



Association of Retirement Benefits Schemes v Attorney General & 2 others; Retirement Benefits Authority (Interested Party) (Civil Appeal 283 of 2017) [2022] KECA 543 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 543 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 283 OF 2017
W KARANJA, MSA MAKHANDIA & KI LAIBUTA, JJA
APRIL 28, 2022**

BETWEEN

ASSOCIATION OF RETIREMENT BENEFITS SCHEMES APPELLANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

CABINET SECRETARY IN CHARGE OF TREASURY 2ND RESPONDENT

PUBLIC PROCUREMENT OVERSIGHT AUTHORITY 3RD RESPONDENT

AND

RETIREMENT BENEFITS AUTHORITY INTERESTED PARTY

(This was an appeal from the Judgment and Decree of the High Court of Kenya in Nairobi (Mativo, J) delivered on the 9th day of March 2017 in H.C.C.H.R Petition No. 170 of 2016)

JUDGMENT

1. This appeal arises from the judgment and decree of the Hon. Justice J. Mativo delivered on March 9, 2017 in the High Court of Kenya at Nairobi (Constitutional and Human Rights Division) Petition No. 170 of 2016 in which the appellant, Association of Retirement Benefit Schemes, had petitioned the court seeking –
 - (a) spent;
 - (b) 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;



- (c) 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;
 - (d) a declaration that the pension funds of public entities' basic rights as well as constitutionally guaranteed rights and freedoms have been violated; and
 - (e) costs of the petition.
2. In their petition dated April 28, 2016, the appellant claimed that the pension funds of public entities have been denied the rights to freedom of contract as envisaged under Article 19(2) and that their rights under Article 40 have been severally and unconstitutionally restricted. According to the appellant, 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 appellant's competitors.
 3. The interested party, the Retirement Benefits Authority, supported the petition and filed its replying affidavit sworn by Dr. Edward Odundo, the interested party's Chief Executive Officer, on June 7, 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 interested party 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 its functions on behalf of the State nor controlled by the government.
 4. The respondents opposed the petition and filed their Grounds of Opposition dated 9th June 2016. In summary, they oppose the appeal on the grounds that the impugned section is suitably designed to enforce the national values and principles of governance enshrined in Article 10 of the Constitution. Moreover, the national government shoulders liability for any misappropriation or mismanagement of funds held and managed by public entities in form of pension funds. For this reason, such entities ought to manage their affairs in accordance with the regulatory mechanisms established under the Act to ensure their sustainability and efficiency so as to protect the public.
 5. The petition proceeded to hearing on February 21, 2017 after which the court delivered its judgment dismissing the appellant's petition with costs to the respondents. Hence this appeal.
 6. The Appellant is an association of stakeholders in the retirement benefits industry in Kenya, whose membership includes retirement benefit schemes, employers and service providers with the main objectives of –
 - a. encouraging and contributing to closer links between trustees and sponsors of retirement benefit schemes and their various service providers and advisers;
 - b. promoting knowledge of, and research into, the retirement benefits sector; and
 - c. making representations to regulators and to provide support and advice to members of the association.
 7. The 1st respondent is the Attorney-General of the Republic of Kenya and the chief legal adviser to the government, and was enjoined in the petition pursuant to Article 156(4) (b) of the *Constitution*.
 8. The 2nd respondent is the Cabinet Secretary in the Ministry of National Treasury and Planning, while the 3rd respondent is a body corporate established under section 8(1) of the Act pursuant to Article 227 of the *Constitution*.



9. The interested party is a regulator in the retirement benefits industry established and incorporated under section 3 of the *Retirement Benefits Act*, Revised 2020 (1997). Its core mandate is to regulate and supervise the establishment and management of Retirement Benefit Schemes.
10. By a petition dated April 28, 2016, the appellant sought declarations as already set out elsewhere in this judgment.
11. The appellant’s case is that the application of the Act on it by virtue of section 2 (o), which defines public entities as including “a pension fund for a public entity”
 -
 - a. denies pension funds of public entities the rights to freedom of contract as envisaged under Article 19(2) of the *Constitution*; and
 - b. restricts the rights of pension funds of public entities guaranteed by Article 40 of the *Constitution*; and
 - c. amounts to discrimination of pension funds of public entities contrary to Article 27 of the *Constitution* in so far as the Act does not apply equally to the appellant’s competitors.
12. The appellant’s and the interested party’s case in the petition before the High Court leading to the impugned judgment and decree is clear from the supporting affidavits whose import is summarised above, and which we need not repeat. Upon hearing the parties, the learned Judge delivered his judgment on March 9, 2017 dismissing the appellant’s petition with costs to the respondents.
13. Aggrieved by the judgment and decree of the High Court (J. Mativo, J), the appellant filed this appeal and raised 9 grounds to challenge it. We take the liberty to summarise and reframe them. According to the appellant, the learned Judge –
 - a. erred by considering issues not falling to be determined, thereby arriving at an erroneous decision;
 - b. failed to consider uncontroverted evidence;
 - c. erred in finding that section 2 (o) of the Act is constitutional and does not violate the rights of members of the appellant;
 - d. erred in finding that all retirement benefit schemes are public entities subject to the regulatory provisions of the Act;
 - e. erred in declaring that the appellant’s assets are public resources;
 - f. erred in interpreting the scope of section 2 (o) of the Act as including all retirement benefit schemes, and in failing to appreciate the statutory role of the interested party in regulating retirement benefit schemes; and
 - g. failed to appreciate the conflict between the *Constitution* and statute law in holding that all retirement benefits schemes are public entities.
14. In our considered view, the appeal stands or falls on four issues of law, on which learned counsel submitted, and which may be summarized as follows:
 - a. whether the appellant is a public entity within the meaning of section 2 of the Act;



