

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. E463 OF 2025**

IN THE MATTER OF ARTICLES 10, 27, 47, 53 & 159 OF THE CONSTITUTION  
AND

IN THE MATTER OF SECTION 36A OF THE RETIREMENT BENEFITS ACT, CAP  
197

IN THE MATTER OF A DECISION OF THE RETIREMENT BENEFITS APPEALS  
TRIBUNAL DELIVERED ON 19TH DECEMBER 2024 IN CIVIL APPEAL NO. 7 OF  
2024

BETWEEN

**EVALINE ATIENO ONDIEK (suing as next friend and guardian of minors**

**J.Y AND F.A .....  
PETITIONER**

AND

**THE RETIREMENT BENEFITS APPEALS TRIBUNAL ..... 1<sup>ST</sup>  
RESPONDENT**

**KENYATTA UNIVERSITY STAFF**

**RETIREMENT BENEFITS SCHEME ..... 2<sup>ND</sup> RESPONDENT**

AND

YUKIE SAITO ROMBO ..... 1<sup>ST</sup> INTERESTED  
PARTY

RETIREMENT BENEFITS AUTHORITY ..... 2<sup>ND</sup> INTERESTED  
PARTY

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**RULING**

*(On the 1<sup>st</sup> Interested Party’s Preliminary Objection dated 18<sup>th</sup> August, 2025)*

**PETITIONER’S CASE**

1. The Petitioner, Evaline Atieno Ondiek, has moved this Court by way of a Petition dated 21<sup>st</sup> July 2025 and a Notice of Motion of even date, supported by an affidavit sworn on 22<sup>nd</sup> July 2025, seeking, inter alia, the following reliefs:

***(a) Spent***

***(b) That, pending the hearing and determination of this application, a conservatory order be issued restraining the 2<sup>nd</sup> Respondent, the Kenyatta University Staff Retirement Benefits Scheme, from releasing or transferring the 40% portion of the retirement benefits of the late Dr. George Omollo Rombo;***

***(c) That, in the alternative, pending the hearing and determination of this application, a conservatory order be issued restraining the 2<sup>nd</sup> Respondent from releasing or transferring the 40% portion of the retirement benefits of the late Dr. George Omollo Rombo currently held in trust for the minors, J.Y. and F.A.;***

***(d) That, pending the hearing and determination of the substantive Petition, a conservatory order be issued restraining the 2<sup>nd</sup> Respondent from releasing or transferring the retirement benefits of the late Dr. George Omollo Rombo, or the 40% portion currently held in trust for the minors, J.Y. and F.A.; and***

***(e) That this Honourable Court be pleased to grant any other orders it may deem fit in the circumstances.***

2. The Petitioner brings this application in her capacity as the legal guardian and next friend of the minors, who are alleged beneficiaries of a trust fund established pursuant to a resolution of the Scheme's Board of Trustees. She contends that the impugned decision of the Retirement Benefits Appeals Tribunal delivered on 19<sup>th</sup> December 2024 in Civil Appeal No. 7 of 2024, which set aside the said trust and directed that the entire retirement benefits be paid to the 1<sup>st</sup> Interested Party, Yukie Saito Rombo, is unconstitutional, unlawful, and prejudicial to the best interests of the minors.
3. It is contended that upon the death of Dr. Rombo on 17<sup>th</sup> October 2016, and in the absence of a completed nominee form, the Scheme lawfully conducted an inquiry under Section 36A of the Retirement Benefits Act, verified the minors' dependency, and resolved to allocate 40% of the benefits to a trust fund established for their education, health, and upkeep, with 60% allocated to the 1<sup>st</sup> Interested Party as widow. The said determination was communicated to and implemented by the Scheme, resulting in the creation of the trust fund from which the minors have since benefitted. However,

following the death of their mother, Rose Akinyi, in November 2017, the Petitioner assumed full guardianship of the minors.

