



Association of Retirement Benefits Schemes v Attorney General & 3 others (Civil Application Sup E007 of 2022) [2024] KECA 286 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KECA 286 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION SUP E007 OF 2022
SG KAIRU, F TUIYOTT & JW LESSIT, JJA
MARCH 8, 2024**

BETWEEN

ASSOCIATION OF RETIREMENT BENEFITS SCHEMES APPLICANT

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

CABINET SECRETARY FOR THE NATIONAL TREASURY 2ND RESPONDENT

RETIREMENT BENEFITS AUTHORITY 3RD RESPONDENT

PUBLIC PROCUREMENT REGULATORY AUTHORITY 4TH RESPONDENT

(An application for certification to Appeal to the Supreme Court from the Judgement of the Court of Appeal at Mombasa (W. Karanja, Asike-Makhandia & Laibuta, JJ. A) delivered on 28th April 2022 in Civil Appeal No 283 of 2017.)

RULING

1. By a Notice of Motion dated 8th July 2022 brought under Article 163(4) (b) of *the Constitution* of Kenya, Rule 42 of the *Court of Appeal Rules* 2010, section 3A of the *Court of Appeal Practice Directions - Civil Appeals and Applications* 2015, the Association of Retirement Benefits Schemes, the applicant seeks:
 1. That pending the hearing and determination of the intended Appeal, an Order be and is hereby issued staying the enforcement of the provisions, procedures and/or regulatory compliance requirements or attendant processes as enshrined in the Public Procurement and Disposal Act and pursuant subsidiary legislation, regulations or directions on the applicant and pensions schemes of public entities; and,
 2. That this matter be and is hereby certified as raising points of law of general public importance, fit for appeal to the Supreme Court.



2. The background of the case is that the applicant is an association of stakeholders in the retirement benefits industry in Kenya, whose membership includes retirement benefit schemes, employers and service providers. In a petition dated 28th April 2016, the applicant approached the High Court claiming that the application of the [Public Procurement and Asset Disposal Act](#), 2015 (hereinafter ‘the Act’), upon it, by virtue of section 2(o), which defines public entities as including “a pension fund for a public entity” was discriminatory.
3. It contended that under the Act, the pension funds of public entities are denied the right to freedom of contract as envisaged under Article 19(2) of [the Constitution](#), and that their rights under Article 40 have been severally and unconstitutionally restricted. According to the applicant, the pension funds of public entities have been discriminated against contrary to Article 27 in so far as the respondents have failed to apply the public procurement laws equally to the applicant’s competitors.
4. The 4th respondent, the Retirement Benefits Authority, supported the petition and filed its replying affidavit sworn by Dr. Edward Odundo, the 4th respondent’s Chief Executive Officer, on 7th June 2016. According to him, a pension fund established by a public entity under the provisions of the Retirement Benefits Act}} is not a commission, office, agency or other body established under [the Constitution](#). The 4th respondent contended that a pension fund established by a public entity pursuant to the Act is neither an entity created by statute, used for government purposes, performing functions on behalf of the State nor controlled by the government.
5. The applicants petitioned the High Court for the following orders:
 - a. a declaration that section 2 (o) of the [Public Procurement and Asset Disposal Act](#), 2015 (hereinafter referred to as “the Act”) is unconstitutional and, therefore, null and void to the extent of its inconsistency with [the Constitution](#);
 - b. a declaration that section 2(o) of the Act is invalid as it infringes on the pension funds of public entities right to property and freedom of equality;
 - c. a declaration that the pension funds of public entities basic rights as well as constitutionally guaranteed rights and freedoms have been violated; and
 - d. costs of the petition.
6. The learned Judge of the High Court delivered his judgment on 9th March 2017, dismissing the applicant’s petition with costs to the respondents. Aggrieved by the judgment and decree of the High Court (J. Mativo, J. as he then was), the applicant filed its appeal to the Court of Appeal and raised 9 grounds to challenge it. This Court considered two issues that it felt would dispose the appeal; that is,
 1. whether the applicant is a public entity; and
 2. whether section 2 (o) of the Public Procurement and Disposal Act is unconstitutional, or in violation of the applicant’s constitutional rights as alleged.
7. After considering the appeal and the rival arguments of the parties, this Court, differently constituted dismissed the appeal, finding, *inter alia*;
 - i. “The applicant and all retirement benefits schemes are public bodies or entities established to perform functions of a public nature in so far as their membership is not exclusive or restricted to private schemes;
 - ii. That the phrase “public entity” in Article 227 of [the Constitution](#) should receive an extended meaning and not the restricted interpretation ascribed to “public office” or “public officers”



under Article 260 of *the Constitution* and should include statutory bodies, parastatals, bodies established by statute but managed and maintained privately, such as universities and professional societies, all bodies financially supported by the State and operating in close cooperation with State authorities and also any private bodies fulfilling key functions under state supervision. Thus the regulation of the public entities was not discriminatory;