- b. if the answer is in the negative, whether application of the Act on the appellant and similar entities is justifiable;
 - b. whether section 2 (o) of the Act is unconstitutional; and
 - b. whether application of the Act on the appellant –
 - i. amounts to discrimination contrary to Article 27 of the Constitution;
 - ii. restricts the appellant’s freedom of contract contrary to Article 19(2) of the Constitution; or
 - iii. restricts the appellant’s rights guaranteed by Article 40 of the Constitution.
15. By written submissions dated September 16, 2019, learned counsel for the Appellants contended that pension funds of a public entity are neither state organs or public offices as defined in the Constitution. She argued that legislation, regulations and circulars intended to regulate procurement of public goods and services in accordance with Article 227 of the Constitution should not apply to pension funds of public entities. Learned counsel submitted that a pension scheme does not perform duties of a public nature. In her view, pension funds for public entities do not use public finances or funds to procure their assets and services, and are not funded through the public exchequer. Accordingly, the “onerous compliance requirements” under the Act will subject the pension funds for public entities to extra costs.
16. Supporting the appeal, learned counsel for the interested party filed written submissions dated January 15, 2018. In his submissions, counsel argued that the impugned section was ambiguous, inconclusive and unworkable. According to him, the court cannot re-write, reframe or recast legislation, or otherwise broaden the definition of “public entity”.
17. In his written submissions dated October 4, 2021, learned State Counsel for the respondents contended that members of the Appellant are regulated by the State through the Interested Party herein. Consequently, members of the Appellant that are public entities would ordinarily apply their pension funds to perform functions of a public nature. He submitted that, for all intents and purposes, pension funds of public entities are public entities, and should be subject to the Act. According to him, by defining a public entity as including pension funds of public entities, the legislature intended to protect the greater interest of the unsuspecting members of the public who might be duped into joining schemes whose trustees or managers might want to engage in corrupt and underhand dealings resulting in misappropriation of their funds. It is for this reason that such schemes are required to follow the strict procurement guidelines under the Act. With regard to discrimination, learned State Counsel submitted that the Appellant has failed to demonstrate with proof how its members have been discriminated against by the respondents.
18. In our considered view, the appeal stands or falls on four issues of law, on which learned counsel submitted, and which may be summarized as follows:
- a. whether the appellant is a public entity within the meaning of section 2 (o) of the Act;
 - b. if the answer is in the negative, whether application of the Act on the appellant and similar entities is justifiable;
 - c. whether section 2 (o) of the Act is unconstitutional; and
 - d. whether application of the Act on the appellant –