4. Subsequently, the 1<sup>st</sup> Interested Party challenged the allocation before the Retirement Benefits Authority, which upheld the minors' entitlement by a decision dated 4<sup>th</sup> July 2024. Dissatisfied, she lodged an appeal before the Tribunal, which overturned the Authority's decision and directed the release of the entire fund to her. The Tribunal is said to have relied exclusively on the findings of the Succession Court in Nairobi Succession Cause No. 257 of 2017, which had found that the minors were not dependents of the deceased, basing its reasoning on Section 12 of the Births and Deaths Registration Act a provision that was subsequently declared unconstitutional in ***L N W v Attorney General & Registrar of Births and Deaths [2021] eKLR***.
5. The Petitioner asserts that the Tribunal abdicated its statutory duty to independently determine dependency under Section 36A of the Act and unlawfully imported findings from the succession proceedings, contrary to the settled principle that retirement benefits do not form part of the deceased's estate and are to be distributed independently of succession proceedings. It is contended that by doing so, the Tribunal acted ultra vires, undermined its autonomy as a statutory body, and violated the constitutional principles of separation of powers.
6. The Petitioner contends that the enforcement of the Tribunal's decision will occasion irreparable harm to the minors, who risk immediate deprivation of educational, medical, and welfare support. She averred that the minors currently face exclusion from school due to unpaid fees and that one of

them, J.Y., was unable to sit for his KCSE examinations as a result of the ongoing financial hardship. She emphasizes that the trust fund also meets statutory health insurance contributions and other basic needs, which she, being unemployed and supporting her own family, cannot sustain independently.

7. It is argued that the Tribunal's conduct and decision violate the minors' rights under Articles 27, 43(1)(f), 47, and 53 of the Constitution, particularly their rights to equality, social security, fair administrative action, and the paramountcy of the best interests of the child. The Petitioner maintains that the impugned decision, being predicated on a repealed and unconstitutional statutory provision, is null and void ab initio, and its execution would render the pending Petition nugatory.
8. In urging the Court to grant the conservatory orders sought, the Petitioner contends that the matter discloses an arguable constitutional issue and raises weighty questions regarding the legality of the Tribunal's decision-making process. She further contends that unless urgent relief is granted, the minors' rights will be rendered illusory through the depletion of the trust fund, and that it is in the interest of justice, equity, and constitutional fidelity that the Court intervenes to preserve the status quo and safeguard the minors' fundamental rights pending the hearing and determination of the Petition

## **THE 1<sup>ST</sup> INTERESTED PARTY'S CASE**

9. The 1<sup>st</sup> Interested Party, Yukie Saito Rombo, filed a Notice of Preliminary Objection opposing the Petitioner's Constitutional Petition and Notice of Motion Application, both dated 21<sup>st</sup> July 2025, seeking the striking out of the entire suit with costs. The objection is premised on the grounds that the Petition is *res judicata*, that this Honourable Court lacks jurisdiction, and that the proceedings amount to an abuse of the court process.
  
10. It is contended that the matters raised in the instant Petition have already been heard and conclusively determined by courts of competent jurisdiction. Specifically, the 1<sup>st</sup> Interested Party asserts that the same issues were the subject of determination in ***Judicial Review Application No. E005 of 2025 Kenyatta University Staff Retirement Benefits Scheme v Retirement Benefits Appeals Tribunal, Saito Yukie Rombo and another***, in which the court rendered judgment on 17<sup>th</sup> June 2025, addressing the legality of the decision of the Retirement Benefits Appeals Tribunal dated 19<sup>th</sup> December 2024 in **Civil Appeal No. 7 of 2024**.
  
11. It is further argued that the question of who constitutes the lawful wife, children, and dependants of the late Dr. George Omollo Rombo was conclusively determined by the High Court in ***Milimani High Court Succession Cause No. 257 of 2017 In the Matter of the Estate of George Omollo Rombo (Deceased)***, and that no appeal has been preferred against that judgment.
  
12. The 1<sup>st</sup> Interested Party further averred that under Sections 36A, 48 and 49 of the Retirement Benefits Act, this Court lacks jurisdiction to entertain the

Petition, the subject matter of which properly falls within the statutory framework of the Retirement Benefits Authority and the Retirement Benefits Appeals Tribunal. It is contended that the Petitioner's attempt to invoke Article 165 of the Constitution amounts to an impermissible collateral appeal disguised as a constitutional petition, seeking to reopen and challenge findings already adjudicated upon by competent judicial and quasi-judicial bodies.

13. The 1<sup>st</sup> Interested Party maintains that the instant proceedings constitute a frivolous appeal against three binding determinations namely, the judgment of Justice Maureen Odero delivered on 17<sup>th</sup> November 2023 in Succession Cause No. 257 of 2017, the decision of the Retirement Benefits Appeals Tribunal delivered on 19<sup>th</sup> December 2024 in Civil Appeal No. 7 of 2024, and the judgment of Justice Chigiti (SC) delivered on 17<sup>th</sup> June 2025 in Judicial Review Application No. E005 of 2025. The objection asserts that the Petition improperly seeks to relitigate issues conclusively settled by these decisions and is therefore res judicata, an abuse of the process of this Honourable Court, and devoid of merit.
14. The application was canvassed by way of written submissions.