- iii. That the application of the Act to the applicant and all retirement benefits schemes is not discriminatory or in breach of Article 27 of *the Constitution*, but serves to promote good governance.”
8. Aggrieved by the judgment of this Court, the applicant now seeks certification that the appeal raises points of law of general public importance, fit for appeal to the Supreme Court.
9. The Notice of Motion is premised on grounds on the face of the Motion and in the supporting affidavit sworn by Mr. Simon Nyakundi, Chairperson of the applicant, which we summarize as hereunder. The Court of Appeal judgment is challenged as follows:
 - a. Has the effect of irregularly, illegitimately and unceremoniously enlarging the definition of the term “public entity” for purposes of Article 227 of *the Constitution* and thereby creating uncertainty in law;
 - b. Advertently contradicts *the Constitution* and the well-established principles governing Trust Property by finding that a pension fund of a public entity – which is established under irrevocable trust and constitutes a private arrangement between an employee as grantor of the trust and the trustee who oversees the management of the funds – is a public entity;
 - c. Created bad law in its finding that the existence of state regulation, supervision or control of an entity can lawfully be construed to mean that an entity, and in the present case a pension fund of a public entity, is public in nature;
 - d. Created bad law and grossly erred in purporting to allow a finding that a pension fund belonging to a public entity is synonymous/bears similar attributes to public money as defined under section 2 of the *Public Finance Management Act* and thereby ought to be subjected to the Public Procurement and Disposal Act;
 - e. Has the effect of usurping the statutory mandate of the Interested Party herein (Retirement Benefit Authority) as prescribed in section 5 of the *Retirement Benefits Act* No. 3 of 1997 by allowing the governance of procurement processes of pension funds of public entities by the Public Procurement and Disposal Act and enforcement by the Public Procurement Regulatory Authority;
 - f. Has the effect of creating dual regulatory regimes in respect to procurement processes of public pension funds, a situation which would lead to conflict and undue overlap between the Interested Party and the 2nd and 3rd respondent herein;
 - g. Has the discriminatory effect of entrenching a vast economic disparity between pension funds operated by public entities vis-a-vis those operated by private entities with the former being heavily regulated with onerous requirements as prescribed by the Public Procurement and Disposal Act. And subsidiary legislation and the latter being exempted from such regulation/compliance;
 - h. Has the ill effect of infringing the right to property as guaranteed by Article 40 of *the Constitution* of the applicant and members of retirements benefit schemes of public entities



and infringing the applicant's right to freedom to contract as enshrined in Article 19(2) of *the Constitution*.

10. The application is unopposed. None of the respondents filed any responses despite service with the application.
11. We heard the application through our virtual platform on the 6th November 2023. Ms. Sylvia Matasi was present for the applicant, Mr. Marwa, Senior State Counsel holding brief for Ms. Chibole for the 1st and 2nd respondents and Mrs. Nancy Karanu appearing for the 4th respondent. Ms. Matasi relied on their written submissions dated 26th October, 2022. Mr. Marwa informed us that the 1st and 2nd respondent had filed no responses or submissions and were leaving the matter for the Court to decide. Mrs. Karanu relied on their written submissions and replying affidavit both dated 3rd of November 2023.
12. The applicant's advocates, Simba & Simba advocates relied on their written submissions dated 2022. Counsel identifies two issues for determination before us:
 - a. Whether the Issues raised in the applicant's Motion Application satisfy the threshold for certification as a matter of general public importance,
 - b. Whether the applicant is entitled to stay of judgment pending the hearing and determination of this Application and the Appeal.
13. In the submissions, learned counsel for the applicant, Simba & Simba Advocates, pointed out that regulation of privately held retirement savings would have an effect on the entire body of pension schemes of public entities, some that were not parties to the suit. It was urged that the effect of the ruling on others not parties in the suit was an issue of general public importance. Relying on the locus classicus case in the case of *Hermanus Philipus Steyn v Giovanni Gnecci-Ruscone*, Sup. Ct. Civil Application No. 4 of 2012, counsel submitted on three grounds, that, he urged met the threshold to have the matter certified as raising issues that went beyond the private dispute between the applicant and the respondents.
14. He urged that the matters raised in the Motion application are matters that revolve around the regulation and utilization of privately held retirement savings of members of the public. He further submitted that the determination of the matter will have significant bearing on the entire body of pension schemes of public entities in Kenya, their respective members and beneficiaries, which are not parties to the instant suit. It was explained that the impugned judgments will affect considerable numbers of persons. These include all members of pension funds held by public entities in Kenya whose privately held funds are illegally deemed as "public" and therefore subjected to additional superfluous regulation. Further that the Interested Party herein whose power to regulate the public procurement aspects of the pension sector has been unceremoniously usurped and/or inhibited by the 2nd and 3rd respondents, thus justify certification for final appeal in the Supreme Court.
15. He urged that the promotion of a strong pensions system, to secure adequate retirement to a wider Kenyan population, is a tenet of the Financial Pillar of the country's Vision 2030. That thus the organization and regulation of processes that directly relate to the use of funds held by pension schemes (such as procurement processes) have significant bearing on national and public interest. Counsel questioned whether definition of pension fund held by a public entity that is governed under the precincts of private trust property can be legally defined as a public entity as purported under section 2(o) of the Act?



