institute on Friday 27th April 2012. There was also a Press Release dated the same day by the RBA's Managing Director stating that the Board of Directors of RBA had appointed six (6) trustees to the Scheme. The Notice also indicated that the election of three trustees by the members of the Scheme would take place on 27th April 2012 after which the full Board of Trustees will be in place.
21. It is worth noting here that this meeting did not take place as scheduled following this court's Order of stay dated 25th April 2012 issued in Petition No. 159 of 2012.
22. Subsequently, on 4th July 2012, the KRC Managing Director published a notice in the *Standard Newspaper* stating that the Kenya Railways had appointed Corporate & Pension Trust Services Limited as the sole Corporate Trustee for the Scheme. The Notice read as follows:

“APPOINTMENT OF A CORPORATE TRUSTEE OF KENYA RAILWAYS STAFF RETIREMENT BENEFIT SCHEME (KRSRBS)

In exercise of powers conferred to it in the Trust Deed and Rules establishing the Kenya Railways Staff Benefits Retirement Scheme (the Scheme), the Kenya Railways Corporation (the sponsor) has appointed Corporate & Pension Trust Services Limited, A wholly owned subsidiary of Alexander Forbes as the Sole Corporate Trustee of the Scheme with effect from 29th of June 2012.

Corporate & Pension Trust Services Limited was established in 1997 and over the years has built an admirable reputation in the provision of Corporate Trustee Services Retirement Benefit Schemes in Kenya.

The Sponsor of the Scheme has taken this action in order to ensure the continued success and sustainability of the Scheme for the benefit of all members.

The Corporate Trustee will shortly be calling for a Special General Meeting to advise on and discuss the development with members.

The Sponsor will also engage with various member associations of pensioners and deferred pensioners to update them on the development, Communication to that effect will follow directly to the associations.

The Secretariat of the Scheme as previously established remains in place and pensioners are free to make enquiries on their pension and related matters from the Secretariat.

NDUVA MULI

MANAGING DIRECTOR.

23. The petitioners' basic contention is that the Managing Director's action of appointing the **Corporate & Pension Trust Services Limited** as the corporate trustee of the Scheme is irregular, illegal and unconstitutional as it makes Kenya Railways Corporation to have 100% control of the scheme in contravention of the members' interest.
24. The petitioners aver that the Scheme is a closed retirement benefits scheme where the sponsor does not contribute any money and therefore should not be involved in its operations and that therefore, KRC's action of appointing trustees to it is irregular and contrary to the interest of the pensioners. They contend that the involvement of KRC in the running of the petitioners' closed scheme has resulted in mismanagement, fraud, theft of assets as well as other irregularities.
25. The petitioners further contend that the corporate trustee, being a wholly owned subsidiary of **Alexander Forbes Limited**, is not qualified to be the sole corporate trustee and further that the interests of the 9,400 retired pensioners of the Scheme will be prejudiced by the appointment of the corporate trustee as **Alexander Forbes** has been acting as the Actuary of the Scheme and is not free from the malpractices stated in the investigation report. It is the petitioners' belief that the vacuum created by the dismissal of the Scheme's trustees will not be properly filled by the appointment of the corporate entity which would be controlled by the KRC as the sponsor.
26. The petitioners also faulted the Scheme's Trust Deed and Rules stating that the same were defective and that there has been a resolution to amend them which the RBA has failed to do; and that in so far as the Kenya Railways relied on these defective Trust Deed and Rules, then the same were illegal, unprocedural and unconstitutional.
27. The petitioners believe that if the RBA implemented the recommendations in the inspection report and contained the Kenya Railways' interference with the Scheme, the malpractices in the Scheme would be eliminated.
28. The petitioners assert that the Managing Director of KRC, having been one of the trustees recommended to be removed from the Scheme for malpractices, has no moral authority to be involved in appointment of the sole corporate trustee. They contend further that the KRC' action of appointing the 2nd respondent as a sole corporate trustee is done in bad faith with the intention of excluding the pensioners' elected trustees and to effect exclusive management of the scheme to the sponsor. They deem the conduct of KRC in appointing the corporate entity as the Scheme's corporate trustee as illegal and unconstitutional and as a violation of the petitioners' rights guaranteed under Article 47 of the Constitution.
29. They therefore seek the following orders in their petition dated 15th August 2012:

