



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 170 OF 2016**

**In the matter of Articles 2, 10, 19, 22, 23, 27, 40, 227, and 260 of the Constitution of Kenya 2010**

**and**

**In the matter of Public Procurement and Assets Disposal Act, 2015**

**and**

**In the matter of Alleged violation and infringement of the Rights and Freedoms in Article 27 and 40 of the constitution of Kenya**

**BETWEEN**

**Association of Retirement Benefits Scheme.....Petitioner**

**versus**

**The Hon. Attorney General .....1<sup>st</sup> Respondent**

**Cabinet Secretary for the National Treasury.....2<sup>nd</sup> Respondent**

**Public Procurement Regulatory Authority.....3<sup>rd</sup> Respondent**

**Retirement Benefits Authority.....Interested Party**

**JUDGEMENT**

**Introduction**

This petition challenges the constitutionality section 2 (o) of the Public Procurement and Disposal Act<sup>[1]</sup> (hereinafter referred to as the act) on the grounds that it infringes on Pension scheme Funds of public entities rights to Property, Freedom of Equality and freedom of contract and that it contravenes Articles 19 (2), 40 & 27 of the constitution. The core of the petitioners case is that pension scheme funds are basically contributions from savings/income of the individual members of the public and not from public funds, hence pension scheme funds are not public bodies within the meaning of the law and should not be classified as such, hence it is improper to subject such private entities to the provisions of the act, hence

the unconstitutionality of the above section which purports to classify them as public bodies. The said act came into force on 7<sup>th</sup> January 2016 and was enacted to give effect to Article 227 of the Constitution and to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.

## **The pleadings**

Briefly, the petitioner avers that section 2 (o) of the act defines "public entity" to include "a pension fund of a public entity" and also states that pension funds for public entities are established and registered under section 23 of the Retirement Benefits Authority Act[2] under an irrevocable trust, which connotes a private arrangement between employee as a grantor of the Trust by remitting their funds for the purposes of retirement and the trustee who oversees the management of the funds.

It is averred that the above definition offends the provisions of the constitution, and is inconsistent with the definition of a public office and a State Organ in Article 260 of the constitution.

It is also averred that the Pension Funds of Public bodies are obliged to comply with procurement requirements set out under the act and failure to comply amounts to a blatant breach of the law and that the act has paralysed the procurement function and operations of the Pension Funds of Public entities as they lack resources to implement the onerous responsibilities under the act, hence pension Public Funds will diminish due to expenses caused by meeting the obligations of the act.

The petitioners aver that Pension Funds of Public Entities do not receive public funding from the government, hence it ought not be ranked as a public entity or a state organ, and that Pension Funds of Public entities are private property.

The first, second and third Respondent filed grounds of objection on 10<sup>th</sup> June 2016 stating that the challenged legislation is meant to enforce the national values and principles of governance under article 10 of the constitution which is envisaged under section 32 (3) of the Retirement Benefits Authority Act[3] and that management of funds contributed on behalf of the public ought to meet the requirements of the Public Procurement and Asset Disposal Act[4] and further that by dint of section 3 (1) of the Interpretation and General Provisions Act[5] the functions of public entities are public in nature, hence this brings them under the Act and that the petitioners have not demonstrated the alleged unconstitutionality of the said section.

On record is the affidavit of Dr. Edward Odundo, the chief executive officer of the interested party who gave the background to the enactment of the Retirement Benefits Authority Act[6] referred later in this judgement because of its importance and also averred that the functions of the interested party are set out in section 5 of the Retirement Benefits Authority Act[7] and further avers that article 260 on the constitution defines a state organ as a commission, office, agency or other body established under the constitution and that a scheme/pension fund established by a public entity pursuant to the provisions of the Retirement Benefits Authority Act[8] is not a commission, office, agency, or other body established under the constitution and that a scheme/pension fund established by a public entity pursuant to the provisions of the Retirement Benefits Authority Act[9] is neither an entity created by a statute or subject to the state corporations act, nor is it an entity used for governmental purposes, nor does it function on behalf of the state nor does the state have powers or interests.

