



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION - MILIMANI
WINDING UP CAUSE NO. 24 OF 2012
IN THE MATTER OF PYRETHRUM BOARD OF KENYA STAFF SUPERANNUATION
AND
IN THE MATTER OF THE RETIREMENT BENEFITS (MINIMUM FUNDING LEVEL
AND WINDING –UP OF SCHEMES) REGULATIONS 2000
AND
IN THE MATTER OF THE RETIREMENT BENEFITS ACT NO. 3 OF 1997

J U D G M E N T

(Pursuant to Section 5b & 11 (4) of the Retirement Benefits Act, Regulation 5 (2) (a) & (3) of the Retirement Benefits (Minimum Funding Level and Winding - Up of Schemes)

Regulations, 2000 and Rule 5 (a) of the High Court (Winding Up) Rules and all enabling provisions of the Law)

1. The Petition now before the Court is presented by the Retirement Benefits Authority (“the Authority”) for the Winding Up of the Pyrethrum Board of Kenya Staff Superannuation Scheme (“the Scheme”) under the **Retirement Benefit Act No 3 of 1997** and the Regulations made thereunder. The Authority is a corporate body set up under the **Retirement Benefit Act No 3 of 1997**.

The Petition

2. The Petition is brought on very specific Grounds and therefore, notwithstanding its length, it is instructive to set out its terms verbatim. In it, it is averred that:

1. Pyrethrum Board of Kenya Staff Superannuation Scheme, hereinafter referred to as “ the Scheme” was established on the 1st January, 1991.

2. the Scheme was later constituted as a Defined Benefits Scheme as an irrevocable trust pursuant to a Trust Deed and Regulations dated the 19th September, 1995 and subsequently registered by the Authority under certificate number 01296 issued on 5th April, 2011 (RBA /SC/530) ?

3. the Registered Office of the Scheme is c/o Pyrethrum Board of Kenya, General

Mathenge Drive, Nakuru Industrial Area, NAKURU and the registered postal address is Post Office Box Number 420 Nakuru.

4. the objects and purpose for which the Scheme was established are the provision of pensions or other similar periodical benefits from members upon their retirement at a specified age and relief for the Dependants of the deceased Members and other objects as are set out in the Scheme's Trust Deed and Regulations.

5. the facts upon which this petition is grounded are as set out hereunder and in the subsequent paragraphs hereinbelow:

a. That the Chief Executive Officer of the Authority is duly appointed by the Board of the Authority in consultation with the Minister for Finance pursuant to the provisions of Section 11 (1) of the Retirement Benefits Act, No. 3 of 1997.

b. That the duties of the Chief Executive Officer include inter alia.

i. Subject to the directions of the Board, responsible for day to day management of the affairs of the Authority pursuant to Section 11 (4) of the Retirement Benefits Act.

ii. To regulate and supervise the establishment and management of retirement benefits schemes under the object and functions of the Authority.

iii. To protect the interests of members and sponsors of retirement benefit sector.

iv. To implement all Government policies relating to the national policy to be followed with regard to retirement benefits schemes.

v. To generally regulate the operations of the retirement benefits sector in Kenya and to particularly ensure strict compliance with the provisions of the Retirement Benefit Act.

c. THAT Regulation 5 of the Retirement Benefits (Minimum Funding Level and Winding – Up of Schemes) Regulations 2000 empowers the Authority to petition the High Court to wind up a scheme for the following reasons:

i. Where the Authority is of the opinion that a scheme is of unsound financial condition or its funding is below the minimum funding level and that arrangements by the trustees to improve the conditions are ineffective, impracticable or unsatisfactory.

ii. The Scheme question is unable to pay its debts within the meaning of Section 219 (e) as read with Section 220 of the Companies Act, Chapter 486 of the Laws of Kenya.

*iii. Where the Scheme (such as the Scheme herein) in question has failed to comply with the requirements or any of the requirements of the **Retirement Benefits Act No. 3 of 1997 of the Laws of Kenya** and/or the **Regulations** made thereunder and has so continued with the want of compliance for a period of more than four months after Notice from the Authority.*

iv. Where it is just and equitable in the interests of the Sponsor and the Members that the Scheme be wound up

6. on the 2nd August, 2005 the Scheme was placed under interim administration and had all trustees removed for failing to respond to various requirements by the Authority to normalize the areas of non-compliance with various mandatory provisions of the **Retirement Benefits Act. No. 3 of 1997** and the **Rules** thereunder.

7. upon expiry of the Interim administration period on 31st August, 2006 a new board of trustees was set up to take over the management of the affairs of the Scheme.