- a. *A declaration that there is no Board of Trustees duly constituted for the Kenya Railways Staff Retirement benefits Scheme.*
- b. *That the appointment of Corporate & pension Trust Services Ltd of 29th June 2012 is against the Trust Deed and Rules of the Scheme and null and void.*
- c. *A declaration that the current trust deed and rules of the Kenya Railways staff retirement Benefits Scheme as they related to a normal scheme are defective.*
- d. *An order that the third respondent effects amendment of the defective trust deed and rules.*
- e. *An order that the third respondent get the Kenya railways staff retirement benefits scheme operated as a closed scheme.*
- f. *An order staying the holding of the meeting involving Kenya Railways staff retirement benefits scheme scheduled for 24th August 2012.*
- g. *An order restraining Nduva Muli the managing director and the board of directors of the first respondent from interfering with the management of the Kenya Railways staff retirement benefits scheme or making any appointment relating to the same.*

The Respondents' Case

Submissions by the Retirement Benefits Authority

31. The RBA opposed the petition on the basis of replying affidavits of Edward O. Odundo, its Chief Executive officer sworn on 14th May 2012 and 19th October 2012.
32. RBA basically asserts that the court is the wrong forum to vent the matters raised in the two petitions and that the Retirement Benefits Appeals Tribunal ("the Tribunal") was best suited to hear and address the petitioners' concerns. RBA maintained that it was within its statutory mandate under the RBA Act to regulate and supervise the management of retirement benefits schemes. It was its contention that it was in exercise of its statutory mandate in appointing a corporate trustee to ensure prudent investment decisions with respect to the assets of the pension scheme in order to safeguard the pensioners' and deferred members' constitutional right to fair administrative action.
33. With regard to the removal of the trustees, RBA maintained that its decision to remove the trustees of the Scheme was made pursuant to the provisions of **Section 45(2)(b)** of the RBA Act. It contended, further, that its decision was subject to appeal before the Tribunal established under the Act. It was RBA's contention therefore that this Court was not the proper forum to delve into the claims of the propriety or otherwise of business transacted on behalf of the Scheme. According to RBA, the proper forum to interrogate matters concerning the running of a pension scheme or its trust deed and rules is the Tribunal.
34. RBA contended further that these petitions were a subversive attempt to frustrate the management of the Scheme under the pretext of the alleged violation of the petitioners rights; that the filing of these proceeding by the petitioners seeks to have the High Court arrogate to itself the function of determining the suitability or otherwise of persons seeking to manage the scheme and otherwise disregard the report made by an entity vested with the statutory responsibility of overseeing the management of pension schemes.
35. RBA contended that its role over pension schemes was the regulation and the supervision of the schemes in the interest of their respective members and that it did not conduct the elections of trustees but only supervised such elections to ensure that persons seeking to manage or act in that capacity are not persons who are suspected of contributing or causing detriment to the interest of

the members of the scheme in question. According to RBA, the petitioners were seeking to use the court process to frustrate the management of the Scheme by holding the elections of the scheme at ransom under the pretext of the alleged violation of their rights.

36. RBA denied claims by the trustees that they were not accorded fair administrative action, contending that the trustees deliberately ignored its directions.
37. With regard to the inspection report impugned by the petitioners, RBA asserted that it carried out inspection of the Kenya Railways Staff Retirement Benefits Scheme and held several meetings with the secretariat and trustees of the said scheme before preparing the report. It explained that the inspection report made findings concerning the management of the Scheme which findings disclosed impropriety in the management of the Scheme. It was RBA's case therefore that the three trustees did not pass the test and were not approved under the requirement of section 26(3) of the RBA Act to continue being trustees of the Scheme or to vie for elective positions for the management of the scheme. RBA maintained that the court was not the proper forum to question the substantive findings made in the report and that if the petitioners were aggrieved by the findings of the inspection report, the proper course of action would have been to challenge its substantive findings and their disqualification for election as trustees before the Tribunal established under the RBA Act.