### **PETITIONER'S SUBMISSIONS**

15. The Petitioner opposed the Preliminary Objection relying on the established principle in *Mukisa Biscuit Manufacturing Co. Ltd -v- West End Distributors*

*Ltd (1969) EA 696* where Law J.A. held that a preliminary objection must raise a pure point of law, argued on the assumption that all facts pleaded by the opposite party are correct. This position was reiterated in ***Omwoyo v Attorney General & 4 Others [2024] KEHC 7511*** where the Court emphasized that a preliminary objection cannot lie where the court is required to exercise discretion or evaluate evidence. It was the Petitioner's contention that the issues raised by the 1<sup>st</sup> Interested Party touching on the 1<sup>st</sup> Respondent's statutory mandate under Section 36A of the Retirement Benefits Act, the alleged reliance by the Succession Court on an unconstitutional law, and the purported violation of minors' constitutional rights necessitate factual inquiry and constitutional interpretation. The Petitioner therefore argued that the Preliminary Objection fails the ***Mukisa Biscuit*** threshold, as it invites the Court into a fact-finding exercise.

16. It is submitted that under Article 165(3)(b), (d) and (6) of the Constitution, this Court has jurisdiction to determine alleged violations of fundamental rights, to interpret the Constitution, and to exercise supervisory jurisdiction over subordinate courts and tribunals. Reliance was placed on ***Board of Governors, Moi High School Kabarak v Malcolm Bell [2013] eKLR***, where the Supreme Court underscored that jurisdiction flows from the Constitution and must be interpreted purposively. According to the Petitioner, the Petition raises a legitimate constitutional question concerning the 1<sup>st</sup> Respondent's abdication of its statutory duty under the Retirement Benefits Act and reliance on a succession judgment grounded in a law declared unconstitutional in ***L.N.W. v Attorney General [2021] eKLR***, thereby

warranting constitutional scrutiny rather than dismissal at the preliminary stage.

17. On res judicata, the Petitioner submitted that the doctrine is inapplicable as the present proceedings involve neither the same parties nor the same issues as those previously determined. Reliance is placed on ***Kibos Distillers Ltd & 4 Others v Benson Ambuti Adegga & 3 Others [2020] eKLR (Supreme Court Petition No. 3 of 2019 consolidated with Petitions 4 & 5 of 2019)***, where the Supreme Court cautioned against the mechanical application of *res judicata* in constitutional litigation, observing that to do so could undermine the enforcement of the Constitution. It was submitted that the earlier Judicial Review proceedings in the Judicial Review court were confined to procedural review and did not address constitutional questions or the rights of minors, while the Succession Cause, relied on by the 1<sup>st</sup> Respondent, was rendered under a statutory provision already declared unconstitutional. Citing ***Republic v Public Procurement Administrative Review Board & 2 Others ex parte Rongo University & Another [2018] eKLR***, the Petitioner maintained that a body vested with jurisdiction must exercise its mandate independently and not merely adopt another forum's decision. Consequently, a decision rooted in an illegality or nullity could not ground res judicata.
18. The Petitioner invoked Section 9(4) of the Fair Administrative Action Act, which permits direct recourse to the High Court where exceptional circumstances exist or alternative remedies are inadequate. Reliance was placed on ***Republic v Were & 2 Others; Makhanu & 8 Others [2024]***, to

argue that exhaustion is not absolute where constitutional issues or ineffective remedies are involved. It was contended that the instant Petition raises exceptional matters specifically, violations of minors' rights and the 1<sup>st</sup> Respondent's ultra vires conduct thus justifying direct constitutional recourse.

19. On the question of the minors' welfare, the Petitioner invoked Article 53(2) of the Constitution, which makes a child's best interests of paramount importance, citing *J.O. (suing as next friend of S.O.O.) v S.A.O. & Another [2016] eKLR and Z.N. v F.B. [2024] KEMC 79*, to argue that constitutional and procedural principles must yield to the paramountcy of children's welfare. It was submitted that dismissing the Petition at a preliminary stage would undermine minors' rights to education, healthcare, and sustenance.
  
