



**Alexander v Retirement Benefits Authority & 2 others (Petition E184 of 2023)  
[2025] KEHC 6271 (KLR) (Constitutional and Human Rights) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6271 (KLR)

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

**PETITION E184 OF 2023**

**LN MUGAMBI, J**

**MAY 15, 2025**

**BETWEEN**

**JAOKO ALEXANDER ..... PETITIONER**

**AND**

**RETIREMENT BENEFITS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**CHAIRMAN OF THE BOARD OF DIRECTORS OF RETIREMENT BENEFITS  
AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF EXECUTIVE OFFICER OF THE RETIREMENT BENEFITS  
AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition dated May 24, 2023 is supported by the petitioner's affidavit in support.
2. The petitioner, who brings this petition in public interest, assails the respondents' action of publishing the Guidelines contained in Gazette Notice No. 5796 dated 5<sup>th</sup> May 2023. The Guidelines which stem from the *Retirement Benefits Act* No.3 of 1997 introduced a limitation on the training and seminars for trustees to not more than five days annually. These Guidelines are alleged to be in contravention of Articles 1, 10(2), 19, 25, 27, 73, 232(1) (d), (e) & (f) and 259 of *the Constitution*.
3. The petitioner seeks the following relief against the respondents:
  - a. A declaration that the enforcement of Gazette Notice No. 5796 dated 5<sup>th</sup> May, 2023 (the *retirement benefits act*, no. 3 of 1997), is not only draconian but is contrary to Article 10(2), (b) of *the Constitution* is therefore null and void.



- b. A declaration that the enforcement of Gazette Notice no. 5796 dated 5<sup>th</sup> May,2023 (the *retirement benefits act*, no. 3 of 1997), is not only draconian but is contrary to Article 232(1), (d), (e), and (f), of *the Constitution*" values and principles of public service" and is therefore null and void.
- c. A declaration that the enactment and enforcement process of Gazette Notice No. 5796 dated 5<sup>th</sup> May, 2023 (the *retirement benefits act*, no. 3 of 1997), as conducted violated Article 73(2), the principles of objectivity, impartiality and honesty and is therefore null and void.
- d. A declaration that Gazette Notice no. 5796 dated 5<sup>th</sup> May,2023 (the *retirement benefits act*, no. 3 of 1997), was enacted in a manner that was inconsistent with *the Constitution* and is therefore null and void.
- e. An order of Certiorari be issued quashing the Gazette Notice no.5796 dated 5<sup>th</sup> May,2023.
- f. Costs of this petition and interest thereon.

### **Petitioner's Case**

4. The petitioner states that the respondents' Guidelines as published in Gazette Notice No.5796 purport to cap the training/seminars for the 1<sup>st</sup> respondent's staff and officers to not more than 5 days annually. The petitioner argues that this decision is unreasonable and was made without any justification.
5. The petitioner asserts that the impugned decision is aimed at limiting capacity building of the Trustees. It is argued that this is contrary to the known fact that Trustees administer the schemes in trust for their members and thus need to consistently train the members so as to ensure a high level of prudence in their function. Considering this, the petitioner stresses that the Guidelines are unreasonable, discriminative and contrary to the trustees' legitimate expectation.
6. The Guidelines are also impugned as they provide that Trustees are to apply United Nations rates during foreign travels. The petitioner contends that this is unwarranted especially with regard to public institution schemes. It is stated that the power to fix the remuneration for public officers is vested with the Salary and Remuneration Commission (SRC) and not the respondents herein. The petitioner avers that this action purports to usurp the mandate of the SRC. This is claimed be in violation of Article 47 of *the Constitution* as disregard the rules of natural of justice. In addition, contrary to Article 73 of *the Constitution*.
7. The petitioner also claims that the action is discriminatory as it is unfair to apply the United Nation rates during foreign travel while at the same time apply a different rate to other public servants. This is said to be in breach of Article 27 of *the Constitution*, Article 7 of the Universal Declaration of Human Rights and Article 3 of the African Charter on Human and People's Rights.
8. The petitioner also takes issue with the impugned Guidelines as they require the Trustees to seek approval from the 1<sup>st</sup> respondent before scheduling any foreign travel. The petitioner contends that this is akin to micromanagement of the affairs of the scheme yet the 1<sup>st</sup> respondent is mandated to only perform an oversight role.
9. In like manner, the petitioner avers that the *Retirement Benefits Act* already provides for restriction of the use of the scheme funds under Section 30. As such, the 3<sup>rd</sup> respondent has no power to amend the provisions, by deviously adding further restrictions through the Guidelines. Moreover, the petitioner states that Section 11 of the Act does not grant the 3<sup>rd</sup> respondent the power to issue Guidelines.



10. Lastly, the petitioner stresses that enforcement of Gazette Notice No.5796, offends the values and principles of public service under Article 232(1)(d) (e) (f) of *the Constitution* and in violation of Article 10(1) of *the Constitution*. This is because no public participation and stakeholder engagement was carried out. The petitioner however notes that the 1<sup>st</sup> respondent conducted public participation sometime in 2018 however the Trustees rejected the proposed guidelines. He argues that going forward and publishing the same Guidelines is unfair and unlawful.