Submissions by Kenya Railways Corporation

38. KRC, the 1st respondent supports RBA's position. It concurred that the High Court is not the proper forum to ventilate the issues in the petition, arguing that the unlimited jurisdiction of the High Court in both civil and criminal matters is not absolute. It pointed out that the Scheme's Trust Deed and Rules contain an arbitration clause which provides that disputes relating to the meaning and effect of the Trust Deed and the rights and liabilities thereunder shall be referred to a single arbitrator appointed by the parties. It was therefore the position of KRC that the Chief Executive of the RBA should have been the next port of call for the petitioners followed by the Tribunal under section 46 and 48 of the RBA Act. It contended that in so far as there existed an alternative remedy, the Court should decline to make a determination.
39. KRC also submitted that the petitioners had not specified with a reasonable degree of precision the matter complained of, the provisions said to be infringed and the manner of infringement. It contended that the petitions were mere generalised complaints that raised no constitutional question and called on the Court to dismiss them.

Submissions by Corporate & Pensions Trust Services Limited

40. On its part, the **Corporate & Pensions Trust Services Limited**, the 2nd respondent supported the position taken by RBA and Kenya Railways and filed a Replying Affidavit sworn on 11th June 2013 by James Olubayi, its Director, as well as written submissions. Its case is that this Court lacks jurisdiction to entertain the petitions before it as the petitioners had not exhausted the alternative methods of dispute resolution. It termed the petitions as premature, incompetent, bad in law and fatally defective. It relied on the decisions of the Court in the cases of **Safmarine Container N.V. of Antwerp v Kenya Ports Authority, Mombasa High Court Civil Case 263 of 2010** and **Dickson Mukwe Lukeine v Attorney General & 4 others [2012] eKLR** to support the position that alternative dispute resolution processes are complementary to the judicial process and that a statute may by express provision confer or limit jurisdiction.

Submissions by the Interested Party

41. According to the pleadings filed on behalf of the Interested Party in **Petition No. 353 of 2012, The Association of Kenya Railways Retirees (AKERARE)**, it comprises of over two thousand retirees of the Kenya Railways Corporation. AKERARE aligned itself with the respondents' submissions. In distancing itself from the petitioners' averments, AKERARE, through the

Replying Affidavit sworn on its behalf by **Johnson Miano Gatu**, its National Chairman, supported the appointment of the corporate trustee. It submitted that since its appointment, the pensioners have been receiving their pension dues in good time unlike previously. It urged the Court to dismiss the petitions to enable the corporate trustees concentrate on its mandate.

