



**Okoti & 11 others v County Governments Retirement Scheme & 164 others; County Pension Fund Financial Services Limited & 8 others (Interested Parties) (Petition 213, 222 & 230 of 2019 & 36 of 2022 (Consolidated)) [2022] KEELRC 13584 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13584 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION 213, 222 & 230 OF 2019 & 36 OF 2022 (CONSOLIDATED)  
MA ONYANGO, J  
DECEMBER 20, 2022**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**COUNTY GOVERNMENTS RETIREMENT SCHEME & 152 OTHERS & 152 OTHERS & 152 OTHERS & 152 OTHERS ..... RESPONDENT**

**AS CONSOLIDATED WITH  
PETITION 222 OF 2019**

**BETWEEN**

**KENYA COUNTY GOVERNMENT WORKERS UNION ..... 1<sup>ST</sup> PETITIONER  
MATILDA JEBET KEMETTO ..... 2<sup>ND</sup> PETITIONER  
BENSON OLIANGA ORIARO ..... 3<sup>RD</sup> PETITIONER  
BERNARD ATSIULA INYANGALA ..... 4<sup>TH</sup> PETITIONER  
BONIFACE WAWERU GITUKE ..... 5<sup>TH</sup> PETITIONER  
EMILY W MWANGI ..... 6<sup>TH</sup> PETITIONER  
FRED BULUKU ..... 7<sup>TH</sup> PETITIONER  
CHARLES MAKINI ..... 8<sup>TH</sup> PETITIONER**

**AND**

**BOARD OF TRUSTEES OF LOCAL AUTHORITIES PROVIDENT FUND & 5 OTHERS & 5 OTHERS & 5 OTHERS & 5 OTHERS ..... PETITIONER**



AND

COUNTY PENSION FUND FINANCIAL SERVICES LIMITED .... INTERESTED PARTY

BOARD OF TRUSTEES, LOCAL AUTHORITIES PENSION TRUST ..... INTERESTED PARTY

LAPRUST RETIREMENT SERVICES LIMITED ..... INTERESTED PARTY

COUNCIL OF GOVERNORS ..... INTERESTED PARTY

WATER SERVICES PROVIDERS ASSOCIATION ..... INTERESTED PARTY

AS CONSOLIDATED WITH

PETITION 230 OF 2019

BETWEEN

LOCAL AUTHORITIES PENSIONS TRUST BOARD OF TRUSTEES ..... 1<sup>ST</sup> PETITIONER

COUNTY PENSION FUND BOARD OF TRUSTEES ..... 2<sup>ND</sup> PETITIONER

AND

ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT

CABINET SECRETARY, NATIONAL TREASURY ..... 2<sup>ND</sup> RESPONDENT

RETIREMENT BENEFITS AUTHORITY ..... 3<sup>RD</sup> RESPONDENT

LOCAL AUTHORITIES PROVIDENT FUND BOARD OF TRUSTEES ..... 4<sup>TH</sup> RESPONDENT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION . INTERESTED PARTY

COUNTY PENSIONERS ASSOCIATION ..... INTERESTED PARTY

AS CONSOLIDATED WITH

PETITION 36 OF 2022

BETWEEN

CHRISTINE SONGO ..... PETITIONER

AND

COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE, COUNTY GOVERNMENT OF KAKAMEGA ..... 1<sup>ST</sup> RESPONDENT

COUNTY GOVERNMENT OF KAKAMEGA 2ND RESPONDENT LOCAL AUTHORITIES PENSION TRUST (LAP TRUST) ..... 2<sup>ND</sup> RESPONDENT

AND



## LOCAL AUTHORITIES PROVIDENT FUND (LAP FUND) .... INTERESTED PARTY

## COUNTY GOVERNMENT RETIREMENTS SCHEME ..... INTERESTED PARTY

### **The County Governments Retirement Scheme Act, 2019, is unconstitutional for lack of public participation and for being in conflict with various articles of the Constitution**

*The petitioners challenged the constitutionality of the County Governments Retirement Scheme Act, 2019 (the impugned Act). The court found that the impugned Act was unconstitutional for lack of public participation and for being in conflict with various articles of the Constitution. The court held that the decision of the Government to get involved in the management of pensions for county government employees was a violation of not only the Fourth Schedule to the Constitution but also article 6 of the Constitution which provided that the Government at the national and county levels were distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation.*

Reported by Kakai Toili

**Devolution** – National Government vis a vis county governments in management of pensions – role of the National Government in the management of pensions of county governments’ employees - whether the decision by the National Government to get involved in the management of pensions of county government employees was a violation of the Constitution which provided that the Government at the national and county levels were distinct - what was the effect of regulating pension for county government employees by the National Government - Constitution of Kenya, 2010, articles 6 and 43.

**Statutes** – interpretation of statutory provisions – interpretation of section 38(3) of the County Governments Retirement Scheme Act, 2019 (the Act) - whether section 38(3) of the Act was in direct conflict with the Retirement Benefits Act which provided that contributions by the employee vested immediately while contributions by the employer vested upon the employee completing one year in service - whether the definition of pensionable emoluments in the County Governments Retirement Scheme Act, 2019 that excluded housing, transport and any other allowances from pensionable emoluments amounted to unfair labour practice – Constitution of Kenya, 2010, articles 41 and 43(1)(e); County Governments Retirement Scheme Act, 2019, section 38(3); Employment Act, Cap 226, sections 13 and 26; County Government Act, Cap 265, section 132.

**Constitutional Law** – national values and principles of governance – public participation - what did public participation in the Senate entail.

**Jurisdiction** – jurisdiction of the Employment and Labour Relations Court – requirements for one to invoke the Employment and Labour Relations Court’s jurisdiction – employer-employee relationship - whether it was mandatory for there to be an employee-employer relationship between parties for the Employment and Labour Relations Court’s jurisdiction to be invoked – Constitution of Kenya, 2010, articles 162(2) and 165(5).

**Words and Phrases** - include – definition of include - to contain as a part of something; the participle including typically indicates a partial list - Black’s Law Dictionary.

### **Brief facts**

The petitioners challenged the constitutionality of the County Governments Retirement Scheme Act, 2019 (the impugned Act). The impugned Act provided in the preamble that it was an Act of Parliament to establish the County Governments Retirement Scheme for employees in the service of county governments, to provide for retirement benefits of those employees and for connected purposes. Section 52 of the impugned Act repealed the Local Authorities Provident Fund Act and revoked the Local Authorities Pensions Trust Rules, 2007 and the Laptrust (Umbrella) Retirement Fund Trust Deed and Rules registered under the Retirement Benefits Act.



The petitioners sought for among other orders; an order permanently prohibiting the respondents from transferring their workers (employees), members, and benefits from existing schemes (Laptrust, Lapfund, and CPS) to the 2<sup>nd</sup> interested party, the County Governments Retirement Scheme (CGRS) during the five year transition period and until the scheme was fully operationalized, an order compelling the Retirement Benefits Authority (RBA) to fast track the operationalization of the CGRS in strict compliance with the Retirement Benefits Act.

The petitioners contended that the impugned Act contained illegalities which included varying terms and conditions of service of members of the 1<sup>st</sup> petitioner to their detriment, creating a State corporation as opposed to an irrevocable trust, failing to transition the assets and liabilities of the 2<sup>nd</sup> interested party's Defined Benefits Scheme (DB scheme) contrary to the provisions of the Retirement Benefits Act, providing for members of the CGRS to be paid under rules that were already revoked and failing to provide for role of trustees.