8. an investigation of the Scheme's financial and management affairs as at 12th June, 2012 taking into account the most recent actuarial valuation as at 30th June, 2011 disclosed that;

i. The Scheme was insolvent to the tune of Kshs717,288.000/=, the Scheme's assets were valued at Kshs16,800,000.00/= as compared to its liabilities which stood at Kshs734,088.000.00/=

ii. The Scheme's funding ratio was a low 2.3% contrary to the stipulated minimum funding level of 100% stipulated under **regulation 4 of the Retirement Benefits (Minimum Funding Level and Winding –Up of Schemes) Regulations, 2000.**

iii. The pensions payments due to the Members have been in arrears for more than six months, growing at a monthly amount of Kshs2.5 million.

iv. The Scheme's sponsor, the Pyrethrum Board of Kenya, has been experiencing financial difficulties with its financial position not improving evidenced inter alia by arrears in salary to the staff and unremitted contributions to the Scheme.

v. The Scheme was unable to present a remedial plan acceptable to the Authority owing to the failure by the Sponsor to endorse the Scheme's remedial plan citing low business and inconsistent cash flows.

vi. The Scheme has remained unable to pay the forty one (41) Members of the scheme the pension benefits due to them as directed by the Authority and upheld by the Retirement Benefits Appeals Tribunal through the Tribunal's decision delivered on 26th September, 2011 in **Tribunal Appeal No.6 of 2010.**

vii. As a public service retirement benefits scheme, the Scheme has failed to adhere to the Treasury Directive issued through **Circular No. 18/2010** on November 24th, 2010 and in particular on the issue of maintenance of the Statutory 100% funding level, conversion of the scheme into Defined contribution scheme and submission of a Statutory remedial plan to the Authority on how the Sponsor and the Trustees intend to eliminate the scheme deficit.

viii. The Authority has received and continues to receive numerous complaints from the Members against the scheme on account non-payment of the pension benefits due.

9. From the foregoing, it is quite clear that the Scheme in spite of numerous written notices from the Authority has breached and continues to breach, for a period well in excess of 6 months the various provisions of the **Retirement Benefits Act** and the **Regulations** thereunder and the **Treasury Circular No. 18 of 2010**, including inter alia.

i. Regulations 5 (2) of the Retirement Benefits (Minimum Funding Level & Winding UP of Schemes) Regulations 2000 by failing to meet the prescribed minimum funding level and the arrangements by the trustees to improve the conditions are ineffective, impracticable or unsatisfactory.

ii. Failing to pay members of their benefits due as and when they failure despite continuous and numerous directive from Authority.

iii. Failing to pay the forty one (41) Members despite the decision by the Retirement Benefits Appeals Tribunal despite continuous and numerous directives from Authority.

iv. Failing to convert the Scheme into defined contribution scheme not later than 1st July, 2011 in terms of the Treasury Circular No. 18 of 2010.

v. Failing to make any or any satisfactory and acceptable statutory remedial plan to the Authority indicating how the Scheme's Sponsor and the Trustees intend to eliminate the deficiency.

vi. Failing to update its Trust Deed and Regulations to make provisions for amendments in the legislation currently in force and the Rules thereunder.

vii. Failing to make proper investments as per the investment guidelines set out in Part V of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000.

10. THAT in the premises, the Scheme is unable to meet the reasonable expectations of the Members who have made numerous complaints to the Authority in respect of benefits due and/or Judgment debts which have not been honoured.

11. THAT from the foregoing, it is evident that the Scheme is unable to pay its debts within the meaning of section 219 as read with Section 220 of the Companies Act and Regulation 5 of the Retirement Benefits (Minimum Funding Level & Winding Up of Schemes) Regulations 2000.

12. THAT the Scheme's failure to comply with the various requirements of the Retirement Benefits Act and the Regulations thereunder and the Treasury Circular No. 18 of 2010 aforesaid has been continuous and regardless of numerous notices from Authority.

13. THAT the Authority has recommended that the Scheme be liquidated based inter alia on Reports prepared by the Supervision Department of the Authority, the Report take into account the Actuarial Valuation Report by Messers Actuarial Services (E.A) Limited, the continued inability to pay the pension benefits to the Members as and when they fall due, the continued financial difficulties experienced by the Scheme's sponsor which sponsor continues to fail in remitting the pension contributions and the conduct of the Trustees.

14. THAT the Trustees of the Scheme have declined to voluntarily wind up the Scheme in the face of the deplorable state of the Scheme's Finances and the state of compliance with the Requirement Benefits Act and the Regulations thereunder.

15. THAT in view of the totality of the circumstances herein, it is only fair, just and equitable that the Scheme be wound up in order to secure the interest of the Members of the scheme.

3. The Petition also seeks a further order for the appointment of a Liquidator to the scheme, it states; “*that it is also proper that the Honourable Court be pleased to appoint Mr. Robert Alfred Odongo as the Liquidator of the Scheme, the Authority considers Mr. Odongo competent and fit to liquidate the Scheme on account of his academic and professional experience in the winding up of Schemes*”

4. The Authority is a creation of the **Retirements Benefits Act 1997 (“the Act”)**. The objects and functions of the Authority are set out in **Section 5** of the Act. They include the power and responsibility to regulate and supervise the industry and also to protect the interests of members and sponsors of the retirement benefits sector. The Authority is managed by a Board which comprises a Chairman and a Board and a Chief Executive Officer appointed under **Section 11 of the Act**. The Verifying Affidavit is sworn by said Chief Executive Officer.