### **1<sup>st</sup> Respondent's Case**

11. The 1<sup>st</sup> respondent in rejoinder to the petition filed grounds of opposition dated 14<sup>th</sup> September 2023 on the basis that:
- i. The aforesaid application is bad in law and an abuse of the Court process.
  - ii. The Guidelines contained in Gazette Vol. CXXV-No. 103 gazette Notice No. 5796 dated 5<sup>th</sup> May, 2023 (The Retirement Benefits Authority *Act, No. 3 of 1999*) are already in force.
  - iii. The Guidelines contained in Gazette Vol. CXXV-No. 103 gazette Notice No. 5796 dated 5<sup>th</sup> May, 2023 took effect from 5<sup>th</sup> May, 2023 the date of publication in the Kenya Gazette.
  - iv. The Guidelines are intended to foster effective cost management, accountability and transparency on the part of trustees of schemes falling under regulation of the 1<sup>st</sup> respondent.
  - v. The 1<sup>st</sup> respondent under Section 5 of the Retirement Benefits Authority Act is mandated to inter alia regulate and supervise the establishment and management of Retirement Benefits Schemes.
  - vi. The trustees of schemes have an obligation under Section 40 of the Retirement Benefits Authority Act to manage the schemes in accordance with the regulations/guidelines made under the said Act.
  - vii. The aforesaid Guidelines were issued by the 1<sup>st</sup> respondent pursuant to powers granted to it under Section 55(3) of the Retirement Benefits Authority Act.
  - viii. The Guidelines do not violate provisions of *the Constitution*.
  - ix. The Applicant has not established a prima facie case with a probability of success.
  - x. The Guidelines have been issued by the 1<sup>st</sup> respondent in public interest.
12. Correspondingly, the 1<sup>st</sup> respondent filed its replying affidavit through John F.M. Kimanthi Gakunu, the 1<sup>st</sup> respondent's Senior Legal Officer sworn on 15<sup>th</sup> September 2023.
13. He depones that contrary to the petitioner's allegations the maximum number of days for training/seminars for the 1<sup>st</sup> respondent's staff and officials, was arrived at following stakeholder consultation during the stakeholder engagements. He enlightens that capping of the days was modelled along the Trustee Development Programme Kenya (TDPK) which takes a maximum of 5 days.
14. That said, he informs that the schemes under the 1<sup>st</sup> respondent are at liberty to seek extension of time from the 3<sup>rd</sup> respondent and more so where the trainings/seminars are abroad. It is stressed that the capping standardized the number of days a trustee can go for training/seminar in a given year thus not unreasonable or discriminative. Moreover, he notes that seeking of approval ensures that the Trustees attend the training/seminar.



15. He asserts that in publishing the impugned Guidelines as set out in Gazette Notice No.5796, the 1<sup>st</sup> respondent exercised its powers as envisaged under Section 5 and 55 (3) of the Retirement Benefits Authority Act.
16. Likewise, the Guidelines were prior to this submitted to a rigorous process that involved public participation in eight regions in Kenya and also impact assessment from the relevant stakeholders. The comments received were considered. As a result some of the Clauses in the draft Guidelines were reviewed prior to publication of the impugned Guidelines. He notes that the impugned Guidelines were not rejected by the stakeholders as alleged.
17. He underscores that the capped days excludes seminars, workshops and sensitization organized by the 1<sup>st</sup> respondent for education of the Trustees. He also states that the cap under the impugned Guidelines is for the Trustees and not the members of the scheme. Equally, he highlights that the 1<sup>st</sup> respondent's scheme is not a public entity thus SRC lacks the mandate to determine the rates of reimbursement of the scheme Trustees.
18. It is stated that the United Nations rates are applicable to any established scheme either private or public. As such, adopting the United Nations rates is contended not to be discriminatory as the 1<sup>st</sup> respondent's scheme is a different entity from the 1<sup>st</sup> respondent as the sponsor.
19. Bearing these averments in mind, Counsel maintains that the 1<sup>st</sup> respondent did not violate the constitutional provisions as advanced by the petitioner.

#### **2<sup>nd</sup> and 3<sup>rd</sup> Respondent's case**

20. These respondents in response to the Petition filed a Notice of Preliminary Objection dated 17<sup>th</sup> October 2023 on the grounds that:
  - i. The petitioner's suit discloses no cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
  - ii. The suit against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents is bad in law and an abuse of the court process.
  - iii. The suit against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents offends the provision of Section 14 of the [Retirement Benefits Act](#).