The Attorney General filed a notice of preliminary objection against the court's jurisdiction to hear and determine the consolidated petition within the meaning of Chapter 10 of the Constitution and section 12 of the Employment and Labour Relations Act. The position of the Attorney General was that article 165 of the Constitution which established the High Court provided at article 165(3) and 165(5) that the court had exclusive jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights had been denied, violated infringed or threatened and to hear any question respecting the interpretation of the Constitution.

### **Issues**

- i. Whether the decision by the National Government to get involved in the management of pensions for county government employees was a violation of the Constitution which provided that the Government at the national and county levels were distinct.
- ii. What was the effect of regulating pension for county government employees by the National Government?
- iii. Whether the definition of pensionable emoluments in the County Governments Retirement Scheme Act, 2019 that excluded housing, transport and any other allowances from pensionable emoluments amounted to unfair labour practice.
- iv. Whether section 38(3) of the County Governments Retirement Scheme Act, 2019 was in direct conflict with the Retirement Benefits Act which provided that contributions by the employee vested immediately while contributions by the employer vested upon the employee completing one year in service.
- v. What did public participation in the Senate entail?
- vi. Whether it was mandatory for there to be an employee-employer relationship between parties for the Employment and Labour Relations Court's jurisdiction to be invoked.

### **Relevant provisions of the Law**

#### **Retirement Benefits Act, Cap 197**

#### **Section 33 -Statutory contributions**

*(1) Notwithstanding the provisions of any written law for the time being in force, an employer may, with the approval of his employees, pay any statutory contributions in respect of such employees into any scheme fund prescribed for that purpose:*

*Provided that where such payment involves a transfer of funds from another scheme fund, the employer shall, at least sixty days before commencing such payment, give written notice thereof to the Authority and to the trustees of the scheme fund from which such funds shall be transferred.*

*(2) In this section, the expression "statutory contributions" means contributions required under the provisions of a written law to be paid into a retirement benefits scheme.*



## Held

1. Under the LAPTRUST Umbrella Scheme “employer” was defined to include bodies other than the county governments. Section 12(1) of the Employment and Labour Relations Court Act provided for the court to hear; first all disputes referred to the court in accordance with article 162(2) of the Constitution and secondly disputes referred to it in accordance with the provisions of the Employment and Labour Relations Court Act. Thirdly, it had jurisdiction to hear and determine matters referred to the court under any other written law which extended jurisdiction of the court. In all the three circumstances, the matters ought to relate to employment and labour relations. The enumeration under sections 12(1)(a) to (j) of the Employment and Labour Relations Court Act were not exclusive or conclusive.
2. The Constitution and the Employment and Labour Relations Court Act both defined the jurisdiction of the court to deal with employment and labour relations matters. There was no requirement that there must be an employee-employer relationship between the parties to the suit for the court’s jurisdiction to be invoked. Indeed, the Constitution was clear under article 165(5) that the High Court shall not have jurisdiction in matters falling within the jurisdiction of the courts contemplated under article 162(2).
3. Pension and terminal benefits were terms and conditions of employment. The Employment Act at section 10(3) provided for terms and conditions of employment that must be contained in a written contract of employment. The impugned Act provided for changes in the definition of pensionable benefits for county government employees to exclude house allowance. To the extent that the employees were members and had been contributing to the pension schemes in place before the enactment of the impugned Act, the Act constituted an amendment in the terms and conditions of employment of affected employees, which was a matter within the court’s jurisdiction. The consolidated petition related to terms and conditions of employment and the court had jurisdiction to hear and determine the same. There was thus no merit in the preliminary objection raised by the Attorney General.
4. The principle of *locus standi* had been greatly enlarged by articles 22 and 258 of the Constitution. Both articles 22 and 258 of the Constitution made it the duty of every person to protect the Constitution and give every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights or any provision of the Constitution had been contravened or was threatened with contravention. Both the petitioners in Petition 213 of 2019 and Petition 230 of 2019 had *locus standi* under the expanded democratic space as envisioned in articles 22 and 258 to institute the petitions in the manner they did.
5. Order 1 rule 9 of the Civil Procedure Rules provided that no suit shall be defeated by reason of misjoinder or non-joinder of parties. The Attorney General had been joined to all the petitions. The Attorney General being the principal legal advisor to the Government sufficiently represented the interests of both the Senate and National Assembly. To that extent, there was no merit in the objection.
6. From the letter to the stakeholders, the retirees who were in receipt of pensions were not invited. None of the water services companies were invited to the stakeholders’ meeting. The members of the Scheme who were still in employment and were to be affected by the impugned Act were also not invited. Other beneficiaries of the Scheme such as widows, widowers and dependents of deceased pensioners or employees who were in receipt of pensions were not invited.
7. It had not been denied that the committee which eventually presided over the meeting on December 3, 2018 consisted of the chairperson alone and therefore was not properly constituted under the Standing Orders of the Senate.
8. Article 118(1)(b) of the Constitution required Parliament to conduct its business in an open manner in public and to facilitate public participation and involvement in the legislative and other business



- of Parliament and its committees. Indeed Parliament, in recognition of the importance of public participation had published Factsheet No. 14 titled Public Participation in the Legislative Process.
9. Public participation by the Senate would require that the public was notified through the media while the major stakeholders were in addition, invited by letter to submit their views. It was further a requirement that the stakeholders and the public in general, were given sufficient time to prepare their memorandum and to attend any meeting called to receive their views.
  10. The list of sponsors who ought to have been invited to give their views was contained in the First, Second and Third Schedules to the Kenya (Local Government) (Pensions) Regulations, 1963 and the Local Authorities Pensions Trust Rules, 2007. Further, although public participation did not envisage that every view was taken into account, it must be shown that consideration was given to the views expressed and where appropriate, that the views were accommodated in the enactment of the legislation.
  11. The public participation in respect of the impugned Act did not meet the requirements of the Constitution:
    1. The committee before which the public participation meeting was held was improperly constituted as it did not have a quorum as set out under the Standing Orders of the Senate.
    2. There was no advertisement in the media notifying members of the public of the bill, as envisaged under the parliamentary guidelines for public participation.
    3. There was no sufficient time, the stakeholders having been given only one full working day to prepare for the meeting.
    4. Critical stakeholders were not invited to give their views on the Act. They were the retirees, water service organisations and employees who were members of the scheme. Indeed, none of the employees who were members of the affected schemes were never notified to enable them present their views either directly to the Senate or Parliament, or through their representatives.
  12. The impugned Act was unconstitutional for lack of public participation.
  13. The impugned Act established the pension scheme as a State Corporation under the supervision of the Cabinet Secretary responsible for National Treasury. Under the Fourth Schedule to the Constitution, the responsibility of consumer protection including standards for social security and professional pension plans was assigned to the National Government. The Government would have oversight in terms of policy and regulation of social security and professional pension plans.
  14. Social security would be reckoned with reference to articles 43 of the Constitution. Article 43(1)(e) specifically made reference to the role of the Government to be the provision of appropriate social security to persons who were unable to support themselves and their dependants. Neither the Fourth Schedule to the Constitution nor article 43 required the National Government to be involved in the administration of pension schemes for county governments in the manner envisaged in the impugned Act.
  15. Pensions were employment benefits to be managed by employers under private contracts. The National Government was therefore only under the obligation to make provision for pensions for its employees within the context of private employment contracts. The decision of the Government to get involved in the management of pensions for county government employees was a violation of not only the Fourth Schedule to the Constitution but also article 6 of the Constitution which provided that the Government at the national and county levels were distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation.
  16. By regulating pension for county government employees the National Government entered into the realm of regulating terms and conditions of service of employees of county governments. That was incompatible with the provisions of article 6 of the Constitution and the overarching principle of devolution as espoused in the Constitution. To that extent the impugned Act was unconstitutional.