5. As stated, the Verifying Affidavit is sworn by A Edward O. Odondo who is the Chief Executive Officer of the Retirement Benefits Authority “the Authority” who is the Petitioner herein. The Authority was established under the **Retirement Benefits Act, No 3 of 1997**. The Deponent was appointed by the Board of the Authority in consultation with the Minister of Finance pursuant to **Section 11(1) of the Retirement Benefits Act No 3 of 1997**. His duties were inter alia:

- i. Subject to the directions of the Board, responsibility for the day to day management of the affairs of the Authority pursuant to **Section 11(4) of the Retirement Benefits Act**,
- ii. To regulate and supervise the establishment and management of retirement benefits schemes under the object and functions of the Authority
- iii. To protect the interests of members and sponsors of retirement benefit sector.
- iv. To implement all Government policies relating to the national policy to be followed with regard to retirement benefits schemes.
- v. To generally regulate the operations of the retirement benefits sector in Kenya and to particularly ensure strict compliance with the provisions of the **Retirement Benefits Act 1997** (paragraph 11, Verifying Affidavit).

6. The facts that are relevant to this Petition are that the Scheme was established by a Trust Deed dated 19th September 1995. The Founder (later Sponsor) of the Scheme was the Pyrethrum Board of Kenya. The Scheme was intended for its employees, to make provision for them upon their retirement. The Deed appointed Trustees who changed from time to time during the life of the scheme. The trusts on which it was based were to take effect from 1st January 1991. Clause 4 contains the Founder’s covenants with the Trustees. In brief they were covenants to collect contributions and pay them into the trust. this was subject to the caveat that: “provided always that the founder shall have the right to discontinue payment or contributions to the scheme upon giving the trustees nine calendar months written notice and satisfactory reason of its intention to do so and in the event of such discontinuance the scheme shall be dealt with in accordance with the provisions of clause 15 hereof”. It is unclear if that is a typing error because clause 15 relates to the re-organisation of the founder. It is in fact clause 16 that relates to the determination of the trusts. it says “*At the expiration of the Trust Period or at any date which the affairs of the Founder shall be wound up (unless winding up be for the purpose of reorganisation or reconstruction and arrangements shall be made for the purchaser or continuing employer to undertake the Founder’s rights and obligations under the Scheme) as described in Clause 15 or the Founder shall from any other cause cease to contribute to the scheme the trusts constituted by these presents shall determine. Upon determination of the said Trusts the Scheme Funds shall be realised and subject to the payment thereof of all costs charges, and other expenses ...shall be applied by the payable in the determination of the Trusts, the netproceeds of such realisation and moneys then in hand*”. The powers of the Board are set out in **Section 7 of the Act** as follows:

The Board shall have all powers necessary for the performance of its functions under this Act and in

particular, the Board shall have power to-

(a) control, supervise and administer the assets of the Authority in such manner and for such purposes as best promote the purpose for which the Authority is established;”

7. The Petition is opposed by the Respondent through its Trustees. The Replying Affidavit is sworn by a **ELIZABETH GACHAMIU KABIRU** of Post Office Box Number 420, Nakuru . Again notwithstanding its length it is set out below. Consideration of what is said is instructive. The Deponent states that:

(1) I am the Chairperson and a Trustee of the Respondent duly authorized to swear this Affidavit on its behalf.

(2) I have read the Contents of the petition filed through Messers Simba & Simba Advocates dated 11th September 2 012, the Verifying Affidavit sworn by Edward O. Odundo on 14th September 2012, and upon understanding the same, hereafter respond thereto as follows;

(3) the petition is misconceived, frivolous, oppressive, incompetent, lacks, merits, and filed by Advocates who had previously represented the Respondent against the Petitioner on issues related to the matters herein, and still represent the Respondent in matters pending in Court, and the Respondent will at the hearing hereof raise a Preliminary Objection on a point of law on the following grounds inter alia;

a. That the said Advocates had actively represented the Respondent in Retirement Benefit Authority Tribunal Appeal No. 6 of 2010, Pyrethrum Board of Kenya Staff Superannuation Scheme –vs- The Chief Executive Officer Retirement Benefit Authority on issues that are related to and/or giving rise to the instant Petition. (Hereto annexed and marked “**EGK 1**” is a copy of a letter by the said Advocates dated 14th June, 2012 addressed to the Respondent).

b. That the said Advocates had in the course of their representation in the said matters related to and/or giving rise to the petition herein obtained and became privy to confidential information received from the Respondent regarding the issues in the Petition herein and their representation of the Petitioner against the Respondent amount to serious conflict of interest to the detriment of the Respondent.

