



**In re Technical University of Kenya Staff Retirement Benefits Scheme (Insolvency
Petition 14 of 2017) [2024] KEHC 10558 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10558 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
INSOLVENCY PETITION 14 OF 2017
FG MUGAMBI, J
JULY 5, 2024
IN THE MATTER OF TECHNICAL UNIVERSITY OF
KENYA STAFF RETIREMENT BENEFITS SCHEME**

JUDGMENT

Background

1. By a petition dated 25th September 2017 filed pursuant to section 5B & 11(4) of the *Retirement Benefits (Minimum Funding Level and Winding-Up Schemes) Regulations* 2000 and sections 423(1), 424(1) (e) and (g) of the *Insolvency Act*, the petitioner sought an order to wind up the respondent and for the appointment of the Official Receiver or an Insolvency Petitioner registered under the *Insolvency Act* as trustee. The petition was supported by the grounds on the face of it, an affidavit and further affidavit sworn by the petitioner.
2. The petitioner notes that the respondent was placed under interim administration around 10th November 2015 for failure to comply with various mandatory provisions of the *Retirement Benefits Act* No. 3 of 1997. This included the failure to meet the prescribed minimum funding level.
3. At the end of the administration the interim administrator recommended the winding up of the respondent noting that the respondent was not sufficiently solvent to meet its liabilities when they became due especially liabilities to its members. The petitioner warned that the continued deduction of monies from the employees without remitting either the employee and employer contribution meant that the respondent's debt continued to accrue every month and if the court did not wind up the respondent, the members of the respondent would be greatly prejudiced. Further the petitioner noted that the allegation that the government was willing to fund the scheme had remained illusory to date.
4. The petitioner concurred with the recommendation of the interim administrator on similar grounds including the continued inability by the respondent to pay pension benefits to its members when they fell due; the continued financial difficulties experienced by the respondent's sponsor who had failed in remitting pension contributions and the inability of the trustees of the respondent to manage it as a separate entity from the sponsor thereby creating a grave possibility of conflict of interest.



5. The petitioner argued that in view of the circumstances, it would only be fair, just and equitable to wind up the respondent in order to mitigate against further damage and/or loss to the members of the respondent and to secure the interests of the members of the scheme.
6. The respondent opposed the petition through a replying affidavit sworn on 13th April 2018 and a supplementary affidavit sworn on 1st July 2019 by Ruth Kirwa, the legal officer of Technical University of Kenya, the sponsor of the respondent.
7. She averred that the scheme was placed under interim administration to ensure that it abides by the various statutory guidelines relating to its operations and not as a result of insolvency.
8. The respondent argued that although it had been placed under temporary administration, the trustees of the respondent and the sponsor's management were committed to ensuring the success of the respondent. This was evidenced by the remedial plan dated 17th February 2015.
9. Referring to the said plan, the total outstanding contributions were Kshs.533,862,586/= and the sponsor had made monthly remittances to the scheme. As of December 2017, the sponsor had remitted a total sum of Kshs.195,745,515/= leaving an outstanding balance of Kshs.338,117,071/= only.
10. The respondent pointed out that the Ministry of Education, Science and Technology had partially approved the sponsor's budget for a sum of Kshs.1,198,300,000/= and the sponsor was still pursuing the drawdown of the said funds.
11. For these reasons the respondent was confident that the scheme was on its way to full recovery in a period of 12-24 months from the date of the affidavit based on the respondent's funding levels and expected additional funding by the Ministry of Education, Science and Technology.
12. In the circumstances, the respondent pleaded that the petition be dismissed or at the very least be suspended for 12 months to allow for the sponsor to demonstrate the viability and sustainability of the scheme.
13. In this regard, the respondent swore a supplementary affidavit on 1st July 2019 confirming that the sponsor had embarked on the process of employing a corporate trustee who once appointed would run the respondent back to statutory compliance.

Analysis and determination

14. The petition was canvassed by way of written submissions which I have carefully considered together with the pleadings, authorities and evidence submitted by the parties. Section 5 of the [Retirement Benefits Act](#) Cap 197 enlists the functions of the petitioner which include 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;”
15. Further, the petitioner is empowered under regulation 5 of The [Retirement Benefits \(Minimum Funding Level and Winding up of Schemes\) Regulations](#) (the Regulations) to apply to the court for an order to wind up a retirement benefits scheme where the Authority is of the opinion that—
 - “(a) a scheme is in such an unsound financial condition or its funding is below the minimum funding level and that arrangements by the trustees to improve the condition are ineffective, impracticable or unsatisfactory; or



(b) a scheme is in breach of section 28 (1) (a) and (c) of the *Act*.”

16. The issue that this court must determine is whether the conditions under regulation 5 of the *Regulations* has been fulfilled. It is quite obvious that the respondent has financial liabilities. I further note that the respondent has not specifically controverted the petitioner’s submission and the quarterly reports by Zamara Actuaries, Administrators & Consultants Limited which indicate that as at December 2019, the respondent’s debt stood at Kshs.1,177,946,502/=.
17. This amount had risen from Kshs.772,989,511/= as at 30th March 2016 when the interim administrator filed a report confirming this as the respondent’s total liabilities against the respondent’s assets valued at Kshs.133,598,732/=.
18. The argument that the government was willing to fund the scheme has obviously not materialized for if this had happened the respondent would have provided the evidence of the same. This Court can only assume that the absence of such evidence means that the support has not materialized. The same case applies to the evidence of financial reprieve from the respondent’s sponsor. Therefore, as matters stand at this time, the debt has likely increased and there is no concrete rescue plan.
19. What is of further concern to the Court is that the sponsor continues to collect contributions from its staff but does not remit the same to the respondent, further escalating the debt. This submission remains unopposed. The Court notes that the assets held by the respondent are significantly less than its liabilities and this points to a situation of insolvency.
20. While the respondent submits that the scheme has continued to pay benefits to its members and it is therefore not insolvent, the Court notes that no evidence has been provided for such pay outs. The fact of the respondent’s escalating liability and financial distress is in fact admitted by the respondent who confirms having requested a budget of Kshs.1,198,300,000/= supposedly for the bailout, which had been presented for approval to the National Treasury.
21. This arrangement, like the other bailout arrangements that have been outlined by the respondent remain unsatisfactory mainly due to the uncertainty, with no definitive timeline or assurance that the resources will be available.
22. I say so noting that this petition was filed in 2017 and to date, the petitioner has not been able to remedy its financial distress. I note the efforts by the respondent and its sponsor in rescuing the respondent. I am however convinced that it would serve their best interest and the best interest of other stakeholders of the scheme to wind up the respondent so as to enable an orderly liquidation of assets and settlement of liabilities.

Disposition

23. Accordingly, I find merit in the petition dated 25th September 2017 and hereby grant an order winding up the respondent. The Official Receiver is hereby appointed as the Trustee/Liquidator.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 5TH DAY OF JULY 2024.

F. MUGAMBI JUDGE