17. Fair labour practice as provided in article 41 of the Constitution had reference to fair remuneration, reasonable working conditions and right to join and participate in activities and programs of trade unions as set out in article 41(2) of the Constitution. What constituted fair labour practice was therefore contextualised within the facts of specific circumstances. Fair (unfair) labour practice was a flexible term not capable of precise definition and it was left to the courts to define and determine what conduct or practice would amount to fair or unfair labour practice.
18. The definition of pensionable emoluments in the impugned Act excluded housing, transport and any other allowances from pensionable emoluments. The direct consequence of that was that the amount of pension that an employee would be entitled to would be less under the new scheme established in the impugned Act. That in itself would amount to unfair labour practice and a violation of both article 41 of the Constitution and section 26 of the Employment Act. In addition, it would amount to the amendment of the terms of employment to the detriment of employees and violate the employee's rights under article 43(1)(e) of the Constitution as it would reduce the social security that the employee would otherwise have been entitled to under the existing schemes.
19. The definition of pensionable emoluments in the impugned Act excluding housing, transport and any other allowances from pensionable emoluments would further violate section 13 of the Employment Act which provided that the employee must be consulted before any changes especially if negative, could be made to his terms of employment. It would further amount to a violation of the collective bargaining agreement between the county governments and associated institutions and the County Government Workers Union. The same action would violate the provisions of section 132 of the County Government Act which provided that members, officers and staff of county governments, shall subscribe to an existing pension scheme for members, officers and staff of local governments. The County Governments Act did not envision the setting up of a new Scheme for members, officers and staff of county governments.
20. The Government approved the pegging of pensionable pay to basic salary and house allowance as an exception to the policy of the Government on pension schemes in the letter dated July 21, 2011, from the Permanent Secretary/Treasury. That policy direction which was specific to county government pension schemes had not been amended by the Government. The impugned Act was therefore in conflict with and a derogation from the policy of the Government which authorised the inclusion of house allowance as an exception in the definition of pensionable emoluments for county government employees and which therefore created a legitimate expectation upon which such pension schemes were established. The definition of pensionable emoluments in the impugned Act would amount to unfair labour practice and a violation of article 41 of the Constitution.
21. The impugned Act did not make any provisions for the payment of unremitted funds. The provisions of section 38(3) of the impugned Act were in direct conflict with the Retirement Benefits Act which provided that contributions by the employee vest immediately while contributions by the employer vest upon the employee completing one year in service. The impact of that was that all money in the scheme for all employees who had completed at least one year in service were vested in the employee. The employer or any other body could not deal in such funds without the consent of the employee. Such funds could therefore only be transferred with the consent of the employee. To that extent section 5 of the impugned Act was in conflict with section 33 of the Retirement Benefits Act.
22. The terms "pension fund" and "provident fund" were defined in the Trustees (Perpetual Succession) Act. LAPTRUST was a pension scheme while LAPFUND was a provident fund. Before the enactment of the County Governments Act and the Urban and Cities Act the employees of County Governments were members of both schemes. A provident fund by definition was a defined contribution scheme as the benefits payable to the members was an aggregate of the employee's contribution, the employer's contribution and the interest earned from investment of both. The policy changes contained in the Treasury Circular No. 18 of 2010 could only have been directed at



- LAPTRUST as LAPFUND was already compliant. It was not the intention of Parliament to lock out any of the two schemes when enacting the two statutes. If that was the intention, nothing prevented Parliament from expressly stating so.
23. The reference to existing pension scheme in section 132 of the County Governments Act and section 49 of the Urban and Cities Act must of necessity refer to both LAPFUND and LAPTRUST. The county governments in their capacity as employers were to define the categories of staff to be eligible for membership of either of the schemes as was the intention at the inception of the two schemes.
  24. The petitioner in Petition No. 36 of 2022 was an employee of the County Government of Kakamega. It was not clear whether the petitioner filed the petition in her capacity as an employee or in her capacity as the area branch secretary of the Kenya County Government Workers Union. If she filed the petition in her capacity as area branch secretary, then the petition would be incompetent as the Labour Relations Act provided for the manner of instituting trade disputes by trade unions at section 62(1) thereof. Section 73(3) of the Labour Relations Act provided for the procedure of referring duties to the court.
  25. Authorised representative was defined at section 2 of the Labour Relations Act to mean; the general secretary of a trade union; an employer or the chief executive officer of an employer; the secretary of a group of employers; the chief executive or association secretary of an employers' organisation; or any person appointed in writing by an authorised representative to perform the functions of the authorised representative. The petitioner, not being an authorised representative would have no capacity to file a representative dispute or petition on behalf of the union or union members.
  26. If the petition was filed in the petitioner's capacity as an employee of the County Government of Kakamega, the procedure for resolution of dispute was as provided in section 77 of the County Government Act. The petition was incompetently filed by the petitioner before the court, it was incurably defective and premature, having not exhausted the procedure provided for under the County Government Act. The same was accordingly dismissed.

*Consolidated petitions partly allowed.*

#### **Orders**

- i. *The County Governments Retirement Scheme Act, 2019, was unconstitutional for lack of public participation and for being in conflict with articles 1, 2(1) and (4), 3(1), 6, 10, 35, 40(2)(a), 4(1), 43(1) (e), 118, 191(3)(b) and 258 of the Constitution.*
- ii. *The impugned Act was further in conflict with the County Government Act and the Urban and Cities Act, the Retirement Benefits Act and the Employment Act.*
- iii. *Article 2 of the Constitution provided that the Constitution was the supreme law of Kenya and therefore any statute in conflict with the Constitution was invalid. The County Governments Retirement Scheme Act was declared unconstitutional and therefore null and void.*
- iv. *Every party to bear its costs.*

#### **Citations**

##### **Cases**

##### **Kenya**

1. *Advanced Gaming Limited v Betting Control and Licensing Board, Liti Wambua & Cyrus Maina; Safaricom Limited (Interested Party) Constitutional Petition 271 of 2019; [2019] KEHC 4631 (KLR) - (Followed)*
2. *Akuti, George Onyango v G4S Security Services Kenya Ltd Cause 107 of 2013; [2013] KEELRC 727 (KLR) - (Applied)*
3. *Gakuru, Robert N. & Others v Governor Kiambu County & 3 others Petition 532 of 2013 & 12, 35, 36, 42, & 72 of 2014 & Judicial Review Miscellaneous Application 61 of 2014 (Consolidated); [2014] eKLR - (Followed)*