*c. That the said Advocates are on record representing the Respondent in **CMCC No. 3366 of 2012 Moyez Sadrudin Bhanji -vs- The Registered Trustees Pyrethrum Board of Kenya Staff Superannuation Scheme and Kingsland Court Benefits Services, (Milimani)** which matter is yet to be concluded. (Hereto annexed and marked “**EGK 2**” is a copy of the Statement of Defence filed by the said Advocates on behalf of the Respondent).*

d. That there is every likelihood the Respondent may summon Simba & Simba Advocates to give evidence in its favour in the instant petition.

e. That is only fair and just for purposes of determining the real issues raised in the Petition that Simba & Simba Advocates be disqualified from acting for, or representing the Petitioner.

(4) THAT the unmarked documents bound together with the Verifying Affidavit are regrettably too faint to discern and seem to be only in favour of the interest of the Petitioner and a few members of the Respondent who are former employees of Pyrethrum Board of Kenya (the sponsor).

(5) THAT the Respondent admits the contents of paragraphs 1, 2, 3, 4 and 5 of petition save for its address for the purposes of the petition which is care of Messers Rodi Orege and Company Advocates, Mache Plaza, 1st Floor, Post Office Box Number 780 -20100, Nakuru.

(6) THAT the petition is incompetent and does not meet the threshold for winding up the Respondent or at all.

(7) THAT the intended winding up is not just or equitable in the interest of the sponsor, or members.

(8) THAT the Sponsor is an ongoing concern with 176 employees who are active members of the Respondent. (Hereto annexed and marked “ **EGK 3**” is a bundle of documents containing the details of the said members).

(9) THAT it is apparent that the petition is skewed in favour of the Pensioners and the deferred members of the Respondent, to the detriment of the active members and the Respondent.

(10) THAT the sponsor has acknowledged its indebtedness to the Respondent and has made proposals on how it intends to settle that indebtedness vide the Remedial Action Plan it had submitted to the Petitioner. (Hereto annexed and marked “ **EGK 4**” is a copy of the Remedial Action Plan of March 2012).

(11) THAT to date, the Petitioner is yet to respond or react to the Remedial Action Plan rendering the petition pre-mature.

(12) THAT the interim Administrator had advised that the Respondent was viable.

(13) THAT the sponsor is taking various urgent actions to restore viability to its business which will generate cash flow, to enable it fulfill its obligations to the Respondent, including:

(a) selling of its non –core assets to generate liquidity to be injected to its business. (Hereto annexed and marked “**EGK 5**” is a bundle containing a resolution by the full board of the sponsor made on 18th February, 2010, letters on approval by the Cabinet and an advert in the Daily Nation of 28th September, 2012 for sale on 25th October, 2012), which intended action as tentatively stopped by the Permanent Secretary Ministry of Agriculture coupled with a Court Order on temporary injunction which was apparently influenced by among others the Petitioner herein hereto annexed and marked “ **EGK 6**”).

(b) cost cutting and seeking cash from Kenya government to assist in financing payments of arrears to pyrethrum farmers.

(14) THAT the Petitioner has demonstrated its opposition to the Sponsor’s efforts to revitalize its financial status by filing a suit in Court (**HCC No. 395 of 2012 Nakuru**) against the sponsor for an Injunction restraining it from selling the non-core assets. (Hereto annexed and marked “ **EGK 7**” is a bundle containing the Complaint, a Court Order and an Affidavit to that effect).

(15) THAT save for lack of support by the Petitioner, the said actions by the sponsor have received broad support including from Kenya government.

(16) THAT the non- core assets intended to be sold by the sponsor constitute a mere 7.5%

of its total assets base.

(17) **THAT** the intended sale of the sponsor's non-core assets is designed to raise about 300 million, which will fill the deficit left out of the sum of Kshs; 200 million that the government had offered to grant to the sponsor and the total working capital of 500 million which is needed by the sponsor will retire debts and enable the sponsor to resume monthly payments to growers and thereby become self-sustaining. (Hereto annexed and marked "EGK 8" is a letter by the sponsor dated 14th June, 2011 and addressed to the Petitioner with the report on the status of the sponsor attached).

(18) **THAT** the sponsor has ascertained that a number of the Respondent's members who are seeking benefits or payments from the Respondent were in fact incorrectly paid large sums of those benefits in 1994 following the winding up of the sponsor's provident fund. (Hereto annexed and marked " EGK 9" is a bundle of documents demonstrating payments of provident fund).

(19) **THAT** whereas the Petitioner herein had promised to recover the said incorrect payments made to the said members in respect to the defunct provident fund scheme, on behalf of, or in favour of the Respondent, the Petitioner is yet to act effectively and/or decisively in spite of several requests and reminders by the Respondent for assistance. (Hereto annexed and marked " EGK 10" is a letter by the Respondent dated 30th May, 2012 addressed to the Petitioner.