20. The Petitioner urged that the Preliminary Objection does not raise a pure point of law, that this Court retains jurisdiction to hear and determine constitutional questions arising from the actions of statutory tribunals, and that res judicata cannot apply to nullities or to bar the enforcement of continuing constitutional violations. The Petitioner emphasized that public policy and Article 53 of the Constitution oblige the Court to prioritize substantive justice over procedural technicalities and accordingly prayed that the Preliminary Objection be dismissed with costs and that the Petition proceed to hearing on the merits.

## **1<sup>ST</sup> INTERESTED PARTY'S SUBMISSIONS**

21. Relying on the leading authority of ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) E.A.***, the 1<sup>st</sup> Interested Party submits that a preliminary objection must be founded on a pure point of law, to be determined on the presumption that all facts as pleaded by the opposing party are correct, and that such an objection is inapplicable where factual issues must be established or judicial discretion exercised. The 1<sup>st</sup> Interested Party's asserts that the present objection satisfies this legal threshold, as it raises pure points of law on *res judicata* and jurisdiction, which, if upheld, would conclusively dispose of the entire Petition at the outset.
22. It is submitted that the substratum of the present Petition and Application emanates from the judgment of the Retirement Benefits Appeals Tribunal (RBAT) delivered on 19<sup>th</sup> December 2024 in ***RBAT Civil Appeal No. 7 of 2024 Saito Yukie Rombo v Retirement Benefits Authority & Kenyatta University Staff Retirement Benefits Scheme***, which has already been the subject of judicial determination. Following that decision, the 2<sup>nd</sup> Respondent instituted ***Milimani Judicial Review Application No. E005 of 2025 Kenyatta University Staff Retirement Benefits Scheme v Retirement Benefits Appeals Tribunal, Saito Yukie Rombo and another***, seeking, inter alia, orders of certiorari to quash the Tribunal's decision and prohibition restraining implementation of the same. The Judicial Review Application was, however, dismissed on 17<sup>th</sup> June 2025, and its judgment the court held at paragraph 78 of the judgment that the Tribunal's appeal process had followed the correct procedure, and further at paragraph 82, that to grant the orders sought would be tantamount to the Court sitting on appeal over the judgment of the high court delivered on 17<sup>th</sup> November 2023 in ***Milimani High Court Succession***

***Cause No. 257 of 2017 In the Matter of the Estate of George Omollo Rombo (Deceased).***

23. The 1<sup>st</sup> Interested Party emphasized that Milimani Succession case, the court conclusively determined that the two minors, J.Y. and F.A., were not dependants or beneficiaries of the deceased within the meaning of Section 29 of the Law of Succession Act, as expressly stated at paragraph 77 of that decision. It is asserted that the minors were duly represented in the said succession proceedings, and no appeal has ever been lodged against that finding. Accordingly, the present Petition, which challenges the implementation of those same decisions, is *res judicata*, contrary to the well-established principle that litigation must come to an end.
24. It is further submitted that by seeking to reopen the findings of by the two High Court decisions, the Petitioner is effectively inviting this Court to sit on appeal against decisions of a court of concurrent jurisdiction, in violation of Articles 164 and 165 of the Constitution of Kenya. Reliance is placed on the Court of Appeal decision in ***Bellevue Development Company Ltd v Hon. Mr. Justice Francis Gikonyo & 7 others (Civil Appeal No. 239 of 2018)***, where it was held that judges of concurrent jurisdiction do not possess supervisory authority over each other and that the High Court cannot superintend or review the decisions of other High Court judges.
25. The 1<sup>st</sup> Interested Party also challenges this Court's jurisdiction under the Retirement Benefits Act, citing Sections 36A, 48, and 49, which provide a complete statutory framework for the determination of disputes relating to pension and retirement benefits. It is argued that any challenge to the

decision of the Retirement Benefits Appeals Tribunal constitutes an appeal disguised as a constitutional petition, contrary to the clear procedure set out under the Act. Reliance is placed in ***Speaker of the National Assembly v James Njenga Karume (Civil Application No. 92 of 1992)***, where the Court of Appeal held that where the law provides a specific procedure for redress, that procedure must be strictly adhered to.

26. Further reliance is placed on the Court of Appeal decision in ***Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & another v Ann Wangui Ngugi & 524 others [2018] KECA 710 (KLR)***, which affirmed that there exists no right of appeal from the Retirement Benefits Appeals Tribunal to the High Court or the Employment and Labour Relations Court, and that such jurisdiction cannot be implied or inferred.
27. It is submitted that the Petition and accompanying application are incompetent, frivolous, and an abuse of the process of court, being a veiled appeal against decisions already conclusively determined by competent for a and the it is urged that the entire Petition be struck out with costs, as it is *res judicata*, the Court lacks jurisdiction to entertain it, and it offends the principle of finality in litigation.