4. *In the Matter of the Kenya National Human Rights Commission* Sup. Ct Advisory Opinion Reference 1 of 2012; [2014] eKLR - (Followed)
5. *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* Civil Appeal 224 of 2017; [2017] KECA 436 (KLR) - (Followed)
6. *Judicial Service Commission v Shollei & another* Civil Appeal 50 of 2014; [2014] KECA 334 (KLR) - (Followed)
7. *Kaps Parking Limited & Paytech Limited v County Government of Nairobi & Nairobi City County Assembly* Petition 104 of 2020; [2021] KEHC 5819 (KLR) - (Followed)
8. *Katiba Institute & another v Attorney General & another* Constitutional Petition 548 of 2017; [2018] eKLR - (Followed)
9. *Kenya Council of Employment and Migration Agencies & another v Samuel Mwangera Arachi & 2 others* Civil Miscellaneous 20 of 2014; [2015] KEELRC 999 (KLR) - (Followed)
10. *Kenya Ports Authority v Industrial Court of Kenya & 2 others* Civil Appeal 236 of 2012; [2014] KECA 107 (KLR) - (Followed)
11. *Khaoya, John Wekesa v Attorney General* Petition 60 of 2012; [2013] eKLR - (Applied)
12. *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* Civil Appeal 46 of 2017; [2018] KECA 381 (KLR) - (Followed)
13. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] 3 KLR 199 - (Applied)
14. *Mogere, Mackenzie Moulding & another v Trustees of Telposta Pension Scheme & 4 others* Civil Appeal 221 of 2015; [2017] KECA 330 (KLR)
15. *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others* Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); [2015] eKLR - (Followed)
16. *Munyendo, Moses & 908 others v Attorney General & another* Petition 16 of 2013; [2013] eKLR - (Followed)
17. *Ngugi, Anne Wangui & 524 others v Retirement Benefits Authority & Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006* Appeal 10 of 2014; [2016] KEELRC 1672 (KLR) - (Applied)
18. *Opembe, Nellie Wanjala v Fibi Usita Aura & Attorney General* Civil Appeal 83 of 2015; [2016] KECA 359 (KLR) - (Followed)
19. *Public Service Commission & 4 others v Cheruiyot & 20 others* Civil Appeal 119 & 139 of 2017 (Consolidated); [2022] KECA 15 (KLR) - (Followed)
20. *Speaker of the Senate & Another v Attorney General & 4 Others* Advisory Opinion Reference 2 of 2013; [2013] eKLR - (Applied)
21. *Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & another v Ann Wangui Ngugi & 524 others* Civil Appeal 20 of 2017; [2018] KECA 710 (KLR) - (Followed)
22. *Wasbeke, Elizabeth and 62 others v Airtel Networks (K) Ltd & another* Cause 1972 of 2012; [2013] KEELRC 572 (KLR) - (Applied)
23. *William Odhiambo Ramogi & others v Attorney General & others* Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated); [2020] eKLR - (Followed)

### **Uganda**

*Olum & another v Attorney General* [2002] 2 EA - (Followed)

### **South Africa**

1. *Doctors for Life International v Speaker of the National Assembly & Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) - (Followed)
2. *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) - (Followed)



3. *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) - (Followed)
4. *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) - (Followed)
5. *Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others* (CCT86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) - (Followed)

#### Texts

Garner, BA., Black, HC., (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn

#### Statutes

##### Kenya

1. Civil Procedure Rules (cap 21 Sub Leg) order 1 rule 9- (Interpreted)
2. Constitution of Kenya articles 1(c); 3(1); 4(2); 6; 10; 20(3) ; 20(4); 22; 27(1); 36; 40; 41; 43; 48; 50(1); 159; 162; 162(2); 165(5); 258; 259; Schedule 4 clause 14; Schedule 6 clause 6 ; 15 - (Interpreted)
3. County Government Act (cap 265) sections 77, 132, 138 - (Interpreted)
4. County Governments Retirement Scheme Act sections 4(3) ; 5 ; 6 ; 7 ; 13; 14; 18 ; 21; 22; 23 ; 24 ; 38(3); 45 ; 52; 53; 55; 56 (cap 189B) - (Interpreted)
5. Employment Act (cap 226) sections 10(5); 13 ; 26- (Interpreted)
6. Employment and Labour Relations Court Act (cap 8E) section 12(1)- (Interpreted)
7. Income Tax Act (cap 470) In general- (Cited)
8. Intergovernmental Relations Act (cap 265F) In general- (Cited)
9. Judicature Act (cap 8)In general - (Cited)
10. Labour Relations Act (cap 233) sections 2 ; 57; 62(1); 73(3) - (Interpreted)
11. Laptrust (Umbrella) Retirement Fund Trust Deed and Rules (cap 197 Sub leg) In general- (Cited)
12. Local Authorities Pensions Trust Rules (LN 50 of 2007)rules 14, 16, 78 - (Interpreted)
13. Local Authorities Provident Fund Act (cap 272) section 4 - (Interpreted)
14. Occupational Retirement Benefits Regulations (cap 197 Sub Leg) In general- (Cited)
15. Retirement Benefits Act (cap 197) section 33- (Interpreted)
16. Salaries and Remuneration Commission (Remuneration and Benefits of the Other Public Officers) Regulations (cap 412D Sub Leg) section 8(3)(4)- (Interpreted)
17. Urban Areas and Cities Act (cap 275) section 49- (Interpreted)

#### Advocates

None mentioned

## JUDGMENT

1. The [County Governments Retirement Scheme Act](#) came into force on October 7, 2019 (the commencement date) following assent to the Act by His Excellency the President of the Republic of Kenya on September 18, 2019.
2. The [Act](#) provides in the preamble thereto that it is an [Act](#) of Parliament to establish the County Governments Retirement Scheme for employees in the service of County Governments, to provide for retirement benefits of those employees and for connected purposes.
3. Part II of the [Act](#) establishes the scheme as a body corporate with perpetual succession and a common seal. The scheme is defined in section 4(3) as a defined contribution scheme providing social security benefits including:
  - (a) periodic payments through the purchase of annuities;



- (b) a lump sum as a commutation of pension or trivial pension in accordance with the RBA Regulations;
  - (c) income drawdown;
  - (d) gratuity; and
  - (e) any other benefit approved by the Board under this Act.
4. Section 5 provides that a county public officer or any other person approved by the Board may become a member of the scheme under the auspices of a sponsor.
5. Section 6 sets out the membership of the Board of Trustees under whose management the scheme will be run as follows –
- (2) The Board shall consist of —
    - (a) the chairperson elected by the Trustees from amongst the members under paragraph (d), (e), (f) and (g);
    - (b) the Principal Secretary responsible for matters relating to finance or his representative;
    - (c) a person nominated by Council of County Governors;
    - (d) a person nominated by County Public Service Boards;
    - (e) a person nominated by County Assembly Service Boards;
    - (f) five persons nominated by most representative trade unions employees of county governments of who at least two shall not be of the same gender as follows:
      - (i) four persons from trade unions representing the employees within the county executive; and
      - (ii) a person from trade unions representing the employees within the county assemblies’ service; and
    - (g) the Chief Executive Officer who shall be an ex officio member and the secretary to the Board with no voting rights.
  - (3) The vice-chairperson of the Board shall be elected by the Trustees from among their number.
6. Section 7 of the Act provides qualifications for appointment as Trustee of the Scheme as follows –
- (7) A person is qualified for appointment as a Trustee if that person—
    - (a) is a citizen of Kenya;
    - (b) holds a degree from a university recognized in Kenya;
    - (c) has at least five years’ experience in—
      - (i) finance;
      - (ii) law;
      - (iii) economics;
      - (iv) actuarial science; or