(20) **THAT** the correction of the irregular payments to the members can be done by the Petitioner through recovering cash or offset against subsequent benefits claims by the members.

(21) **THAT** the sponsor has stretched its meager resources to fund payment to the Respondent to enable the Respondent make some payments to the valid Claimants, a sign that the sponsor is committed to fulfilling its remedial action plans.

(22) **THAT** conventionally, the best way to serve the interest of all the stakeholders in a business including employees, creditors, upstream and downstream related businesses as well as the owners is to restore viability to the business and that is what the sponsor is doing in the best interest of all the stakeholders and it is only fair that in return, all the stakeholders demonstrate goodwill.

(23) **THAT** the goodwill referred to hereinabove has been demonstrated by the suppliers and the workers to the sponsor. However, it appears that the Petitioner is willing to act only on what it considers as the best interest of the retirees and former employees of the Respondent, to the detriment of the other stakeholders, including the workers, the suppliers and other creditors including Kenya Revenue Authority.

(24) **THAT** there is no nexus between the sponsor's defunct provident fund scheme and the Respondent since no funds were transferred from the former to the latter. (Hereto annexed and marked " EGK 11" is a copy of a letter by R. M. Kuria, a former employee, dated 18th October, 2012 and addressed to the Respondent).

(25) **THAT** the Respondent is a recognized creditor to the sponsor.

(26) **THAT** the actuarial report and findings were based on the wrong premises having apparently been based on the assumption that money from the Provident Fund Scheme had been transferred to the Respondent and further by relying on the Trust deed which contains too generous provisions that have resulted into insufficient contributions to fund the Respondent.

(27) **THAT** it is not true that the scheme is insolvent to the tune of Kshs; 717,288,000.000/= as alleged since the same is informed by inaccurate actuarial assessment report and view.

(28) **THAT** it has not been demonstrated that the sponsor is no longer in active business or that it lacks the potential to be rekindled with a view to sustaining among other stakeholders, the Respondent.

(29) **THAT** it is unfair for the Petitioner to overly be keen to pursue the interest of 41 members of the Respondent at the expense of the other stakeholders who are in the larger majority. (30) **THAT** it is only fair and just that the sponsor be granted more time to enable it stabilize its financial status and address the case of the Respondent among several other creditors, and this can only viably materialize if the Petition is dismissed and the ill-intended winding up of the Respondent stopped by the Honourable Court.

(31) **THAT** the Petitioner has failed to place any material before this Honourable Court to sustain the petition or to justify the oppressive and arbitrary Orders sought for and it is only fair in the wider interest of justice to dismiss the petition with costs.

8. As to paragraph 3 of the Replying Affidavit, the Respondent made an Objection relating to representation. Early on in these proceedings the Respondent through its Trustees objected to the representation of the Petitioner by Messrs Simba and Simba Advocates. That issue was Ruled upon by Hon Havelock J on 30th October 2013. The Objection was dismissed. That issue is now both res judicata and superseded by events. Thereafter, the matter had very slow progress until 2015/2016 when it was heard by this Court.

9. Each of the Parties has filed voluminous Exhibits to the Verifying Affidavit and the Replying Affidavit respectively the Court has read and considered these at length, in particular the reports of the various professionals.

10. The picture that emerges is that the Pyrethrum Board of Kenya Staff Superannuation Scheme was established by a Trust Deed in 1991. In 1997 the Act brought massive changes in the law, with a focus on protection of the members of schemes already in existence and those to be established. The Authority was established under the Act as stated. The Act provided for the Scheme to be registered under and thereafter be regulated by the Authority. The Scheme was registered by the Authority under Certificate No 01296 issued on 5th April 2011. The Deponent of the Verifying Affidavit sets out that it is brought under **Regulation 5 of the Retirement Benefits (Minimum Funding Level and Winding Up of Schemes) Regulations 2000** whereby the Authority is empowered to Petition the Court for the Winding up of the Schemes which it regulates. Such a Petition can be brought when the scheme is in an unsound financial condition, or its funding is below the minimum funding level together with the fact that arrangements by the trustees to improve the condition are ineffective, impracticable or unsatisfactory or there is a breach of Section 28(1)(a) and (c) of the Act. The Petitioner relies upon all of those grounds.

11. The Respondent denies wholesale the grounds and the facts and matters relied upon to justify them as is clearly set out in the Replying Affidavit. They range from the Advocates not being entitled to represent the Board, to the exhibits are illegible. That is surprising since some of them, at least, would have been brought to the Trustees attention in the course of their dealings with the Board and the Scheme. It is also said the reports of the investigators are flawed.

12. It is also said that the Petition is “incompetent and does not meet the threshold for winding up the Respondent at all and that the intended winding up is not just or equitable in the interest of the sponsor or members”. The legal justification for that statement has not been set out clearly. Paragraph 22 expresses an admirable desire to restore viability to the business of the sponsor, again it does not set out how that is to be achieved, either in its remedial plan or otherwise.