#### **Petitioners' Submissions**

21. The petitioner filed submissions dated 20<sup>th</sup> April 2024. The petitioner recapping his averments as outlined in his affidavit and petition, submitted that the respondents by publishing the impugned Guidelines in Gazette Notice No.5796 disregarded public interest, the law and [the Constitution](#) in effect violating Articles 1 (1), (2) & (3), 10 (2), 19, 25, 27, 73, 232(1), (d), (e) & (f) and 259 of [the Constitution](#).
22. The petitioner echoed that the Guidelines were discriminatory in view of the manner in which the number of days were capped without any justification for the 1<sup>st</sup> respondent's staff and officers, thus violating Article 27 of [the Constitution](#). Reliance was placed in Peter K. Waweru -Vs-Republic (2006) eKLR where it was held that:

“Blacks Law Dictionary 11<sup>th</sup> Edition defines "discrimination" as under:

"Discrimination" in constitutional law the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found.



A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

23. The respondents’ actions were as well contended to be in breach of the Trustees legitimate expectation. That is, the trainings will be enhanced in order to equip them with knowledge for better understanding of the schemes, for the members’ benefits. This action is said to be in violation of Article 10 and 232 of *the Constitution*. Reliance was placed in Republic-Vs. Kenya Revenue Authority. Ex Parte Shake Distributors Limited [2012]eKLR where it was held that:

“a legitimate expectation arises where there is demonstration that: a decision maker led a party affected by the decision to believe that he would receive or retain a benefit or advantage including a benefit that he/she/it would be accorded a hearing before the decision was taken; a promise was made to a party by a public body that it would act or not act in a certain manner and which promise was made within the confines of the law; the public authority whether by practice or promise

committed itself to the legitimate expectation; the representation was clear and unambiguous; the claimant fell within the class of person(s) who were entitled to rely upon the representation(s) made by the public authority; the representation was reasonable and that the claimant relied upon it to its detriment; there was no overriding interest arising from the decision maker’s action and representation; the representation was fair in the circumstances of the particular case and that the same arose from actual or ostensible authority of the affected public authority to make the same; the promise related either to a past or future benefit; its main purpose is to challenge the decision maker to demonstrate regularity, predictability and certainty in their dealings with persons likely to be affected by their action in the discharge of their public mandate.”

24. Comparable dependence was placed in R (Bibi) -Vs. Newham London Borough Council (2001) EWC4 607, (2002) WLR 237, Republic -Vs. Kenya Revenue Authority & Another Ex-Parte Trade Wise Agencies [2013] eKLR, Keroche Industries Limited Vs. Kenya Revenue Authority & 5 Others NAIROBI HCMA No. 743 of 2006 [2007] KLR 240 and Kenya Revenue Authority-Vs- Universal Corporation Ltd [2020] eKLR.

25. The petitioner further submitted that the 1<sup>st</sup> respondent in issuing the Guidelines had essentially usurped SRC’s mandate. Yet they are subject to it as SRC has the mandate to set remuneration for all public officers. Reliance was placed in Section 11 of the *Salaries and Remuneration Commission Act* which provides for the powers and functions of SRC and includes the power to make recommendations on the review of pensions payable to holders of public offices.

26. In like manner, Counsel submitted that the respondents had overlooked the principle of public participation before publication of the impugned Guidelines. Reliance was placed in Poverty Alleviation Network and Others v President of the Republic of South Africa and Others (CCT86/08) [2010] ZACC 5 where it was observed that:

“Engagement with the public is essential. Public participation informs the public of what to be expected. It allows for the community to express concerns fears and even make demands. In any democratic state/ participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision in the present petition public or community participation refers to members of staff affected with the organization review.”



27. It was further argued that the respondents in publishing the impugned Guidelines failed to adhere to the principle of natural justice as envisaged under Article 47 of *the Constitution* since their actions were unfair, malicious and unlawful contrary to a fair administrative action.
28. Additionally the petitioner submitted that the restriction on the use of scheme funds is provided under Section 38 of the *Retirement Benefits Act* hence in purporting to amend them, the 3<sup>rd</sup> respondent was acting ultra vires and contrary to the power stipulated under Section 11 of the Act.

### **Respondents' Submissions**

29. On 12<sup>th</sup> September 2024, Adipo and Company Advocates filed submissions on behalf of the respondents. The issues for determination were outlined as: whether the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have been properly enjoined as parties to this suit; whether the petitioner has locus standi to file this petition; whether the respondents disregarded the law or contravened *the Constitution* by publishing the Guidelines and whether the decision to cap the training/ seminars for the 1<sup>st</sup> respondent's staff to not more than 5 days annually is justifiable.
30. Counsel on the first issued submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had been wrongly joined in this suit. This is since the 1<sup>st</sup> respondent is established under Section 3(1) of the *Retirement Benefits Act* as a body corporate thus with the legal capacity to sue and be sued. Consequently, suing the 2<sup>nd</sup> and 3<sup>rd</sup> respondent offends Section 14 of the Act which protects members of the 1<sup>st</sup> respondent's Board or any other officer from personal liability for actions done in bona fide execution of their duties.
31. Counsel relying in Article 22 and 258 of *the Constitution* challenged the petitioner's locus standi to file this suit. Counsel submitted that the petitioner had not demonstrated that there had been any infringement or violation of the Bill of Rights or that he is acting as a member of, or in the interest of a group or class of persons affected by the impugned Guidelines. It was contended thus that the petitioner had failed to demonstrate the public interest he seeks to protect in the petition.
32. Reliance was placed in *Randu Nzai Ruwa and 2 Others v Secretary, the Independent Electoral and Boundaries Commission and 9 others* (2016) eKLR where it was held that:

“*The Constitution* today gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper, and who acts in good faith to institute proceedings challenging any violations under the Bill of Rights.”
33. On the third issue Counsel submitted that the respondents in publishing the impugned Guidelines, paid regard to public interest and did not violate the cited constitutional provisions. Counsel noted that the exercised mandate was within the respondents' power to regulate and oversee management of scheme funds and so were within the constitutional framework. Moreover, Counsel submitted that the petitioner had not proved how his rights or those of the public had been violated by capping of the maximum number of days for trainings/seminars to five annually.
34. Reliance was placed in *David Mathu Kimingi v SMEC International PTY Limited* (2021) eKLR where it was held that:

“The petitioner further alleges violation of his constitutional right under Article 23(3) in the Orders he seeks in the Petition yet the same is not averred with specificity and particulars given on how the Respondent violated the said right. It is my considered opinion that the Petitioner has failed to satisfy the threshold of specificity as espoused in the celebrated cases



of Anarita Karimi Njeru v Republic (No.1) (1979) 1 KLR 154 and Mumo Matemu v Trusted Society of Human Rights Alliance, Civil Appeal No.290 of 2012 (2013) eKLR."

35. Counsel recapping the averments in the 1<sup>st</sup> respondent replying affidavit submitted that the John F. M. Kimanthi had exhaustively outlined the legal procedures that had been undertaken before the impugned Guidelines were published. He underscored that the process was in addition guided by the constitutional principles Articles 10, (2) (b), 19, 47 and 73(2), 232(1) of *the Constitution*.
36. Equally Counsel submitted that Section 5 and 55(3) of the *Retirement Benefits Act* empowers the 1<sup>st</sup> respondent to make regulations and guidelines to ensure the proper administration and management of retirement benefits schemes. This was similarly affirmed by the Court in Republic v Kenya Revenue Authority Ex-Parte L.A.B International Kenya Limited (2011) eKLR which was cited in support.
37. Comparable dependence was placed in Republic v Public Procurement Administrative Review Board & 2 others Ex parte Rongo University [2018] eKLR and Kenya Association of Manufacturers & 2 others v Cabinet Secretary -Ministry of Environment and Natural Resources & 3 others [2017] eKLR.
38. Counsel urged the Court to review the respondents' actions in light of Article 259 of *the Constitution* as emphasized by the Court in Centre for Human Rights and Awareness v. John Harun Mwau & 6 Others (2012) eKLR, that *the Constitution* should be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, and contributes to good governance. On this premise Counsel submitted that the impugned guidelines were made in good faith towards the realization of the values and principles of public service.
39. Counsel on the fourth issue submitted that although the petitioner had argued that the impugned Guidelines were unjustified, he failed to demonstrate how they are contrary to the principle of legitimate expectation especially since the guidelines are intended to meet the legitimate expectation of retirement benefit schemes' members.
40. Reliance was placed in Communication Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR where it was held that:

“legitimate expectation arises when a public authority, through its conduct or explicit promises, leads individuals to reasonably expect that they will be treated in a certain way.”
41. Counsel submitted that limitation of the training days is a reasonable measure to balance resource utilization and administrative efficiency so as to safeguard the financial security of pensioners. Reliance was placed in Republic v Public Procurement Administrative Review Board & 2 others Ex parte Rongo University [2018] eKLR where it was held that:

“Regulatory decisions must be reasonable and rational, serving the purpose for which they are enacted.”
42. Like reliance was placed in Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 and Another v Ann Wangui Ngugi and 524 Others (2018) eKLR.
43. The imposed restriction is also said to be in line with the 1<sup>st</sup> respondent's powers under Section 5 of the *Retirement Benefits Act* thus the petitioner's assertion otherwise erroneous.
44. In sum, Counsel submitted that the petitioner had failed in his petition to demonstrate that the respondents had failed to comply with the constitutional dictates in publishing the impugned Guidelines.



## Analysis and Determination

45. It is my considered view that the key issue raised for determination in this petition are:
- i. Whether the petitioner has the requisite locus standi to file this petition.
  - ii. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were wrongly joined in this suit.
  - iii. Whether the impugned Guidelines are in contravention of the constitutional principles and provisions under Articles 1, 10(2), 19, 25, 27, 73, 232(1) (d), (e) & (f) and 259 of *the Constitution*.
  - iv. Whether the petitioner is entitled to the relief sought.