- (v) any other profession or work experience directly relevant to the functions of the Board; and
  - (d) meets the requirements of leadership and integrity set out in Chapter Six of the Constitution.
- 7. Section 18 provides for appointment of the Chief Executive Officer of the Scheme by the Board for a term of three years renewable once. The qualifications for appointment as Chief Executive Officer are set out at section 18(3) as follows –
  - (3) A person is qualified for appointment as the chief executive officer if that person—
    - (a) is a citizen of Kenya;
    - (b) holds a degree from a university recognized in Kenya;
    - (c) has at least ten years of experience of which five years should be at senior management level in a profession relevant to the functions of the Scheme as may be defined in the Regulations; and
    - (d) meets the requirements of leadership and integrity set out in Chapter Six of the Constitution.
- 8. Sections 21, 22 and 23 provides for appointment of fund manager, custodian of the scheme and administrator respectively by the Board.
- 9. Section 24 of the Act provides for contributions by both the employee (12%) and employer (15%) of pensionable emoluments which are defined in section 2 to mean basic salary excluding housing, transport and any other allowances or fluctuating emoluments.
- 10. Section 45 provides that –

Where there is a conflict between the provisions of this Act and the provisions of the Retirement Benefits Act, the provisions of the Retirement Benefits Act shall prevail.
- 11. Section 52 repeals the Local Authorities Provident Fund Act and revokes the Local Authorities Pensions Trust Rules, 2007 and the Laptrust (Umbrella) Retirement Fund Trust Deed and Rules registered under the Retirement Benefits Act.
- 12. In the transitional provisions, sponsors and members are exempted from making Tier II contributions from other schemes. Further, that persons with pensionable service of less than five years are ineligible to join the Fund under the Act. Provision is also made for compulsory transfer of members of Local Authorities Provident Fund and Local Authorities Pensions Trust Fund to join the scheme upon commencement of the Act; and for the Local Authorities Provident Fund, Local Authorities Pensions Trust, Local Authorities Pension Trust (Defined Benefits) Scheme and Local Authorities Pension Trust (Umbrella) Retirement Fund to be closed to new entrants on the commencement date.
- 13. The transitional provisions further provide that the closed funds shall continue paying any pension and benefits out of the closed funds up to the end of five years from date of commencement.
- 14. Section 132 of the County Government Act is repealed by section 59 of the Act.
- 15. Following the commencement date of the Act, several petitions were filed challenging the constitutionality and legality of the Act and/or sections thereof.



16. Petition No 213 of 2019 is filed by Okiya Omtatah Okoiti, who describes himself in the petition as a public spirited individual, human rights defender and Executive Director of Kenyans for Justice and Development (KEJUDE) Trust, a legal entity founded in Kenya to uphold the rule of law and constitutionalism, to defend human rights, promote democratic governance and agitate for sustainable economic development and propriety in the general population.
17. The Petitioner names the County Governments Retirement Scheme, local Authorities Provident Fund Trustees, Laptrust/County Pension Trustees as the 1<sup>st</sup> to 4<sup>th</sup> respondents respectively.
18. The 5<sup>th</sup> to 51<sup>st</sup> respondents are the County Governments of the 47 counties of Kenya. The 52<sup>nd</sup> respondent is the Council of Governors while the 53<sup>rd</sup> to 150<sup>th</sup> respondents are the water and sewerage companies based in counties who remit worker dues to the various pension schemes named as the 2<sup>nd</sup> to 4<sup>th</sup> respondents.
19. The Cabinet Secretary, National Treasury is the 151<sup>st</sup> respondent and the Retirement Benefits Authority (RBA) the 152<sup>nd</sup> respondent. The Attorney General is named as the 153<sup>rd</sup> respondent.
20. The petition is anchored on articles 1(c), 3(1), 4(2), 10, 20(3) and (4), 22, 48, 50(1), 159, 162, 165(5), 258 and 259 of the Constitution.
21. The petitioner seeks the following reliefs –
  - (i) An order permanently prohibiting the respondents and anybody howsoever handling workers' pension funds from transferring their workers (employees), members, and benefits from existing schemes (Laptrust, Lapfund, and CPS) to the County Governments Retirement Scheme (CGRS) during the five year transition period and until the scheme is fully operationalized.
  - (ii) An order compelling the Retirement Benefits Authority to fast track the operationalization of the County Governments Retirement Scheme (CGRS) pursuant to section 56(6) of the CGRS Act in strict compliance with the Retirement Benefits Act.
  - (iii) An order compelling the Retirement Benefits Authority and the trustees of the schemes in issue herein to cause an independent actuarial audit of the schemes to protect the workers savings before the merger is completed.
  - (iv) An order compelling the Retirement Benefits Authority and the trustees of the schemes in issue herein to ensure that investments of all the schemes find the institutions established under the schemes are protected and transited to the CGRS.
  - (v) An order quashing the section 52(2) of the CGRS Act and therefore preventing mixing up of defined benefit schemes and defined contribution schemes contrary to the Retirement Benefits Act.
  - (vi) An order compelling Retirement Benefits Authority and the trustees of schemes in issue herein to ensure that no employees of the Lapfund Scheme and of the administrator of Laptrust Scheme lose their jobs, and should be transmitted to the new scheme as stated in the Act.
  - (vii) Order compelling the respondents to bear the costs of this suit.
  - (viii) Any other relief the court may deem just to grant.



22. The second Petition is No 222 of 2019 filed by Kenya County Government Workers Union, a trade union registered under the [Labour Relations Act](#) with membership in all 47 counties in Kenya who are also members of the existing pension schemes for employees of county government.
23. The petitioner has named the Board of Trustees of the Local Authorities Provident Fund as 1<sup>st</sup> respondent, its CEO David Koros as the 2<sup>nd</sup> respondent, the Attorney General as the 3<sup>rd</sup> respondent, Cabinet Secretary for National Treasury and as 4<sup>th</sup> respondent and Cabinet Secretary, Ministry of Devolution as 5<sup>th</sup> respondents, Cabinet Secretary, Ministry of State for Public Service, Youth and Gender as 6<sup>th</sup> respondent, Cabinet Secretary, Ministry of Labour as 7<sup>th</sup> respondent and Retirement Benefits Authority as 8<sup>th</sup> respondent. The 47 county governments are named as the 9<sup>th</sup> to 55<sup>th</sup> respondents.
24. The petitioner has enjoined the following as interested parties:
  - (1) County Pension Fund Financial Services Limited
  - (1) The Board of Trustees, Local Authorities Pension Trust
  - (3) Laprust Retirement Services Limited
  - (4) The Council of Governors
  - (5) Water Services Providers Association.
25. The petitioner objects to the impugned [Act](#) for subjectively seeking to transfer its members from a superior scheme to an inferior scheme without their consent.
26. The petitioner further accuses the 2<sup>nd</sup> respondent of changing the names of the 1<sup>st</sup> respondent and purporting that the 1<sup>st</sup> respondent is the scheme created in the impugned [Act](#).
27. The petitioner accuses the 8<sup>th</sup> respondent of complicity for failing to give guidance in the face of illegalities in the impugned Act and violations committed by the 2<sup>nd</sup> respondent.
28. The petitioner lists the illegalities to include varying terms and conditions of service of members of the 1<sup>st</sup> petitioner to their detriment, creating a state corporation as opposed to an irrevocable trust, failing to transition the assets and liabilities of the 2<sup>nd</sup> interested party's Defined Benefits Scheme contrary to the provisions of the [Retirement Benefits Act](#), providing for members of 2<sup>nd</sup> interested party to be paid under rules that were already revoked and failing to provide for role of trustees.
29. The petitioner prays for the following reliefs:
  - (a) A declaration be issued to the effect that the petitioners are entitled to protection under the provisions of the [Constitution 2010](#).
  - (b) A declaration that the actions, omissions and or conduct of the respondents complained of constituted and or amount to infringement of the petitioner's rights to equal treatment before the law and freedom from discrimination in line with the provisions of article 20(1) and 27(1) of the [Constitution](#).
  - (c) A declaration that the definition of pensionable emoluments under section 2 of the impugned Act violates the right of the Petitioner's members to fair labour practices and social security thus contravening the [Constitution](#) and the [County Government Act](#).
  - (d) A declaration that sections 4(3), 6, 7 and 56 of the impugned [Act](#) are discriminatory and therefore in contravention of the Constitution and are therefore null and void.