Determination

42. Several issues have been raised with regard to the matters before me. They include the question of the Court's jurisdiction to determine the matters now before it, and whether there has been any violation of the petitioners' rights under the Constitution in the acts of the respondents either in removing the trustees in Petition No. 159 of 2012 or in appointing the corporate trustee and thus violating the rights of the petitioners in Petition No. 353 of 2012. I will first deal with the question of jurisdiction.
43. The petitioners insist that this Court has jurisdiction to determine the matters raised in the petitions, and that the petitions were therefore properly before it. Mr. K'Opere, Learned Counsel for the petitioners in Petition No 159 of 2012, was emphatic that the petition concerned the fundamental rights of the petitioners; that the issue of removal and being barred from holding elective positions touched on the petitioners' fundamental rights and cannot be dealt with by the Tribunal; and that the questions of the right to a fair hearing and fair administrative action cannot be dealt with by an administrative tribunal. Counsel also pointed out that the issue relates to the attempt to replace the trustees without the process set out in the Act being followed. He argued therefore that the RBA took a decision that was ultra vires the Act. It was Counsel's further contention that the act of trying to appoint a corporate trustee was to circumvent a court order, was sub judice, and was done without observing the rules of natural justice. Mr. K'Opere further submitted that the effect of the respondent's actions was to take away the livelihood of the petitioners and therefore raised a constitutional issue.
44. To buttress the argument that this Court was the proper forum for determination of their dispute with the respondents, the petitioners cited Article 165(3) which provides that the High Court shall have unlimited original jurisdiction in criminal and civil matters and the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied violated, infringed or threatened. They also relied on the case of **Jeanne W Gacheche & 6 Others v The Judges and Magistrates Vetting Board & 2 Others [2012] eKLR**.
45. On their part, the respondents were emphatic that the Court was not the proper forum to adjudicate the issues raised in the petition and that there existed alternative remedies and processes which the petitioners were bound to exhaust before resorting to the High Court. It was their contention that the petitions were improperly before the Court and the Court ought to decline to exercise jurisdiction.
46. As the Court observed in **The Matter of the Interim Independent Electoral Commission [2011] eKLR**:
- “[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent.... [30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”***
47. **Article 165(3)** of the Constitution vests wide powers on this court. The Article reads as follows;

“(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

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

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

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

48. Given the wide jurisdiction conferred on the Court by the above Article therefore, it is doubtless correct to say that this court has jurisdiction by virtue of **Article 165(3)** to deal with the matters before it. As to whether this Court is the appropriate forum in the circumstances is a different issue altogether. Courts will at times decline to exercise jurisdiction even though they may have jurisdiction to deal with the issues the subject of controversy where there are alternative remedies available in other forum stipulated under the law. In its decision in **Diana Kethi Kilonzo & another v The Independent Electoral & Boundaries Commission (IEBC) & 10 others, Petition No. 359 of 2012 [2013] e KLR**, the Court observed as follows:

“[73] We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.” [Emphasis added]

49. The matters presently before me revolve around the exercise of powers by the RBA, a body corporate established under **Section 3** of the **RBA Act** and with its powers set out under **section 5** of the Act as follows:

“(a) regulate and supervise the establishment and management of retirement benefits schemes;

(b) protect the interests of members and sponsors of retirement benefits sector;

(c) promote the development of the retirement benefits sector;

(d) advise the Minister on the national policy to be followed with regard to retirement benefits schemes and to implement all Government policies relating thereto; and

(e) perform such other functions as are conferred on it by this Act or by any other written law.”

50. It is apparent therefore that RBA is the body entrusted with the regulation and supervision of the management of retirement benefits schemes. **Part VI** of the Act deals with appeals under the Act. **Section 46** provides for Appeals to the Chief Executive Officer and states that:

“(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.”

51. **Section 47** establishes an Appeals Tribunal for the purpose of hearing appeals under the Act, while **section 48** goes on to provide as follows:

“48. Appeals to the Tribunal

(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.”

52. It is clear from the provisions cited above that there is a specific mechanism established under the RBA Act for dealing with disputes under the Act.

53. The word used in section 48 with regard to appeals is ‘may’, which likely raises the question whether the appeal to the Tribunal is optional. The words of the Court in **Velji Shahmad vs. Shamji Bros and Popatlal Karman & Co. [1957] EA 438** are apposite in this regard. The Court stated in that case that:

“Such expressions as “may”, “shall be empowered”, “may be exercised”, in certain circumstances are to be construed as having a compulsory or imperative force. The test is whether there is anything that makes it the duty on whom the power is conferred to exercise that power...”