### Whether the petitioner has the requisite locus standi to file this petition

46. The meaning of the term locus standi was explained in *Daykio Plantations Limited v National Bank of Kenya Limited & 2 others* [2019] KEELC 48 (KLR) as follows:

“...In the case of *Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000*, the Court held that ;-

“Locus Standi signifies a right to be heard; A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.

47. *The Constitution* has given a wide scope on who can institute Court proceedings claiming that *the Constitution* has been violated or is threatened with violation.

48. Article 22 states:

22.

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
  - a. a person acting on behalf of another person who cannot act on their own name;
  - b. a person acting as a member of, or in the interest of, a group or class of persons;
  - (c) a person acting in the public interest; or
  - (d) an association acting in the interest of one or more of its members

49. Further there is also Article 258 which provides:

Enforcement of this Constitution.

258.

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention. 118 Constitution of Kenya



- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
  - a. a person acting on behalf of another person who cannot act in their own name;
  - b. a person acting as a member of, or in the interest of, a group or class of persons;
  - c. a person acting in the public interest; or
  - d. an association acting in the interest of one or more of its members.

50. The above Constitutional provisions received judicial consideration in the Court of Appeal case of *Randu Nzai Ruwa & 2 others* (supra) where the Court explained:

“Articles 22, 258 and 260 of *the Constitution* are cited to make the point that historical common law restrictions on the standing have been overhauled by *the Constitution* of Kenya, 2010....

The three Articles give an enlarged view of locus standi to the effect that every “person” including persons acting in the public interest, can move a court of law contesting infringements of any provision in the Bill of Rights or *the Constitution*.”

Each of the first two Articles starts with the phrase “Every person has the right to institute court proceedings.” They also provide that that person may either bring the proceedings as an individual in his/her own interest. He/she can, in addition bring proceedings in many other capacities, on behalf of persons who cannot act in their own name, or as a member of or in the interest of a group or class of persons, or, like in the above cited Supreme Court case of *Mumo Matemo* (supra), acting in the public interest or, finally an association acting in the interest of one or more of its members can also institute court proceedings for the enforcement of the Bill of Rights.”

51. In addition to the above, Article 3(1) of *the Constitution* provides ‘Every person has an obligation to respect, uphold and defend *the constitution*.’ The Petitioner made it clear he is challenging gazette notice number 5796 of 5/5/2023 on the grounds that it is unconstitutional. The Constitution empowers the Petitioner to defend it from violation hence the Petitioner has legal the capacity to move the Court to determine the constitutionality of the Respondent’s action. The argument that the Petitioner has no locus lacks merit and is therefore rejected.

### **Whether the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were wrongly joined in this suit**

52. The law on joinder of parties and misjoinder of parties in constitutional petitions is anchored in *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

Rule 5 stipulates:

The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

- a. Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.



- b. A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.
  - c. Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.
  - d. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—
    - i. order that the name of any party improperly joined, be struck out; and
    - (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.
  - (e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.
53. The above principle was clarified by the Supreme Court in *Ndii & others v Attorney General & others* [2021] KEHC 9746 (KLR) where it was held that:

“537. Be that as it may, order 1 rule 9 of the Civil Procedure Rules is clear that a suit cannot be defeated for misjoinder or non-joinder and that what the court should be bothered with is the determination of the rights of the parties; that rule reads as follows: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

538. To the extent that this rule is applicable to the petitions such as the one before court, we can confidently say that regardless of whether the 1<sup>st</sup> respondent has been properly joined to this suit, this court is in good stead and ideally placed to ‘deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.’”

54. In my view, mis-joinder cannot defeat a suit it is unnecessary that I should now dwell on this issue any further.

**Whether the impugned Guidelines are in contravention of constitution in particular, Articles 1, 10(2), 19, 25, 27, 73, 232(1) (d), (e) & (f) and 259 of *the Constitution***

55. The principles of constitutional interpretation were emphasized by the Court of Appeal in *Center for Rights Education and Awareness* (supra) as follows:

“a. It should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms



and permits development of the law and contributes to good governance as provided by Article 259.

- b. The spirit and tenor of *the Constitution* must preside and permeate the process of judicial interpretation and judicial discretion.
- c. It must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.”
- d. The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).”

56. These principles were echoed by the Court of Appeal in Ferdinand Ndung’u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 others [2014] KECA 615 (KLR) where the Court noted as follows:

“I accept the proposition that the appellant has put forward, that *the Constitution* must be interpreted in a liberal, purposive and progressive manner, in order to give effect to the principles and values contained therein. This is found at Article 259 (1) of *the Constitution* which is framed as follows:

Article 259 (1) This Constitution shall be interpreted in a manner that—

- a. promotes its purposes, values and principles;
- b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- c. permits the development of the law; and
- d. contributes to good governance.

These principles have been reiterated time and again by our courts. In *Njoya & 6 others - vs- Attorney General & 3 others* No 2 [2008] 2 KLR (EP), this Court held that:

*The Constitution* is not an Act of Parliament but the supreme law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purpose for which its makers framed it.”