- (e) A declaration that sections 6, 10 and 52 of the impugned Act undermine the authority of the *Retirement Benefits Act* and are therefore void.
  - (f) A declaration that the impugned *Act* is unconstitutional for lack of public participation as guaranteed by the *Constitution*.
  - (g) A declaration that the nature of the County Government Retirement Scheme as a state corporation as created under the impugned *Act* contravenes the *Retirement Benefits Act*.
  - (h) Any other reliefs that this Honourable Court will deem fit and just to give in the circumstances of this case.
  - (i) Costs of this Petition be granted to the Petitioner.
30. The third Petition No. 230 of 2019 is filed by Local Authorities Pensions Trust Board of Trustees (1<sup>st</sup> petitioner) and the County Pensions Fund Board of Trustees (2<sup>nd</sup> petitioner). The petitioners named the Attorney General, the Cabinet Secretary, National Treasury, the Retirements Benefits Authority and the Local Authorities Provident Fund, Board of Trustees as 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents respectively.
31. The 1<sup>st</sup> petitioner is described in the petition as a statutory body established under rule 14 of the *Local Authorities Pensions Trust Rules, 2007* (LN 50 of 2007). The general mandate of the 1<sup>st</sup> petitioner is to manage the Local Authorities Pensions Trust (hereinafter, “the DB Scheme”) (cf rule 14 of LN 50 of 2007)). The specific statutory mandate of the 1<sup>st</sup> petitioner is to:
- (a) formulate policies relating to the DB Scheme;
  - (b) administer and invest the funds of the DB Scheme;
  - (c) pay various benefits to members of the DB Scheme;
  - (d) protect the property and assets of the DB Scheme; and
  - (e) perform such other duties as may be necessary for the due and faithful performance of trust obligations imposed by LN 50 of 2007 and any other law (cf rule 16 of Legal Notice 50 of 2007).
32. The DB Scheme is a defined benefits pension scheme for the staff and officers of the defunct local authorities, most of whom are now employed by County Governments. The DB Scheme:
- (a) is the successor to the Kenya Local Government Officers’ Superannuation Fund, which was the successor to an earlier pension scheme established in 1928 (cf, Legal Notices No 200 and 313 of 1963);
  - (b) currently serves 9,200 pensioners spread across the world; and
  - (c) has 19,680 active members spread across various County Governments.
33. The 2<sup>nd</sup> petitioner is described as the body responsible for the management of the County Pension Fund (hereinafter, “the DC Scheme”). The mandate of the 2<sup>nd</sup> petitioner is analogous to that of the 1<sup>st</sup> petitioner.
34. The DC Scheme which was previously known as the Laptrust (Umbrella) Retirement Fund:
- (a) is a defined contribution pension scheme for the members, officers and staff of County Governments; and



- (b) has 46,200 members as at the date of presentment of this Petition.
35. It is the 1<sup>st</sup> petitioner's position that it promoted, established and registered the DC Scheme on May 27, 2011 pursuant to Policy Guidelines and Circulars issued by the 2<sup>nd</sup> respondent as part of preparations for transition to the devolved system of government. Consequently, the DC Scheme is and has at all material times been the "existing pension scheme" for the members, officers and staff of county governments referred to in:
- (a) Section 132 of the [County Governments Act, 2012](#); and
- (b) Section 49 of the [Urban Areas and Cities Act, 2011](#).
36. The petitioners state that they have filed the petition herein pursuant to their legal and fiduciary obligations to 75,760 members of the DB Scheme and the DC Scheme. Specifically, the Petitioners have filed this Petition for and on behalf:
- (a) 42,600 members of the DC Scheme, currently serving in various County Governments;
- (b) 19,680 active members of the DB Scheme, currently serving in various County Governments;
- (c) 9,200 pensioners of the DB Scheme, currently living in various countries across the world; and
- (d) 680 deferred members of the DB Scheme.
37. The petitioner avers that the impugned [Act](#) is unconstitutional because it:
- (a) Violates the functional and institutional integrity of County Governments, contrary provisions of (*inter alia*) articles 6(2), 40, 41, 43(1)(e), 189(1)(a) and 235(1), to the extent that it (*inter alia*) —
- (i) purports to establish a pension scheme for County Governments when the constitutional mandate of the National Government is limited to prescribing standards for consumer protection, including standards for social security and professional pension plans;
- (ii) gives overbearing powers to the 2<sup>nd</sup> respondent, who is a State Officer within the National Government, over a pension scheme for the members, officers and staff of County Governments;
- (iii) purports to establish a pension scheme for County Governments that mirrors a state corporation under the direct control of the National Government through the 2<sup>nd</sup> respondent;
- (b) violates article 10 of the [Constitution](#) to the extent that it was enacted without genuine public participation and, specifically, in contemptuous disregard of the comments and concerns raised by:
- (i) the DB Scheme;
- (ii) the DC Scheme;
- (iii) the Council of Governors; and
- (iv) other key stakeholders;
- (c) violates article 27 of the [Constitution](#), to the extent that:



- (i) it excludes certain officers of County Governments (e.g. Governors, Deputy Governors, County Executive Committee Members and Members of County Assemblies) from joining the pension scheme it purports to establish;
  - (ii) its transitional provisions secure the employment of the 4<sup>th</sup> respondent's administrative staff without according similar treatment to the employees of the administrator of the petitioners;
  - (iii) Locks out the current corporate administrator of the DB Scheme and the DC Scheme from administering not only the DB and DC Schemes but also the proposed new Scheme;
- (d) Violates article 40 of the Constitution to the extent it is premised on the untenable assumption that pension savings of members of the DB Scheme and DC Scheme are public funds and thus subject to state control through the 2<sup>nd</sup> Respondent;
- (e) Violates article 41 of the Constitution to the extent that it purports to unjustifiably:
- (i) force members of the DB Scheme and the DC Scheme to abandon those schemes and join a scheme that offers inferior benefits;
  - (ii) Repeal statutory protections accorded to some members of the DB Scheme, and the DC Scheme, through sections 132 and 138 of the County Governments Act, against adverse alteration of pension rights and benefits;
- (f) Violates article 36 of the Constitution to the extent that it purports to compel the members, officers and staff of County Governments to join a pension scheme other than that they have freely and voluntarily chosen;
- (g) Violates article 43 of the Constitution to the extent that it purports to enable the state to shirk its responsibility for the social security of the members, officers and staff of County Governments to the extent that it requires members of the scheme it purports to establish to provide for their own social security by ensuring that they save in order to cater for their livelihood during their retirement. This aspect of the Impugned Act is also discriminatory, contrary to the provisions of article 27 of the Constitution; and
- (h) Violates Clause 6 of the Sixth Schedule to the Constitution to the extent that its transitional provisions create a leeway for the National Government to evade or shirk its responsibility for the actuarial deficits and liabilities of the DB Scheme.
38. The petitioners also contend that the Impugned Act is radically in conflict with Government Policy and overarching laws and regulations that govern all retirement benefits schemes in Kenya. Specifically, the Petitioners contend that the Impugned Act is radically in conflict with (*inter alia*):
- (a) The Retirement Benefits Act and Regulations made thereunder;
  - (b) Sections 132 and 138 of the County Governments Act, 2012;
  - (c) Section 49 of the Urban Areas and Cities Act, 2011;
  - (d) General principles and the common law of trusts;
  - (e) policy guidelines issued by and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents; and
  - (f) countless letters issued to the petitioners by and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.