16. It was counsel's submission that the purported intervention of the procurement processes of these funds to the exclusion of all similar pension funds held by private entities in Kenya, was not legally justifiable and proportionate to limit exercise of the trustees' fiduciary duties, and by extension the constitutional rights of pension fund to non-discrimination of right to property and freedom of contract.
17. He urged that there is need for certainty in the law and procedure on the interpretation of the term "public entity" to prevent its lopsided and unceremonious extension to include entities that do not meet the criteria well-laid down in case jurisprudence. He urged that in particular, the Supreme Court should be allowed to provide astute guidance on the "wider interpretation" of the term public entity in the circumstances. He relied on *Pati Limited v Funzi Island Development Limited & 4 others* [2019] eKLR - Civil Application 4 of 2015 for the proportion that the issue of the interpretation of section 2(o) of the Act was dealt with by both Courts below and pronouncements made, which are the subject of the intended appeal.
18. The applicant relies on the Hermanus principle, which governs application of this nature. In *Hermanus Philipus Steyn v Giovanni Gnecci-Ruscione, supra*, the Supreme Court sets out what an applicant seeking certification to appeal to the Supreme Court should establish. One of them is to show that the matter involves a matter of great public importance. It observed thus in that regard:

"The importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance. Where the matter involves a point of law, the applicant must demonstrate that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable the courts to administer the law, not only in the case at hand, but also in such cases in future. It is not enough to show that a difficult question of law arose. It must be an important question of law."
19. We have considered the application. We find that the applicant has demonstrated that the application does raise a substantive matter that needs clarification by the Supreme Court. The need for clarity whether pension funds or pension schemes of public entities are public funds. The clarification will involve interpretation of *the Constitution* and the Act in question, the subject matter of the matter before both the High Court and the Court of Appeal.
20. Prayer one of application sought that pending the determination of the intended appeal (to the Supreme Court) an order staying the enforcement of the provisions, procedures and/or regulatory compliance requirements or attendant processes as enshrined in the *Public Procurement and Disposal Act* and pursuant subsidiary legislation, regulations or directions on the applicant and pensions schemes of public entities. In effect, the applicant sought to stay the judgment of this Court that upheld the judgment of the High Court. We lack jurisdiction to entertain that prayer, being functus officio and for lack of statutory authority to do so. See decisions of this Court in *Odongo v Clerk, Nakuru County Assembly & 5 Others* [2023] KECA 1554 (KLR) and *Dickson Muricho Muriuki v Timothy Kagondu Muriuki & 6 Others* [2013] eKLR. In the latter case, the Court delivered itself thus:

"On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this Court has pronounced the final judgment, it is functus officio and must down its tools.



In the absence of statutory authority, the principle of *functus officio* prevents this Court from re-opening a case where a final decision and judgment has been made.”

21. Accordingly, we allow prayer two of the application and hereby certify that the intended appeal raises points of law of general public importance fit for appeal to the Supreme Court. To that extent only, the application dated 8th July 2022 succeeds.
22. We make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

S. GATEMBU KAIRU, FCIArb.,

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