He also avers that the phrase "any other public entity" as used in article 227 of the constitution refers only to a public entity of a nature that is similar to a state organ and such a definition does not apply to a scheme or pension fund, hence, to the extent that section 2 (o) of the Public Procurement and Disposal Act[10] includes a scheme/pension fund which is not contemplated in Article 227 of the constitution, then, the same is inconsistent with the constitution, hence, null and void.

He also averred that the retirement industry in Kenya comprises of the Civil Service Scheme, the National Social Security Fund, Occupational Retirement Benefits Scheme and Individual Retirement Benefits Scheme and out of all the registered schemes, 95 % are privately set by Trust Deed and that trustees are

exclusively responsible for the administration and management of the scheme and that the interests of the members of the scheme are set out in the trust deed and that the definition of public office under article 260 of the constitution does not cover a scheme/pension fund and that public procurement within the meaning of the Public Procurement and asset Disposal Act refers to procurement using public funds. He reiterated that the assets of a scheme comprise of contributions made by a member of a scheme and where the employer is contributing, the amount contributed by the employer is a portion of the employees monthly earnings, hence the funds are not public funds.

### **Advocates submissions**

Counsels for all the parties filed written submissions which they also highlighted in court.

The petitioners counsel submitted that the definition in section 2 (o) of the act is inconsistent with the definition in the constitution which defines a state organ in article 260 and added that in determining the constitutionality of a statute, the court has to consider the purpose of the statute and whether it infringes constitutional rights, and if it does, then the same is unconstitutional<sup>[11]</sup> and submitted that the petitioner is not a public entity or a state organ as defined under article 227 of the constitution and cited the definition of a public entity in *Black's Law Dictionary*<sup>[12]</sup> and *Halsbury's Laws of England*<sup>[13]</sup> and also the definition offered in the *Leadership and Integrity Act*.<sup>[14]</sup>

Counsel also cited the definition of a public body offered in section 3 of the Interpretation and General Provisions Act<sup>[15]</sup> which is as follows:-

*"Public body means-*

*a) the Government, or any department, institution or undertaking thereof; or*

*b) ..*

*c) a local authority; or*

*d) any authority, board, commission, committee or other body, whether paid or un paid, which is invested with or is performing, permanently or temporarily, functions of a public nature;"*

Counsel also cited the definition offered by the court in *Githunguri Dairy Farmers Co-operative Society Ltd vs A.G. & 2 Others*<sup>[16]</sup> and maintained that the petitioners fundamental rights to equality, discrimination, right to property and freedom of contract have been violated and urged the court to allow the petition.

Counsel for the interested party urged the court in determining the constitutionality of the section in question which was enacted to give effect to Article 227 of the constitution, to consider the surrounding text of the entire chapter 12 of the constitution.

Counsel for the Respondents cited section 3 (1) of the Interpretations and General Provisions Act<sup>[17]</sup> and which defines a public entity to be that whose functions are public in nature<sup>[18]</sup> and submitted that pension funds should be treated as such and referred to the above cited case of *Githunguri Dairy Farmers Co-operative Society Ltd VS A.G & 2 Others*<sup>[19]</sup> where the learned judge held that the phrase "*public entity*" in article 227 of the constitution should receive an extended meaning and not to be restricted to the interpretation ascribed to "*public office*" or "*public officers*" under article 260 of the constitution. The learned judge went further to state that the phrase "*public entity*" under article 227 should include statutory bodies, parastatals, bodies established by statute but managed and maintained privately such as universities and professional societies...and also any private bodies fulfilling key functions under state supervision."