57. The Supreme Court has also in numerous occasions guided on the principles that should be adopted in constitutional interpretation. In *Kidero & 4 others v Waititu & 4 others* [2014] KESC 11 (KLR) the superior Court held as follows:

“(142) For our purposes, interpretation of *the Constitution* involves revealing or clarifying the legal content, or meaning of constitutional provisions, for purposes of resolving the dispute at hand (call it the hermeneutic aspect). The basic reference-point in constitutional interpretation is the text. Application of *the Constitution* is a more dynamic notion. It comes into play when the provision of *the Constitution* remains in some vital respects (even after the jural process of content-ascertainment) indeterminate, or ambiguous, or vague, or contradictory. In other instances, a constitutional text may be quite clear on paper, but when applied to a dispute, it leads to absurd consequences. In such a situation constitutional application ceases to be a



simple exercise in interpretative syllogism. It takes on the character of “creative interpretation” (see Jeffrey Goldsworthy, *German Law Journal*, Vol.14 No.08, pp. 1279-1295(August 2013)), or what some American theorists have called “constitutional construction” (see Randy E. Barnett, *Interpretation and Construction*, 34 *Harv. J.L and Pub. Policy*65 (2010)).”

58. The first question that one must answer is whether the 1<sup>st</sup> Respondent (Retirement Benefit Authority was mandated under the law to issue the guidelines in question, and if so, whether the guidelines were issued in accordance with that law or not?

59. The *Retirement Benefits Act* provides at Section 55 as follows:

#### Regulations

1. The Cabinet Secretary may, in consultation with the Authority, make regulations generally for the better carrying out of the provisions of this Act.
2. Without prejudice to the generality of subsection (1) regulations under this section may—
  - a. prescribe anything required to be prescribed under this Act;
  - b. subject to this Act, provide for the procedure for registration and the conditions of registration;
  - c. provide the eligibility requirements for the membership of schemes and access to retirement benefits;
  - d. provide for any matter relating to the nature of benefits under schemes;
  - e. prescribe the fees and other charges payable to the Authority;
  - f. subject to the provisions of this Act and of any other written law, make provisions with regard to the winding up of schemes and the transfer of the assets of the schemes upon such winding up;
  - g. regulate the transitional period prescribed by Section 57.
3. Without prejudice to subsection (1), the Authority may from time to time, issue guidelines, practice notes or codes of conduct for better administration of the retirement benefits schemes.

60. The principles of making a statutory instrument are highlighted in the *Statutory Instruments Act, Act No. 23 of 2013*. This Act defines a statutory instrument as follows:

‘any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.’

61. The Act in view of enacting Guidelines provides as follows under Section 5 that:

#### Consultation before making statutory instruments

1. Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—
  - (a) have a direct, or a substantial indirect effect on business; or



- (b) restrict competition;  
the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.
  - (2) In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—
    - a. drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and
    - b. ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.
  - (3) Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall—
    - a. involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or
    - b. invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.
62. Further Section 5A of the Act provides as follows:  
Explanatory memorandum
- (1) Every statutory instrument shall be accompanied by an explanatory memorandum which shall contain—
    - a. a statement on the proof and demonstration that sufficient public consultation was conducted as required under Articles 10 and 118 of *the Constitution*;
    - b. a brief statement of all the consultations undertaken before the statutory instrument was made;
    - c. a brief statement of the way the consultation was carried out;
    - d. an outline of the results of the consultation;
    - e. a brief explanation of any changes made to the legislation as a result of the consultation.
  - (2) Where no such consultations are undertaken as contemplated in subsection (1), the regulation-making authority shall explain why no such consultation was undertaken.
  - (3) The explanatory memorandum shall contain such other information in the manner specified in the Schedule and may be accompanied by the regulatory impact statement prepared for the statutory instrument.
63. The petitioner contended in the Petition that the Retirement Benefits Authority does not grant the 1<sup>st</sup> Respondent the power to issue guidelines but a plain reading of Section 55 (3) of the RBA Act squarely displaces this contention as by stipulates as follows: ‘Without prejudice to subsection (1), the Authority may from time to time, issue guidelines, practice notes or codes of conduct for better administration of the retirement benefits schemes.’