39. It is the position of the petitioners that the impugned Act violates and/or are inconsistent with articles 2(4), 6(2), 10(2)(a), 27, 36, 40, 41, 43(1)(e), 118(1)(b) and 235(1) of the Constitution as read with clause 14 of the Fourth Schedule and clauses 6 and 15 of the Sixth Schedule thereof.
40. The petitioners aver that they will or are likely to suffer injury as follows –
- (a) the comingling of defined benefit obligations and defined contribution obligations, contrary to structural differences in the two types of schemes and the prevailing regulatory norms;
  - (b) unjustifiable adverse alteration of the terms and conditions of employment for members of the petitioners and all county government employees and, specifically –
    - (i) forced bulk transfer of members from superior to inferior retirement benefits schemes; and
    - (ii) abrogation of members' right to consent or decline the adverse alteration of their terms and conditions of employment;
  - (c) the illegal and or irregular merger of the DB Scheme into another scheme without proper and adequate provision for its auctorial deficits and liabilities, which are a responsibility of the National Government. This will jeopardize the pensions and other retirement benefits of hundreds of thousands of members of the 1<sup>st</sup> petitioner;
  - (d) unjustifiable frustration of contracts between the two Schemes (i.e. the DB Scheme and the DC Scheme) and –
    - (i) various sponsors within County Governments;
    - (ii) water companies and various other entities associated with County Governments; and
    - (iii) administrators, hand managers, custodians and various other service providers;
  - (e) unnecessary and unjustifiable wastage of funds, in excess of Kshs.1.5 million, invested by the DB Scheme in promoting, establishing, recruiting and transferring members to the DC Scheme;
  - (f) unjustifiable wastage of funds invested by the DB Scheme in establishing the current corporate administrator;
  - (g) unnecessary and unjustifiable losses of employment for the staff of the current corporate administrator of the petitioners;
  - (h) establish a pension scheme in the nature of a state corporation, contrary to the global best practice and the prevailing overarching regulatory framework for retirement benefits schemes as set out in the Retirement Benefits Act and Regulations made thereunder;
  - (i) place the private pension savings of the members of the DB Scheme and the DC Scheme under the direct control and management of the National Government, thereby infringing the Petitioners' members' rights relating to expropriation and protection of private property; and
  - (j) subject the management of the private pension savings of the members of the DB Scheme and the DC Scheme to the vagaries of politics, contrary to the provisions of the Retirement Benefits Act, the prevailing Government Policy and the prevailing global best practices on the management of pension scheme funds.
41. The petitioners seek the following reliefs:



- (a) a declaration to the effect that the *County Governments' Retirement Scheme Act, 2019* is incompatible with the devolved system of government set out in the Constitution and accordingly, null and void.
- (b) Alternatively, and without prejudice to prayer (a) above, a declaration to the effect that sections 2, 3(c), 6, 18, 23, 24, 52, 53, 55 and 56 of the *County Governments Retirement Scheme Act, 2019* are inconsistent with the provisions of:
- (i) Articles 2(4), 6(2), 10(2)(a), 27, 36, 40, 41, 43(1)(e), 118(1)(b), 174(c), (h), 186(1), 189 and 235(1) of the *Constitution*;
  - (ii) Clause 14 of the Fourth Schedule to the *Constitution*; and
  - (iii) Clause 6 and 15 of the Sixth Schedule to the *Constitution*, and thus null and void.
- (c) a declaration to the effect that the County Pension Fund is and has at all material times been the “existing pension scheme” for the members, officers and staff of County Governments referred to in:
- (i) the version of section 132 of the *County Governments Act, 2012* that prevailed immediately before the enactment of the *County Governments Retirement Scheme Act, 2019*; and
  - (ii) section 49 of the *Urban Areas and Cities Act, 2011*.
- (d) a declaration to the effect that the County Governments Retirement Scheme Act, 2019 cannot close or affect the County Pension Fund in any way in view of the supersession of the *Retirement Benefits Act* over all other laws relating to retirement benefits schemes;
- (e) an order directing 1<sup>st</sup> Respondent to pursue such amendments as may be necessary to bring the *County Governments Retirement Scheme Act, 2019* into conformity with:
- (i) the provisions of articles 2(4), 6(2), 10(2)(a), 27, 36, 40, 41, 43(1)(e), 118(1)(b), 174(c), (h), 186(1), 189 and 235(1) of the *Constitution*;
  - (ii) the provisions of Clause 14 of the Fourth Schedule to the Constitution;
  - (iii) the provisions of Clause 6 and 15 of the Sixth Schedule to the *Constitution*;
  - (iv) the version of section 132 of the *County Governments Act, 2012* that prevailed immediately before the enactment of the County Governments Retirement Scheme Act, 2019;
  - (v) section 138 of the *County Governments Act, 2012*;
  - (vi) section 49 of the *Urban Areas and Cities Act, 2011*; and
  - (vii) the relevant provisions of the *Retirement Benefits Act* and Regulations made thereunder.
- (f) the costs of and incidental to this Petition;
- (g) interest on (f) above at court rates with effect from the date of filing this Petition until the date of full and final settlement; and/or
- (h) such other, further, additional, incidental and/or alternative reliefs as the Honourable Court may deem just, appropriate and expedient.



42. The fourth Petition No 36 of 2022 was originally filed in ELRC Kisumu as Petition No 6 of 2020 by Christine Songo against County Executive Committee Member Finance, County Government of Kakamega – 1<sup>st</sup> Respondent, County Government of Kakamega – 2<sup>nd</sup> Respondent, Local Authorities Pension Trust (Lap Trust) – 3<sup>rd</sup> Respondent and the Local Authorities Provident Fund (Lap Fund) – 1<sup>st</sup> Interested Party and the County Government Retirements Scheme – 2<sup>nd</sup> Interested Party
43. The petitioner who is an employee of the County Government of Kakamega states that she is the Area Branch Secretary of the Kenya County Government Workers Union and brings the petition on her own behalf and on behalf of her co-workers who are employees of the 2<sup>nd</sup> Respondent.
44. The petitioner avers that the co-workers and herself signed voluntary contracts and were voluntary members of the 2<sup>nd</sup> Interested Party to which they had been contributing their pension savings which are deducted from their salaries by the 2<sup>nd</sup> Respondent. That the 2<sup>nd</sup> Respondent also contributes a certain percentage which together are remitted to the 1<sup>st</sup> Interested Party.
45. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents without the consent of the petitioner or her co-workers with the knowledge that the petitioner and her co-workers were members of the 1<sup>st</sup> respondent unilaterally started deducting and remitting their pension contributions to the 3<sup>rd</sup> respondent.
46. That there has been no formal communication and no provision for the pension contributions that have for many years been contributed and remitted to the 1st Interested Party and NSSF to be transferred to the 3<sup>rd</sup> respondent. Neither is there any formal contract between the petitioner and her co-workers with the 3<sup>rd</sup> respondent.
47. There is no provision for the petitioner and her co-workers pension contributions that had been made to the 1<sup>st</sup> Interested Party for many years before such transfer to the 3<sup>rd</sup> Respondent.
48. It is the Petitioner's contention that the actions of the Respondents would deprive the Petitioner and the co-workers their right to join a pension scheme or fund of their choice contrary to article 41 of the *Constitution*. Further that they have been subjected to administrative action that is inefficient, unlawful, unreasonable and procedurally unfair contrary to article 47 of the *Constitution*.
49. The Petitioner further avers that the Respondents have violated her right to fair hearing under article 50(1), equal benefit and protection of the law contrary to article 27(1) and deprivation of the right to economic rights by removal of certain pension savings to NSSF without any legal reason contrary to article 43(1)(e) of the *Constitution*.
50. The Petitioner contends that her co-workers and herself are bound to suffer loss and damages amounting to over Kshs 29,573,520 for November 2019 contributions and Kshs 29,037,773 for December 2019 contributions totalling Kshs 57,611,293.
51. The Petitioner prays for the following reliefs –
  - (a) A Declaration that the Respondents actions are contrary to the provisions of the *Constitution* article 27, 41,43(1) (d) and (e), 47, 50 and 232 and infringes on the rights of the petitioner and co-workers by unilateral remittance to the 3rd Respondent without their consent.
  - (b) A mandatory order directed at the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to stop remittance of the Petitioners and her co-workers pension contribution to the 3rd Respondent without their consent and to remit the same to the 1<sup>st</sup> Interested Party pending transition to the 2<sup>nd</sup> Interested Party.