Counsel submitted that the petitioner is regulated by the state through the interested party herein and that

under section 2 of the Public Finance Management Act, a Public Fund is defined to include that which is likely to generate liability against the government, hence it is imperative that such funds are subjected to regulations and that legislation should only be impugned only where it has been proven to be unconstitutional, null and void.[20] Counsel also urged the court to consider the objects and purposes of the legislation[21] and denied that the petitioners rights under articles 27 and 40 have been violated in any manner.

### **Issues for determination**

The key issues for determination are **(a)** whether or not the petitioner is a public entity and **(b)** whether or not section 2 (o) of the Public Procurement and Disposal Act[22]is unconstitutional, that is, does it violate the petitioners constitutional rights as alleged?.

### **Principles governing statutory interpretation.**

The principles governing the interpretation of statutes are summarized as follows:-[23]

- i. Under Article 259 of the constitution, the court is enjoined to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article 159 (2) (e) of the constitution to protect and promote the purposes and principles of the constitution.*
- ii. There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise.[24] (The court should start by assuming that the Act in question is constitutional).*
- iii. In determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself. Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect.*
- iv. The constitution should be given a purposive, liberal interpretation.*
- v. That the provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.[25]*
- vi. The spirit of the constitution must preside and permeate the process of judicial interpretation and judicial discretion.[26]*

The disposition of issues relating to interpretation of statutes and determining constitutional questions must be formidable in terms of some statutory and constitutional principles that transcend the case at hand and is applicable to all comparable cases. Court decisions cannot be *had hoc*. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the case at hand.[27]The privy council[28] while interpreting the Constitution of Bermuda stated that a constitutional order is a document *sui generis* to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation. It is important to give full recognition and effect to fundamental rights and freedoms.

**Lord Wilberforce**, while delivering the considered opinion of the court in the above case observed:-

*“A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for*

*the process of interpretation recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.....”*

The recognition of the sanctity of the Constitution and its special character calling for special rules of interpretation was captured in the decision of the High Court of Kenya in the case of *Anthony Ritho Mwangi and another vs The Attorney General*[29] where the court stated:-

*“Our Constitution is the citadel where good governance under the rule of law by all three organs of the state machinery is secured. The very structure of separation of powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations and powers of the two organs, namely the executive, and the legislature. The judiciary though seems to be omnipotent, is not so, as it is obligated to observe and uphold the spirit and the majesty of the Constitution and the rule of law.”*

**Ringera J** (as he then was) put it more succinctly[30] when he observed that the Constitution is a living document and not like an Act of Parliament. Courts must be innovative and take into account the contemporary situation of each age but innovations must be supported by the roots. In this regard, I endorse fully the presumption of constitutionality which was powerfully expressed by the Supreme Court of India in the case of *Hamdarddawa Khana vs Union of India Air*[31] where the respected Court stated:-

*“In examining the Constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment.”*

My discernment from the foregoing jurisprudence is that in interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

Statutory interpretation is the process by which courts interpret and apply legislation. The court interprets how legislation should apply in a particular case as no legislation unambiguously and specifically addresses all matters. Legislation may contain uncertainties for a variety of reasons such as:-

- a. Words are imperfect symbols to communicate intent. They can be ambiguous and change in meaning over time.*
- b. Unforeseen situations are inevitable, and new technologies and cultures make application of existing laws difficult.*
- c. Uncertainties may be added to the statute in the course of enactment, such as the need to compromise or catering for certain groups.*

Therefore, a court must try to determine how a statute should be enforced, but I am alive to the fact that in constructing a statute, the court can make sweeping changes in the operation of the law so this judicial power should be exercised carefully. There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. *Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete.* The implication is that when the language is clear, then it is not necessary to belabour examining other rules of statutory interpretation.

In my view, it is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite,

recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot legislate itself.