64. The Petitioner's contention that the 1<sup>st</sup> Respondent lacked the authority under the law to issue guidelines is thus untenable.
65. The Petitioner did not challenge the Constitutionality of this statutory provision instead he assailed the content of the guidelines. He in particular took issue with the requirement that limits the duration of training days for trustees to five days annually, that payment of travel expenses be in accordance with the United Nations rates yet that does not apply to other public servants whose rates are set by SRC and also before any travel can be undertaken, approval be sought from the 1<sup>st</sup> Respondent. The petitioners termed these guidelines unreasonable adding that they were made without justification. He also contended that the 1<sup>st</sup> Respondent usurped the mandate of SRC in setting the said travel rates. Besides, the Petitioner also asserted that the guidelines are unconstitutional because they were never subjected to public participation.
66. In answer to the Petition, the 1<sup>st</sup> Respondent through the John Kimanthi Gakunu in the replying affidavit sworn on 15/9/2023 refuted the Petitioner's assertion that there was no public participation and stated that the guidelines were passed after extensive stakeholders' consultations in eight regions and the input received was factored in the formulation of the guidelines. He denied Petitioner's contention that the proposal for five days training was rejected during stakeholders' consultations. He explained that the five days of training were modelled on the Trustee Development Programme Kenya (TDPK) which takes five days. Moreover, even where the scheduled training would take a longer period, there was a provision for seeking an extension from the 3<sup>rd</sup> Respondent. That the training duration directive aligns with the principle of ensuring that training is conducted within reasonable time limits so that trustees and administrators are not away from their duties for prolonged periods thereby supporting the efficient administration of retirement benefit schemes and also, and further to minimize on operational costs.
67. He refuted the Petitioner's claim that the 1<sup>st</sup> Respondent's Scheme is a public entity of which SRC rates apply and stated that the 1<sup>st</sup> Respondent retirement benefit scheme is different from the 1<sup>st</sup> Respondent as the sponsor. On discriminative application of UN travel rates, he said that the requirement was not discriminative it was meant for all retirement benefit schemes whether private or public.
68. I will first deal with the content of the guidelines issued, did the 1<sup>st</sup> Respondent have the legal capacity to prescribe the directives governing the management/administration of the retirement benefits scheme? The answer to lies within the provisions of the Act itself. Firstly, the preamble which provides that it 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'
69. 'Regulation, supervision and promotion' are three key words that broadly convey the intention of the Act.
70. Moving on, the Act establishes the Retirement Benefits Authority at Section 3 (1) and proceeds to set out its objectives at Section 5 as follows:
- Section 5. Object and functions of the Authority
- The object and functions of the Authority shall be to—
- a. regulate and supervise the establishment and management of retirement benefits schemes;
  - b. protect the interests of members and sponsors of retirement benefits sector;



- (ba) approve trustees' remuneration approved by members during the annual general meeting after every three years;
  - c. promote the development of the retirement benefits sector;
  - d. advise the Cabinet Secretary 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.
71. From the reading of the above section, two functions of the RBA authority are explicitly defined, one, 'to regulate and supervise...management of retirement benefits scheme' and two, 'protect the interest of the members and sponsors of the retirement benefits schemes.'
72. The above provisions give RBA extensive powers to formulate strategies that would ensure that the retirement's benefits schemes are administered efficiently and in a manner that will preserve members savings in the retirement benefits schemes.
73. The Petitioner argued that the guidelines given by the respondent on capping the training duration to five days annually, the need to apply UN travel rates during official trips and requirement to seek approval from the 3<sup>rd</sup> respondent before training are unreasonable and unjustified requirements.
74. When a Court is required to review an administrative decision on the ground of unreasonableness, the Court focusses on the substance of the decision and whether or not a decision is irrational will depend on the circumstances of each case. A decision can be struck out as unconstitutional on the basis of unreasonableness. Article 47 (1) provides that a person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. However, the threshold for reasonableness especially when the public body or officer is exercising discretionary power is very minimal, and the fact that one has a different opinion would not make the decision reached unreasonable.
75. In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 observed as follows:
- “ [90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately.[108] A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision...”
76. For the decision to be struck out on the grounds of irrationality, the decision taken or act done must be so unreasonable that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision given the circumstances in question. Such a decision is that usually in defiance of logic and acceptable moral standards. The Court will consider 'the nature of the



decision, the range of factor relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and wellbeing of those affected.

77. In another South African case, *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) the Court stated:

“Rationality and the separation of powers

I must next address a contention that this Court’s upholding of the decision of the Supreme Court of Appeal that the decision of the President was irrational would amount to a violation of the principle of the separation of powers. The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large.....

.... And Affordable Medicines said:

“The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of *the Constitution*. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society.”

This applies equally to executive decisions.”

78. In my view considering the nature of the guidelines, which the 1<sup>st</sup> Respondent has the power to formulate as long as the necessary processes are followed, and which culminated into limiting the number of training days for the trustees to five days annually which decision the 1<sup>st</sup> respondent stated was fashioned alongside a recognized trustees training model (TDOK), the decision on the applicable during official trips to be pegged on UN standard rates and need to seek approval from the 3<sup>rd</sup> respondent before undertaking official trips in my view passed a measure to ensure prudent funds utilization and is meant to safeguard retirement benefits scheme from unnecessary expenditure and possible abuse through uncontrolled training activities and unplanned and unstructured travel costs that might end up eating into retirement savings to the members. The reasons given by the respondent for formulating these guidelines align well with one of the stated objectives of the Act which is ‘protecting the interests of the members and the sponsors of the schemes.’
79. In my considered view, the guidelines do not violate, instead they promote or enhance the values and principles of governance particularly, transparency, integrity and accountability in the running of retirement benefits schemes as envisaged by the Act and are also in harmony with the constitutional principles under Articles 10 (2) (c), 73, 232 of *the Constitution*.
80. Further, the Petitioner made a claim of discrimination in violation of Article 27 of *the Constitution*. In *Jacqueline Okeyo Manani & 5 others v Attorney General & another* [2018] eKLR it was held that
- “Discrimination... will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.”
81. The Petitioner’s claim of discriminative application of the guidelines was denied by the 1<sup>st</sup> respondent who stated that the guidelines applied to all the retirement benefit schemes public or private. The