54. According to its long title, the RBA Act is, **“An Act of Parliament to establish a Retirement Benefits Authority for the regulation, supervision and promotion of retirement benefits schemes, the development of the retirement benefits sector and for connected purposes.”** In my view, the purpose of the Act as a whole and the specific dispute resolution provisions would be best served by reading the word ‘may’ as an imperative term that requires that the appeal mechanism of the Tribunal is exhausted before recourse can be had to the High Court. In this respect, I agree with the sentiments expressed by Odunga J in **Jimmy Mutinda v Independent Electoral and Boundaries Commission & 2 others ex parte Shaileshkumarnata Verbai Patel**

& 2 Others Misc. Civil Appl. 2 & 11 of 2013 [2013] eKLR where he observed at paragraph 13 that,

“ It was also contended that since under section 99 of the Act the right to request a review under this Part is in addition to any other legal remedy a person may have and hence the applicants were not restricted to the procedure for review. Such interpretation, in my view would defeat the whole purpose of having a procurement dispute determined by the Board. In other words as was held by the Court of Appeal in Kimutai vs. Lenyongopeta & 2 others [2005] 2 KLR 317 it is necessary, in order to arrive at the real meaning, to get the exact conception of the aim, scope and aspect of the whole Act, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure the mischief. Whereas the review route does not necessarily lock out other available remedies, the review route being a route provided under the relevant Act ought to be adhered to unless circumstances militate against that route.”

55. In this case, the petitioners did not seek recourse from the Tribunal once they felt aggrieved by the decisions of the respondents. They chose to come directly to court. I have perused the pleadings again and again and save for their insistence that the petitions raise constitutional issues which this Court has jurisdiction to hear and determine, I have not seen or heard anything from the petitioners that even suggests that the Tribunal was unable or unwilling to settle their concerns. What they have done is come to this Court to ventilate issues of management and appointment of trustees of the scheme, issues which I find are best resolved in the other forums provided by the RBA Act.

56. The Court must exercise restraint in exercising its jurisdiction under Article 165. Where there exists alternative methods of dispute resolution, the Court must exercise deference to the bodies statutorily mandated to deal with specific disputes in the first instance. This is in accordance with one of the principles for the exercise of judicial authority set out in Article 159, namely the promotion of alternative forms of dispute resolution. As was stated in *International Centre for Policy and Conflict and 5 others v The Hon. Attorney-General & 4 others* [2013]eKLR;

“[109] An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrary to the institutional independence of IEBC guaranteed by Article 249 of the Constitution. “

[110] Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted...”

57. I take the view that the Court undoubtedly has jurisdiction to determine the issues canvassed by the parties by dint of the wide jurisdiction conferred upon it under **Article 165(3)**. That notwithstanding, the Court is divested of jurisdiction by the vesting of such jurisdiction in the persons and bodies established under the provisions of the RBA Act set out above. In the circumstances, I decline to exercise such jurisdiction owing to the fact that there is a more efficacious forum for dealing with the substance of the complaints canvassed in the petitions before me, including those relating to the dismissal and appointment of trustees. As observed by the Court (Georges C.J) in *Minister of Home Affairs vs Bickle & Others* (1985) LRC Const.;

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

58. This holding was also cited with approval by Lenaola J. in ***Papinder Kaur Atwal v Manjit Singh Amrit Nairobi Petition No. 236 of 2011*** where after considering several authorities on the issue, the Learned Judge expressed the following sentiments, which I agree with and adopt:

“[24] All the authorities above would point to the fact that the constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes...”

[27] I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.”

59. In his oral submissions, Counsel for the petitioners in Petition No. 159 of 2012, Mr. K’Opere, suggested that the RBA Tribunal does not have jurisdiction to address its mind to constitutional violations including the right to fair hearing and fair administrative action. This argument is in my view, not tenable. One of the contentions in the case of ***Diana Kethi Kilonzo (supra)*** was that the IEBC’s Nomination Disputes Resolution Committee has no jurisdiction under Articles 22, 23 and 258 to hear and determine matters concerning the contravention of the Constitution. In disagreeing with this position, and in finding that every body and state organ has the duty to act in accordance with the Constitution, the three judge Bench expressed itself in the following words, which I wholly agree with:

“97. Finally, Ms Kilonzo submitted that the Committee acted beyond its jurisdiction by handling matters touching on the Constitution. We do not find any merit in such assertion. Article 3(1) provides that:-

“Every person has an obligation to respect, uphold and defend this Constitution.”