The Supreme court of India in *Reserve Bank of India vs. Peerless General Finance and*

*Investment Co. Ltd. and others*<sup>[32]</sup> observed that:-

*“Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual.”*

In any event, one possible suggestion of the indeterminacy of canons is that statutory construction should be a narrow pursuit, not a broader one:-

*“[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others.... [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: “judicial inquiry is complete.”*<sup>[33]</sup>

A word in a statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim *noscitur a sociis* (meaning of a word should be known from its accompanying or associating words) has much relevance in understanding the import of words in a statutory provision.<sup>[34]</sup>

In addition to being guided by rules of statutory interpretation, one key function of the court in interpreting a statute is the creation of certainty in law. Certainty in law enables planning of human affairs in reliance on the law, and the realization of expectations based on such planning. It makes for uniformity in the administration of justice, and prevents the unbridled discretion of the judiciary. It makes available the tested legal experience of the past.<sup>[35]</sup> The other key point for the court to consider while interpreting the law is to change and adapt the law to new and unforeseen conditions. Law must change because social institutions change.<sup>[36]</sup> And in applying generalized legal doctrine, such as statutes, to the facts of specific cases uncertainties and unforeseen problems arise. As conditions change with the passage of time, some established legal solutions become outmoded. The courts should resolve these uncertainties and assist in adapting the law to new conditions.

Finally while interpreting the law, the court should bear in mind that they should make laws when necessary to make the ends of justice. Legal systems world over could not grow as has been the case without a great amount of judicial law making in all fields, Constitutional law, Common Law and statutory interpretation. However, to the extent that judges make laws, they should do so with wisdom and understanding. Judges should be informed on the factual data necessary to good policy making. This includes not only the facts peculiar to the controversy between the litigants before them, but also enough of an understanding of how our society works so that they can gauge the effect of the various alternative legal solutions available in deciding a case.

In my view, there are two key assumptions relied by courts to explain and justify statutory interpretation. One is the assumption that meaning in legislative texts is "plain" -- that is, clear and certain, not susceptible of doubt. This assumption is the necessary basis for the plain meaning rule. The other assumption is that legislatures have intentions when they enact legislation and these intentions are knowable by courts when called on to interpret legislation.

The great advantage of the plain meaning rule is that, in theory at least, it creates a zone of certainty -- an interpretation-free zone, in effect. It tells the public that if the text is plain, it means what it says and it is safe to rely on it. This emphasis on text at the expense of intention ensures that the law is certain and that the public has fair notice, both of which are prerequisites for effective law.

However, we need not forget that the touchstone of interpretation is the intention of the legislature. The legislature may reveal its intentions directly, for example by explaining them in a preamble or a purpose statement. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.<sup>[37]</sup> To properly understand and interpret a statute, one must read the text closely, keeping in mind that the initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one.<sup>[38]</sup> Courts generally assume that the words of a statute mean what an “ordinary” or “reasonable” person would understand them to mean.<sup>[39]</sup> I personally adhere to the principle that if the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute.

These principles are not new. There are important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.

In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it. In my view the intention of the legislature while enacting the Retirement Benefits Authority Act<sup>[40]</sup> is well captured in the earlier referred to affidavit filed by the interested party sworn by Dr. Edward Odundo, in which he avers *inter alia* that:-

*a) that prior to 1997 the retirement benefits industry in Kenya was largely unregulated, hence it faced numerous problems such as mismanagement of scheme funds, inadequate funding of schemes and arbitrary investment of scheme funds without independent professional advice. There was lack of protection of the interests of members, dominance of sponsors in scheme affairs and absence of transparency which resulted in investment decisions being made with vested interests as opposed to interests of members or the economy as a whole.*

*b) That the Retirement Benefits Authority Act was therefore enacted to cure problems emanating from lack of regulation; to provide regulatory framework for the retirement benefits industry to streamline the industry and gain the required confidence from stakeholders and employees to enable them save more for retirement and contribute towards the national effort of raising the domestic saving rate.*

In my view, Parliament’s intention in enacting the above legislation is well captured in the above affidavit which gives the history behind the enactment in question. In interpretation of the challenged provision, this clear history of the legislation and intention of the legislature cannot be ignored.