13. The Scheme came to the attention of the Authority as long ago as 2005. On 2nd August 2005 the Scheme was placed under Interim Administration. Pursuant to that process the Trustees were removed. The Authority's position is that it had put into place various requirements to remedy the non-compliance with various mandatory provisions. It is said the Trustees failed to respond to these requirements. Administrators were appointed and various reports prepared.

14. At **Exhibit EO 2** there is the Petitioner's Supervision Department's Brief dated 12th June 2012. That report lists the Scheme's History of non-compliance in many areas. The areas listed are:

1. The absence of updated Trust Deed and Rules
2. The Absence of audited accounts since the scheme was established
3. No actuarial valuations carried out; the last valuation was done as at December 2002 and revealed a funding level of 29% against the then acceptable limit of 80%
4. No members' statements had been issued
5. No Trustees meetings were held.
6. The Scheme's accounting and administrative records had not been kept separate from those of the Sponsor.

The Respondent's address set out above demonstrates its proximity with the Sponsor at least physically in the first instance.

15. The consequence of the non-compliance was that the Authority had placed the Scheme under interim administration to remedy the non-compliant status. The Administration was to continue for a period of 12 months and ended on 31st August 2005. A Report was submitted by the Administrators (Kingsland Court Trusts and Benefits Services Ltd) The Report showed that earlier shortcomings had been remedied by the Administrators. These included:

- (1) The preparation of financial statements for the period 1st January 2000 to 30th June 2005;
- (2) Segregation of administration records and procedures covering maintenance of active members' records of pensioners and recipients of dependant benefits updated.
- (3) Monthly contributions remitted to a segregated bank account where benefits and pensions were paid out. Any surplus amount was invested by the appointed fund manager.

16. The Authority also **directed the Trustees** to prepare and file a remedial plan of action in order to improve the funding level of the Scheme, as recommended by the actuary. The Trustees' response was to attempt to engage the Sponsor but the Sponsor did not endorse nor commit to the remedial plan citing low business and inconsistent financial cash flows. As a result of this failure the authority carried out an inspection on 17th June 2011. That established that the financial position of the Sponsor was not improving and the arrears of salary and unremitted contributions suggested it may be deteriorating. A valuation of the scheme showed a deficit of Kshs717,000,000/= which translates to a funding ratio of 2.3% against the expected funding level of 100% (increased from 80%). In addition the analysis was that funding ratio continued to drop and the Scheme had assets of only about Kshs700,000/=. Liquidity was also identified as a weak area with benefits being paid outstripping contributions. This has resulted in pensions in payment having arrears for six months growing at a rate of Kshs2.5million per month. The Sponsor's own difficulties mean that it cannot continue funding the scheme. The Scheme is also in default of pension payments since December 2011. Those Members complained to the Authority. What followed is telling and so I quote directly from page 6 of the Report (page 49 of the Exhibit), *"Members of the Scheme have written to the trustees directing them to pay all the dues owed to the complainants and outstanding pension arrears but the trustees, through their administrator, informed the Authority that*

the Scheme had run short of money and was not in a position to pay until such time as the sponsor resumes funding of the scheme." (Emphasis added). That statement is inconsistent with the Replying Affidavit. The Conclusions and recommendations of the report are that the Scheme is unable to meet its liabilities which are significantly more than its assets. The Petitioner has mooted several possibilities for recovery including Government support for the Sponsor and/or transfer of non-core assets to the Scheme. A further alternative was winding up and setting up a new scheme. The recommendation based on that analysis was a reluctant recommendation to wind up the scheme pursuant to the provisions of **Regulation 5 of the Retirement Benefits (Minimum Level and Winding Up of Schemes) Regulations 2000** on the basis that the Scheme is not in a sound financial condition, far below the level of minimum funding. The recommendations are also critical of the Trustees where they say "that arrangements by the trustees to improve the scheme's condition are demonstrably ineffective impracticable and unsatisfactory to improve the scheme's position".

17. The requirement for funding levels is set out in Rule 4 of the 2000 Rules, as follows:

4. Minimum funding level of the scheme

(1) A scheme fund shall be deemed to be below the minimum funding level if—

(a) in the case of an occupational retirement benefits scheme—

(i) the assets of the scheme are less than one hundred per centum of the value of the accrued liabilities of the scheme;

(ii) the scheme is unable to meet liabilities as and when they fall due; or

(b) in the case of an individual retirement benefits scheme, the scheme is unable to meet its liabilities as and when they fall due.

(2) Where the Authority is of the opinion that a scheme fund is below the minimum funding level, the Authority shall direct such scheme to submit an actuarial valuation report together with a remedial plan within thirty days from the date of such direction, setting out the arrangements intended to eliminate the deficiency in the scheme fund.