Article 20 further provides that the Bill of Rights applies to all law and binds all State organs and all persons. Article 21 goes further to provide that, ‘it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.’

98. We are all expected to live by the constitution and every person has a duty to follow the dictates of the constitution.”

Whether the Petitions Disclose Violations of Constitutional Rights.

60. The respondents submit that the petitions raise no constitutional issue and were vague and general in nature. An examination of the pleadings, particularly in ***Petition No. 353 of 2012***, reveals that the petitioners merely set out factual complaints without stating what the specific rights infringed by those complaints were. For instance, the Scheme’s Trust Deed and Rules are impugned on the ground that they were ‘defective’. It would have been expected that the petitioners would go further to point out to the Court what those defects were, and in what manner the ‘defects’ in the Trust Deed and Rules amounted to a violation of the petitioners’ constitutional rights. This was critical if the Court was to be persuaded to exercise its constitutional jurisdiction in a matter that on the face of it is entirely within the sphere and mandate of the RBA and the dispute resolution

mechanism set up under the Act.

61. The petitioners then challenge the mode of appointment of the corporate trustee, terming it as illegal and unconstitutional. However, once again, they have not demonstrated to the Court how and in what manner the appointment was unconstitutional, and what rules were broken in the said appointment. More importantly, they have not demonstrated how the appointment of the corporate trustee infringes on any of their constitutional rights.
62. The petitioners in Petition No. 159 of 2012 made a slight effort to point to infringement of their rights to fair administrative action and right to fair hearing in the manner the inspection was carried out and their subsequent removal as trustees effected.
63. However, it ought to be remembered that the fundamental rights and freedoms guaranteed under the Constitution are also actualized within the framework established by law, in this case, the RBA Act. The petitioner's right to fair administrative action in the context of the RBA Act must be realized within the legal framework and the institutions created under the said Act. Provided that the process under the Act is followed, and the same is not unconstitutional, then there would be no basis for complaining. I can do no better than to refer to the words of Lenaola J in **Papinder Kaur Atwal V Manjit Singh Amrit** (supra) cited above: that not every pain can be addressed through the Bill of Rights or alleged violation thereof.

Conclusion

64. The upshot of my findings with regard to the two petitions before me is that they must fail. While the High Court has wide jurisdiction conferred under Article 165 of the Constitution, it must also respect and foster the development of other forums established in legislation. This Court is not the right forum to canvass and deal substantively with the issues the subject of the two petitions. The RBA Act has put in place a special and elaborate regulatory mechanism for the resolution of such disputes which should be the first port of call for parties in the position of the petitioners and which ought to be exhausted before invoking the jurisdiction of this Court.
65. That notwithstanding, even were the Court minded to exercise jurisdiction and determine the issues raised in the petition, it is my view that the petitions would suffer the same fate. As observed elsewhere, the allegations in the petitions are very general in nature and do not demonstrate which provisions of the constitution have been violated, and the manner in which they have been violated. It must be remembered that in proceedings for enforcement of fundamental rights and freedoms, it is the duty of the petitioner to plead the alleged breach and spell out the nature of the breach in relation to him. See **Anarita Karimi Njeru v Attorney General** (supra).
66. In the circumstances, the two consolidated petitions are hereby dismissed.
67. It is apparent, however, that there are concerns regarding the management of the Kenya Railways Retirement Benefits Scheme, and from the pleadings before me, such disagreements within the Scheme are apt to have a negative impact on the lives and livelihoods of hundreds of pensioners. It is therefore incumbent on the RBA, in exercise of its statutory mandate, to address the concerns of the petitioners in the spirit of the Constitution and for the wider interests of the pensioners.
68. With regard to costs, given the nature of the matters before me, I direct that each party bears its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 13th day of November 2013

MUMBI NGUGI

JUDGE