petitioner did not rebut this assertion by demonstrating that the said rules were made to apply against some retirement benefits schemes and not others in the same class or category. This ground of attack was bare and not substantiated at all.

82. The other ground of attack was the one relating to public participation. The Petitioner alleged that no public participation was conducted prior to the formulation of the guidelines a contention that was strongly opposed by the Respondent which countered the same by claiming that public participation was carried out in eight regions.
83. The issue of public participation is of paramount consideration. *The Constitution* inter alia requires that in making or implementing public policy decisions, all State organs, State officers, Public officers and all persons are bound by the national values and principles of governance which among others in Article 10 (2) (a) include public participation. The Court in *Institute of Social Accountability & another v National Assembly & 4 others* [2015] KEHC 6975 (KLR) discussing this principle held as follows:
- “75. As to the nature and form of public participation, the South African Constitutional Court in *Doctors for Life International Case* (supra) held that;
- [105] ... The general right to participate in the conduct of public affairs includes engaging in public debate ... it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation...it must be clear, upon examination of the legislative process, that a reasonable level of participation has been afforded to the public.”
84. Furthermore, the Court in *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] KEHC 7516 (KLR) held as follows:
- “75. In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates.”
85. I have closely examined the 1<sup>st</sup> respondent’s bundle ‘JK 2’ annexed to the replying affidavit of John F. Kimanthi Gakunu sworn on 15<sup>th</sup> September, 2023. It contains record of participants of various meetings held on 12<sup>th</sup> February, 2019 at National Treasury Boardroom 3<sup>rd</sup> Floor, Stakeholders Forum Workshop at Lake Naivasha Resort on 2<sup>nd</sup> -5<sup>th</sup> March, 2019, 3<sup>rd</sup> -6<sup>th</sup> March, 2019, 2<sup>nd</sup> -5<sup>th</sup> October 2019, 9<sup>th</sup> December, 2019 at Panafric Hotel, Nairobi; various letters seeking approvals to hold the said meetings; the public notice inviting the public and stakeholders to forums in Nairobi on 4/9/2019; Kisumu 9/9/2019, Mombasa 9/9/2019, Kakamega 10/9/2019, Nanyuki 11/9/2019, Eldoret 12/9/2019, Embu 12/9/2019, Nakuru 13/9/2019, Machakos 13/9/ 2019 and Nairobi 17/9/2019. There is also an attached report with a report of various views collected from the participants of these regions.
86. In my assessment, there was comprehensive public participation which was undertaken prior to formulation of the impugned guidelines contrary to the Petitioner’s assertion that no public participation was conducted which position has been effectively displaced by the evidence provided by the respondent.



87. The final issue was the Petitioner’s claim that the Respondent was in breach of the Petitioner’s legitimate expectation as the trustees administer the schemes on behalf of the members who legitimately expect that trainings will be enhanced in order to equip them with sound knowledge and understanding of the schemes.

88. In *Oindi Zaippeline & 39 others v Karatina University & another* [2015] eKLR the Court explained legitimate expectation as follows:

“Legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise. An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfill a promise.”

89. The practice of training trustees has not been abolished by the guidelines, instead, it is the training duration that has been capped to five days annually which according to the respondent is geared towards ensuring the training is cost-effective. The petitioner has not, besides, merely complaining about the prescribed duration of the training, demonstrated by providing any evidence that the 1<sup>st</sup> respondent ever made a promise that it would not regulate the training of trustees, which the 1<sup>st</sup> respondent said it has modelled along the Trustees Development Training Programme Kenya (TDPK) that takes 5 days. In any case, where circumstances demand, the duration of training can actually be expanded upon application.

90. Given that the guidelines do not abolish the practice training of trustees, I do not think modifying the guidelines to fixed duration of training period is in breach of legitimate expectation on the training of trustees because the petitioner has not shown that the respondent gave a promise to the trustees that they will always have unlimited trainings throughout the year and now they are abandoning that promise. The practice of training trustees to equip them with skills has not been removed. It has only been structured after a process of public participation to ensure cost effectiveness and accountability in delivery of the training of trustees. The claim that there was breach of legitimate expectation on training of trustees has not been proved.

91. The upshot is that this Petition lacks merit and is hereby dismissed in its entirety.

92. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF MAY, 2025.**

.....

**L N MUGAMBI**

**JUDGE**