(3) Where the Authority finds that a remedial plan submitted in accordance with paragraph (2) is consistent with the provisions of the Act and the regulations made thereunder, and it is satisfied that the arrangements set out therein shall raise the funding level of the scheme in accordance with this regulation, it may approve the remedial plan.

(4) Where the Authority is not satisfied that the remedial plan submitted in accordance with paragraph (2) shall raise the funding level of a scheme in accordance with this regulation, it may appoint an interim administrator to manage the scheme in accordance with the provisions of section 45 of the Act, or direct the scheme to amend the remedial plan or submit a new remedial plan within thirty days from the date of such direction, and such amendment or new remedial plan shall be accompanied by an actuarial report in respect of the amendment or new remedial plan.

18. The Report bringing to the attention of the Board (and Trustees) the inadequate funding levels is based on the work of other professional, for example the Actuarial valuation as at 31 December 2004 concluded that the "Actuarial valuation has disclosed a significant past service actuarial deficit of KShs388.67m. The level of funding (ie the ratio of the value of the assets to the past service liability is 24.9%. That was a reduction from the 2002 valuation of 29.7%). The purpose of that report was to assess solvency. Previous recommendations on funding levels or contribution rates were not met. The minimum funding requirement of 80% is contained in the *Retirement Benefits Regulations 2000*. It is a level set by subsidiary legislation and not something left to the discretion of the Authority and/or its officers. That triggered the need to submit a remedial plan several years ago. There is also the further Affidavit of Mr. Maruti sworn on 15th September 2015 exhibiting the Actuarial Report for the Scheme as

at 31st December 2014. Section 8 of the ~Report sets out the considerations for winding up. I have considered that and do not accept the basis of the founder ceasing contributions. That is not the case here

19. The Scheme was eventually registered in April 2011 after meeting the registration requirements however, by June 2011 the Minutes of a Meeting between the Authority, the Trustees (**Exhibit EOO**), the Sponsor and the Pensioners elicited the conclusion that the situation was "deplorable". The number of pensioners had increased - as would be expected with the passage of time. Coupled with redundancies at the Sponsor, that meant there were fewer members contributing. There were debts in the form of benefit payments outstanding and liabilities due to combination of membership changes and actual experience. One of the causes of this deterioration was identified as poor investment decisions.

20. The Verifying Affidavit also exhibits the Report of the Actuarial Valuation dated 30th June 2011. The Schedule shows it was received by the Chairperson of the Trustees who is also the Deponent who is not complaining the documents are not legible, on 28th November 2011.

21. As stated above, the Respondent Scheme through its Trustees is opposing the Petition. The Terms of the Replying Affidavit are set out above in the interests of presenting a more complete record. These can be summarised in the following list of Grounds:

- (1) The Petition is incompetent and does not meet the threshold for winding up
- (2) That a winding up is not just or equitable in the interest of the sponsor or members
- (3) That the Sponsor is a going concern with 176 members who are active members (it is not said these members actually support continuation of the Scheme). The Respondent does not set out how many members they are in payment apart from the 41 who sued the Scheme and won.
- (4) The Petition is *"skewed in favour of the Pensioners and the deferred members to the detriment of the active members and the Respondent."* No details are provided.
- (5) That the Respondent submitted a Remedial Action Plan (dated March 2012) and the Petitioner has not responded to it. It seems the Petition is a response.
- (6) The Interim Administrator advised the Respondent was viable. That statement does not explain whether viable is intended to mean the same as "solvent". The source of that comment is also not identified.
- (7) The Sponsor has put in place remedial action to restore viability. Such remedial action was opposed by the Authority and prevented by Court injunction eg selling non-core assets. The only order exhibited is temporary.
- (8) Overpayments were made in 1994 following the winding up of the Sponsors Provident Fund. At paragraph 20 it is alleged that it is possible to make corrections of this overpayment. The Affidavit is dated 29th October 2012 which is about 18 years late. That comment in an Affidavit sworn on oath suggests either a willingness to mislead or a complete misunderstanding of the issues that concern the Authority. The Deponent then goes on to say that there is no nexus between the winding up of the Provident Fund and the Respondent.
- (9) The Respondent is a creditor of the Sponsor. That comment also ignores or misses the point as to the terms of the Trust Deed, whereby the Sponsor can withdraw at any time.
- (10) The Scheme is not insolvent, the Actuarial assessment is incorrect. No alternative valuation has been put before the Court.
- (11) The Sponsor should be given more time to remedy the situation. That shows a failure to understand that this Petition and the concerns have been going on for several years already.

22. The Parties have filed Written Submissions and made oral submissions to the Court. All these have been considered and taken into account and form part of the Court Record and so are not repeated here. The Court has a wide discretion. The Court must be satisfied firstly that the Respondent is insolvent. That is apparent and clear from the Reports of the Auditors and Actuaries. The assets and in particular contributions have been diminishing over the years. The Trustees have not put forward a viable recovery/remedial plan. Suing long after the limitation period has lapsed is not a solution at all never mind a viable one. Further, prevailing upon a sponsor that is itself in financial straits and in need of Government backing is not a viable long term solution. There is no definitive statement before this Court from the sponsor setting out that it is willing and able to take on that responsibility.