## **Determination**

In resolving the issues in dispute I take comfort in the fact this route has been trodden by others before me and in this connection I find useful guidance in the decision of the Indian Supreme Court in the case of *International Airport Authority(R.D Shetty) vs The International Airport Authority of India & Ors*,<sup>[41]</sup> where the Court set the test for determining whether an entity is a Government body or not and as

follows"-

*(a) consider whether any share capital of the corporation is held by the Government and if so that would indicate that the corporation is an instrumentality or agency of Government;*

*(b) where the financial assistance of the State is so much as to meet almost the entire expenditure of the Corporation, that fact would afford some indication of the corporation being impregnated with Governmental character;*

*(c) it may also be relevant to consider whether the corporation enjoys monopoly status conferred by the State*

*(d) whether the body has deep and pervasive State control,*

*(e) whether the functions of the corporation are of public importance and closely related to Governmental functions then that would be a relevant factor in classifying the corporation as an instrumentality or agency of Government and*

*(f) if a Department of a Government is transferred to a corporation then it becomes an instrumentality or agency of the Government.*

The Court went on to state that if after the consideration of these relevant factors it is found that the corporation is an instrumentality or agency of government, it would be an 'authority' and therefore, part of the definition of 'State' within the meaning of the expression used in the **Constitution**.

I adopt the above reasoning and would add that based on criteria numbers **(c)**, **(d)** and **(e)**, the interested party fits the bill as an agency of the State or public body as it performs functions of a public nature and enjoy monopoly with regard to the services they provide. Secondly, the definition of a public body by **Section 3(1)** of the *Interpretation and General Provisions Act*<sup>[42]</sup> points out the public nature of the 1st and 2nd Respondents "Public body" has been defined therein as:

*"any authority, board, commission, committee or other body, whether paid or unpaid, which is invested with or is performing, whether permanently or temporarily, functions of a public nature".*

To me the words 'other body' or *is performing, whether permanently or temporarily, functions of a public nature*" ought to be given their natural and literal interpretation, and in my view pension schemes perform duties of public nature. Further, the preamble to the Retirement Benefits Authority Act reads that "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. The use of the word regulation suggests state control.

**Part IV** of the Retirement Benefits Authority Act is entitled "Regulation And Supervision Of Retirement Benefits Schemes." Again this clearly demonstrates an element of both regulation and supervision by the state. Section 32 provides as follows:-

*32. (1) There shall be, in respect of every scheme other than a scheme funded out of the Consolidated Fund, a scheme fund into which all contributions, investment earnings, income and all other moneys payable under the scheme rules or the provisions of this Act shall be paid.*

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

*(3) Subject to the provisions of this Act, the Minister may, in consultation with the Authority, make regulations with regard to the funding, vesting, custody, management, application and the transfer of scheme funds and the accounting for such funds.*

The language in the above provisions is clear. The words regulation and management used in my view are a clear testimony of state control. Applying the canons of statutory interpretation discussed above, I find that the Retirement Benefits Schemes are public bodies and are controlled by the state as provided by the Retirement Benefits Authority Act. That being the definition accorded to a public body it is obvious that the interested party is such body. A similar finding was arrived at in the case of *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*<sup>[43]</sup>

I also find myself in agreement with Onguto J in earlier cited case where he stated that the phrase "public entity" under article 227 should include statutory bodies, parastatals, bodies established by statute but managed and maintained privately such as universities and professional societies...and also any private bodies fulfilling key functions under state supervision."

On the constitutionality of the provision under discussion, **Article 2(1)** of the Constitution provides that '*This Constitution is the Supreme Law of the Republic and binds all persons ...*' Article **260** defines person to include company, association or other body of persons whether incorporated or unincorporated. Article **259** of the constitution enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. This court is obliged under Article **159 (2) (e)** of the constitution to protect and promote the purposes and principles of the constitution. Also, the constitution should be given a purposive, liberal interpretation. The provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.<sup>[44]</sup>The Constitution of Kenya gives prominence to national values and principles of governance. Article 10 (2) of the Constitution provides the national values and principles of governance which include integrity, transparency and accountability.