## **ANALYSIS AND ISSUES FOR DETERMINATION**

28. I have carefully considered the 1<sup>st</sup> Interested Party's Preliminary Objection together with the written submissions of all parties. The core issue for determination is whether the Preliminary Objection meets the threshold of a

pure point of law as set out in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696***, and whether this Court has jurisdiction to entertain the instant Petition in view of previous determinations rendered by courts of concurrent jurisdiction.

29. In ***Mukisa Biscuit (supra)***, Law J.A. held that a preliminary objection consists of a pure point of law which is argued on the assumption that the facts pleaded by the other side are correct, and that it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. This principle was reaffirmed in ***Omwoyo v Attorney General & 4 Others [2024] KEHC 7511*** where the Court noted that a preliminary objection would not lie where determination of disputed facts or the exercise of discretion is required.
30. Applying those principles to the matter before me, the substratum of the Petition and the attendant application challenges determinations already rendered by competent courts of concurrent jurisdiction specifically, the decision of Lady Justice Maureen Odero in ***Milimani High Court Succession Cause No. 257 of 2017 In the Matter of the Estate of George Omolo Rombo (Deceased)***, and that of Justice Chigiti in ***Judicial Review Application No. E005 of 2025, Kenyatta University Staff Retirement Benefits Scheme v Retirement Benefits Appeals Tribunal, Saito Yukie Rombo and another***. The Petitioner's contention, although framed as a constitutional grievance, in essence invites this Court to interrogate and pronounce upon findings already made in those judgments.

31. It is settled law that the High Court, being a court of coordinate jurisdiction, cannot sit on appeal over or purport to review decisions of fellow judges of the same court. This position was clearly enunciated in ***Bellevue Development Company Ltd v Hon. Mr. Justice Francis Gikonyo & 7 Others (Civil Appeal No. 239 of 2018) [2018] eKLR***, where the Court of Appeal stated that judges of concurrent jurisdiction do not possess supervisory authority over each other, and that the proper recourse against a decision of the High Court lies in an appeal to the Court of Appeal. Similarly, in ***The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1***, Nyarangi J.A. famously held that jurisdiction is everything, and that a court acting without jurisdiction must down its tools.
32. The Petitioner's contention that the present Petition raises novel constitutional questions does not, with respect, cure the fundamental jurisdictional infirmity. The remedies sought are inextricably bound to the findings and determinations already rendered by courts of concurrent jurisdiction. Any pronouncement by this Court on those matters would, in substance, amount to sitting on appeal over, or reviewing the propriety of, decisions of courts of equal status. Such an approach would not only offend the doctrine of judicial hierarchy but would equally erode the principle of finality in litigation, a principle that is indispensable to the orderly administration of justice.
33. While this Court appreciates the invocation of Articles 22, 23, and 165 of the Constitution, as well as the argument that constitutional petitions must not be barred by procedural technicalities, jurisdiction remains the primary

gateway to the exercise of judicial authority. Where jurisdiction is lacking, the Court has no option but to decline to proceed, irrespective of the perceived merits or urgency of the matter. The Court also notes that the Petition arises from a chain of decisions culminating in judgments already pronounced by competent courts, and as such, the issues are *res judicata* in terms of section 7 of the Civil Procedure Act, Cap 21.

34. In the premises, I find and hold that the Preliminary Objection raises a pure point of law going to the jurisdiction of this Court. Having found that this Court lacks jurisdiction to sit on appeal or to review the decisions of courts of equal status, it follows that the Petition and the accompanying Application are incompetent.

35. Accordingly, this court issues the following orders:

- a) **the Preliminary Objection dated 18<sup>th</sup> August, 2025 is hereby upheld.**
- b) **The Constitutional Petition and the attendant Notice of Motion are struck out for want of jurisdiction.**
- c) **Each Party to bear its own costs, in the interests of justice.**

Orders Accordingly.

File closed accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4<sup>TH</sup> DAY OF DECEMBER 2025.**

**BAHATI MWAMUYE MBS**

**JUDGE**

In the presence of: -

Counsel for the Petitioner – Mr. Ebwoyele h/b Mr. Kimiti

Counsel for the 1<sup>st</sup> Interested Party – Mr. Manyose h/b Mr. Juma

Counsel for the 2<sup>nd</sup> Interested Party - Mr. Moengu h/b Ms. Kosgei

Court Assistant – Ms. Lwambia