23. The Petition is brought under *(Pursuant to Section 5b & 11 (4) of the Retirement Benefits Act, Regulation 5 (2) (a) & (3) of the Retirement Benefits (Minimum Funding Level and Winding - Up of Schemes) Regulations, 2000 and Rule 5 (a) of the High Court (Winding Up) Rules and all enabling provisions of the Law)*.

24. The Court also takes guidance of the law relating to insolvency in force at the time, namely the Companies Act Cap 486 Laws of Kenya, Section 218 et seq of ***the Companies Act (Cap 485)***. It provides: **Section 218:**

“The High Court shall have jurisdiction to wind up any company registered in Kenya”

Section 219:

A company may be wound up by the court if–

(a) the company has by special resolution resolved that the company be wound up by the court;

(b) default is made in delivering the statutory report to the registrar or in holding the statutory meeting;

(c) the company does not commence its business within a year from its incorporation or suspends its business for a whole year;

d)below two, or, in the case of any other company, below seven;

(e) the company is unable to pay its debts;

(f) the court is of opinion that it is just and equitable that the company should be wound up,
.....

Section 220(a):

A company shall be deemed to be unable to pay its debts–

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one thousand shillings then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

25. **Regulation 5 of Winding Up Rules etc 2000** provides:

5. Winding-up of scheme

(1) A scheme shall not be de-registered unless the winding-up process has been determined subsequent to a final actuarial valuation done on a winding up basis and the benefits of all members

transferred to other schemes to purchase a retirement benefit.

(2) 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;

the Authority, subject to section 28(2) of the Act, may apply to the court for an order to wind up the scheme.

(3)The court may make an order in accordance with paragraph (2), subject to the provisions contained in paragraphs (4) to (10).

(4) The provisions of the Companies Act shall apply mutatis mutandis to the winding up of a scheme under this regulation, in so far as he said provisions refer to the winding up by the court in terms of the Companies Act, and in so far as the said provisions are applicable and not inconsistent with the Act and the regulations made thereunder.

(5)The Authority shall have the right to be heard in all petitions for winding-up of a scheme.

(6)The court may direct that the provisions of the Companies Act (Cap. 486) referred to in paragraph (4) may, for the purposes of the winding-up of a scheme be suitably modified in any particular case if the court is satisfied that having regard to the circumstances of the scheme concerned, it would be impracticable or onerous to comply

CAP. 197 Retirement Benefits

26. Bearing in mind the size of the deficit and the rate at which it is growing, the Scheme could be unable to pay its debts. Add to that the fact that there are substantial arrears of payment, it is clear that the Scheme is de facto unable to pay its debts and therefore insolvent. On the question of whether it is just and equitable, the first question to ask must be, Is the Respondent fulfilling its function, that is, principally, to pay the pensions in receipt. It is common ground between the Parties that there are arrears due to the members and dependants who are being paid and at least 41 pensioners have not received anything at all despite the decision of the Authority on that matter. That raises real concerns that current contributories, and future pensioners are at risk of suffering the same fate.

27. In addition, there is the question of statutory regulation. It is also clear from the evidence before the Court that apart from the period when the Respondent was under interim receivership, the Trustees have not demonstrated any willingness to assure or even attempt compliance with the Regulations whether as to financial viability or management or meeting obligations. The criticism of the Authority in the terms set out in the Replying Affidavit is demonstrative of an unwillingness to recognise shortcomings and need for remedies for in the short term and the long term. Regulation of the industry is necessary given the position of trust that the Scheme has in relation to the contributions drawn from salaries of the workers at the Sponsor. It is not a gift to be squandered.

28. In the circumstances, the Petition is allowed. As to Costs each Party to bear its own costs. The Authority because bringing these proceedings is part of its function and role. The Trustees should bear their own costs collectively. It is also ordered that ALL proceeds recovered from the Winding Up of the Scheme shall be shared equally between the current members whether pensioners in receipt or contributories.

29. The Court would expect the Authority to also advise those members on how best to invest their funds so as to obtain the best returns during retirement whether individually or collectively.

30. As to the appointment of a Liquidator. That decision is premature at this stage. The Court would need to hear further submissions as to the who should be appointed and why that is the best person for the job. The Court is disinclined to make the Order sought on the evidence currently before it due to his proximity to the disputes. It may be that in the circumstances of this case, a more independent liquidator is more appropriate.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED and DELIVERED AT NAIROBI THIS 1st day of December 2016

In the Presence of:

Isaiah Otieno – Court Assistant

Mr Orege – Respondent

Ms Matasi - Petitioner