- i. amounts to discrimination contrary to Article 27 of the *Constitution*;
 - ii. restricts the appellant’s freedom of contract contrary to Article 19(2) of the *Constitution*; or
 - iii. restricts the appellant’s rights guaranteed by Article 40 of the *Constitution*.
19. Having considered the impugned decision of the High Court, the submissions of learned counsel for the appellant dated 16th September 2019, those of the Attorney-General dated October 4, 2021, and those of learned counsel for the interested party dated January 15, 2018, and having considered the numerous constitutional and statutory provisions cited before us, we pronounce ourselves as follows.
 20. The decisive question is whether the appellant and all retirement benefit schemes are public entities within the meaning of section 2 of the Act. Neither the *Constitution* nor the Act defines a public entity. However, its meaning may be derived from the dictionary meaning of the words “public” and “entity”. *The Black’s Law Dictionary 10th edn* defines “an entity” as “an organisation (such as a business or a governmental unit) that has a legal identity apart from its members or owners.” The dictionary also defines the term “public” as “of, relating to, or involving an entire community, state or country”. The operative words in the definition of a public entity are “organisation”, “legal identity” and, in the context of this case, “community”. Accordingly, a public entity may be defined as an organisation or body which has a legal identity, and whose establishment is designed to serve a public, as opposed to a private, interest, need or benefit. The question is – are the appellant and all retirement benefits schemes such entities? Indeed, they are.
 21. We do not agree with the appellant’s submission that the term “public entity” has the same meaning as “public office” or “public officer” as defined in Article 260 of the *Constitution*. It is not an office or an officer, but an organisation or body having a legal identity and established to serve some community or public interest or benefit. A “public body” is defined in section 3(1) (d) of the *Interpretation and General Provisions Act* (Cap. 2) as “... an authority, body, 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.” And that is what the appellant and all retirement benefits schemes are. They are public bodies or entities established to perform functions of a public nature. In our considered judgment, they are public bodies in so far as their membership is not exclusive or restricted to private schemes.
 22. We agree with Onguto, J’s interpretation of the term “public entity” In *Githunguri Dairy Farmers Co-operative Society Ltd v the Attorney-General and 2 others* [2016] eKLR at para. 72 where the learned Judge stated:

“ ... 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*. 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, 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.”
 23. Though not financially supported by the State, the appellant and all retirement benefit schemes operate in close cooperation with State authorities and fulfill key functions under state supervision. They are, as the learned Judge held, public entities supervised under the regulatory provisions of the *Retirement Benefits Act*, Revised 2020 (1997). They perform functions of a public nature and, most important,



- their membership includes pension funds of public and private corporations, all of which are subject to State supervision by way of statutory regulation. That settles the first issue.
24. Having concluded that the appellant and all retirement benefits schemes are public entities, it follows that the application on them of the Act is a matter of course. It is for that reason that they are defined as public entities within the meaning of section 2 (o) of the *Public Procurement and Asset Disposal Act, 2015*. It is noteworthy that the Act is suitably designed to –
- a. give effect to Article 227 of the *Constitution* – procurement of public goods and services; and
 - b. to provide procedures for efficient public procurement and for assets disposal by public entities.
25. In addition to the foregoing, the Act is purposed to guarantee the realisation of the national values specified in Article 10(2) (c) of the *Constitution*, which are “good governance, integrity, transparency and accountability”. To argue, as the appellant has attempted to, that the Act should not apply to it or to any retirement benefits scheme is to suggest that such bodies have little regard for, or have no wish to espouse, those values. To our mind, taking such a curious position is an attempt by the appellant to create in its sector a culture of impunity where the procurement of public goods and services would be undertaken without regard to the critical need for transparency and accountability. Yet, these are the very values that we are all called upon to embrace. The justification for the application of the Act to the appellant and all retirement benefits schemes cannot be over emphasised. That settles the second issue before us.
26. Having considered the grounds on which the impugned judgment is challenged, the submissions of the parties, the *Constitution* and statute law, we find nothing to fault the learned Judge’s decision by holding that section 2(o) of the Act is constitutional. The appellant has failed to persuade us otherwise, and there is nothing more to say on this matter. Neither are we persuaded that application of the Act to the appellant and all retirement benefits schemes is discriminatory and in breach of Article 27 of the *Constitution*. We do not see how.
27. We fail to see how State regulation of public entities, whether by statute or administrative procedures, or by other regulatory mechanisms that do not apply to private individuals or corporations, can be said to be discriminatory. The fact that private institutions with which the appellant and other retirement benefits schemes compete are not subject to such regulatory mechanisms does not of itself amount to discrimination contrary to Article 27. There is a limit to which we can stretch these constitutional edicts not to violate one’s right to equality and non-discrimination. The appellant’s further submission that applying the Act to it offends or restricts its right to freedom of contract is also untenable. Public entities that undertake procurement of public goods and services cannot be free from State supervision or shielded from liability to be transparent and accountable to their stakeholders, and to the public at large. Neither does the responsibility to be transparent and accountable stand in the way of the appellant’s realisation of its property rights guaranteed by Article 40 of the *Constitution*. The application of the Act to the appellant serves to meet the dictates of good governance to which we all aspire. Having addressed the remaining issues before us, we need not say more.
28. In conclusion, we dismiss the appellant’s appeal and uphold the judgment and decree of the High Court (Constitutional and Human Rights Division Petition No. 170 of 2016 (J. Mativo, J)). The appellant shall bear the costs of this appeal. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28 TH DAY OF APRIL, 2022

W. KARANJA



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JUDGE OF APPEAL
ASIKE-MAKHANDIA

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JUDGE OF APPEAL
DR. K. I. LAIBUTA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