Article 227 of the constitution proves that:-

*(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.*

Pursuant to the above article, Parliament enacted the Public Procurement and Asset Disposal Act<sup>[45]</sup> to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.

Having found that the phrase "public entity" under article 227 should include statutory bodies, parastatals, bodies established by statute but managed and maintained privately such as universities and professional societies and any private bodies fulfilling key functions under state supervision, and having examined the need to give prominence to the principles, values and purposes of the constitution, I find nothing unconstitutional in the challenged section.

The upshot is that this petition fails and the same is dismissed with costs to the Respondents.

Orders accordingly. Right of appeal 30 days

Dated at Nairobi this **9<sup>th</sup>** day of **March** 2017

**John M. Mativo**

**Judge**

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<sup>[1]</sup> Act No. 33 of 2015

<sup>[2]</sup> Act No. 3 of 1997

[3] Supra

[4] Ibid

[5] Cap 2, Laws of Kenya

[6] Supra

[7] Ibid

[8] Ibid

[9] Ibid

[10] Supra

[11] Counsel quoted Law Society of Kenya Ltd vs A.G & 2 OTHERS {2013}eKLR

[12] 9<sup>th</sup> Edition (2009)

[13] 4<sup>th</sup> Edition Vol. 1 Para 6

[14] Cap 182, section 2

[15] Cap 2, Laws of Kenya

[16] {2016}eKLR

[17] Supra

[18] Satrose Ayuma & Others vs The AG & Others {2013}eKLR

[19] Supra

[20] Bishop Joseph Kimani & Others vs A.G, Pet No. 699 of 2009

[21] See Muranga Bar Operators & Another vs Minister of State for Provincial Adm & Internal Security & Others Pet No 3 of 2011, {2011}eKLR

[22] Supra

[23] E. M. Githinji, JA in the case of Center for Rights Education and Awareness & 2 others v John Harun Mwau & 6 others, {2012} eKLR

[24] See Ndyababo vs A. G of Tanzania {2001} E. A. 495

[25] See Tinyefunzavs A G of Uganda, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3

[26] These words expressed in the Namibian case of State vs Acheson{1991} 20 SA 805

[27] See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Havard Law Review P. 1.

[28] In the case of Minister for Home Affairs and Another vs Fischer{1979} 3 ALL ER 21

[29] Nairobi Criminal Application no. 701 Of 2001

[30] Njoya and Others vs Attorney General {2004 } 1 KLR 232, {2008} 2 KLR (EP) 624 (HCK)

[31] {1960} 554

[32] {1987} 1 SCC 424

[33] Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). The Court takes much the same approach when it chooses congressional intent rather than statutory text as its touchstone: a canon of construction

should not be followed “when application would be tantamount to a formalistic disregard of congressional intent.” Rice v. Rehner, 463 U.S. 713, 732 (1983).

[34] K. Bhagirathi G. Shenoy and others v. K.P. Ballakuraya and another {1999} 4 SCC 135

[35] Quintin Johnstone, An Evaluation of the Rules of Statutory Interpretation, Kansas Law Review, {1954} Vol 3 at page8-9

[36] Ibid page 9

[37] Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, "A guide to reading, interpreting and applying statutes" <https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf>

[38] Christopher G. Wren and Jill Robinson Wren, The Legal Research Manual: A game Plan for Legal Research and Analysis(2d. ed. 1986)

[39] Plain meaning should not be confused with the “literal meaning” of a statute or the “strict construction” of a statute both of which imply a “narrow” understanding of the words used as opposed to their common, everyday meaning. Supra note 1

[40] Supra

[41] {1979} 1 S.C.R. 1042

[42] Supra

[43] Pet. NO. 65 OF 2010-Lenaola J & Ngugi J

[44] See Tinyefunza vs A G of Uganda, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3

[45] Supra