- (c) A mandatory order directed at the 3<sup>rd</sup> Respondent to transfer all petitioners and her co-workers pension contributions remitted to it by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to the 1<sup>st</sup> Interested Party with whom they have a contract.
- (d) An order directed at the Respondents to comply with section 52, Part VI sections 54, 55, 56 and 57 of The County Governments Retirements Scheme Act, No 21 of 2019.
- (e) The costs of the petition be borne by the Respondents.

52. Several of the Respondents and Interested Parties filed responses to the petitions.

### **The Attorney General's Response**

- 53. The Attorney General who is a common party in Petition 213 of 2019, 222 of 2019 and 230 of 2019 filed replying affidavits of Dr. Julius Muia, the Principal Secretary of the National Treasury dated 12<sup>th</sup> March 2020 in respect of Petition 230 of 2019 and another replying affidavit dated 15<sup>th</sup> May 2020 in respect of Petition 213 of 2019. It also filed a notice of preliminary objection in Petition 222 of 2019 dated 15<sup>th</sup> July 2022.
- 54. In the notice of preliminary objection, the Attorney General contends that Okiya Omtatah the Petitioner lacks *locus standi* citing Civil Appeal No. 119 of 2017 consolidated with 139 of Civil Appeal of 132 of 2017 Public Service Commission & 4 others v Cheruiyot & 32 others.
- 55. It is further the Attorney General's position that the Petitions (213, 222 and 230 of 2019) are misconceived since they do not disclose any cause of action or dispute against the Respondents within the meaning of section 12(1) of the Employment and Labour Relations Court (ELRC) Act, that the Petitioners are forum shopping and that the Petitions are grossly incompetent, incurably defective, frivolous, vexatious and an abuse of the Court process.
- 56. In the replying affidavits, Dr. Julius Muia deposes that as early as 2006, there were proposals to merge LAPTRUST and LAPFUND under one Act of Parliament following consultations among stakeholders. Upon promulgation of the 2010 Constitution which established the devolved system of Government comprising the National Government and 47 County Governments the function of overseeing matters pertaining to consumer protection, standards for social security and professional pension plans was assigned to the National Government with standards to be regulated, supervised and overseen by the Retirement Benefits Authority.
- 57. The affiant deposes that during the process an interagency Technical Committee (TC) comprising representatives of the Council of Governors and National Government was established by the Council of Governors (CoG) chaired by RBA with representation from RBA, National Treasury (Pensions Department), SRC, TA (Transition Authority) CoG, Ministry of Devolution and Planning (Directorate of Public Service Management) Commission on Implementation of the Constitution, Kenya Law Reform, Public Service Commission, County Public Service Boards, LAPTRUST and LAPFUND. The TC recommended an umbrella pension scheme for all staff of the county governments.
- 58. Following adoption of the recommendations of the TC an implementation committee was set up to oversee the implementation. That the TA however noted that instead of setting up a new pension scheme as recommended the CoG adopted LAPTRUST as Umbrella Pension Scheme as the County Pension Scheme contrary to the recommendations of the TC.



59. A private member bill (County Retirement Scheme Bill 2014) was introduced in the senate which the Senate Standing Committee on Labour and Social Welfare resolved to be taken over by the National Treasury who prepared a draft County Governments Superannuation Scheme Bill, 2015 following which stakeholders were consulted. The bill was presented to Cabinet by Treasury and thereafter tabled before the National Assembly.
60. The affiant contends that LAPFUND and LAPTRUST were among stakeholders who submitted their views. That the bill was approved and passed by a simple majority of the Senate and sent to the National Assembly for concurrence.
61. On the allegations raised by the Petitioners, the affiant states that there are no conflicts between the impugned Act with any of the provisions of the Constitution cited by the Petitioner.
62. The affiant states that in the impugned Act the role of the 2<sup>nd</sup> Respondent is limited to the appointment by gazette notice of persons nominated by various stakeholders under the Act. That it is therefore not true that the Act gives overbearing powers to 2<sup>nd</sup> Respondent. That the management of the fund is vested in the Board of Trustees which is answerable to the sponsors and members as set out in sections 13 and 14 of the Act.
63. The affiant depones that state officers who work in county governments are catered for under Sections 4(3) and 57(2) of the Act which also preserves the jobs of existing staff of the existing schemes under the transitional provisions. Further, that the Act provides for the scheme funds to be managed and protected under the Public Finance Management Act. That the serving provisions protect the interests of members and there is no demonstration that the scheme is inferior to the existing schemes.
64. It is further the affiant's position that there is no conflict between section 132 and 138 of the County Governments Act and section 49 of the Urban Areas and Cities Act.
65. It is further the position of the affiant that there is no conflict between the impugned Act and the Retirement Benefits Act. Further, that the Impugned Act takes precedence over the Occupational Retirement Benefits Scheme Regulations under the RBA as provided in the Judicature Act.
66. The affiant concludes that there was genuine public participation involving all stakeholders and that the orders sought by the Petitioners if granted will occasion hardship to the Respondents. That the orders sought are not based on public interest but on private interest of the Petitioners. That the Petitioners have not demonstrated any reasonable or justifiable cause to warrant the grant of the orders sought.

#### **Response by Local Authorities Provident Fund (LAPFUND)**

67. The LAPFUND responded to the petitions through the replying affidavit of David Koros, its Chief Executive Officer sworn on 21<sup>st</sup> February 2020.
68. Mr. Koros deposes that LAPFUND is a Statutory Body established under section 4 of the Local Authorities Provident Fund Act, cap 272, Laws of Kenya enacted in 1960. LAPFUND is under the ministerial responsibility of the National Treasury purely for accountability purposes but does not receive or channel any funds to the public coffers since all the funds held therein are vested in individual members.
69. That currently, the scheme has 52,000 members drawn from the county governments and the fund value stands at 36 billion.



70. That at inception, the scheme was intended to manage retirement benefits for the lower cadre of the local authorities' staff who were mainly African natives. The scheme was in addition to the then Local Authorities Superannuation Fund (which later changed the name to Local Authorities Pension Trust) earlier established to manage retirement benefits for the senior cadre of the local authorities who were then Whites and Indians during the colonial era.
71. That LAPFUND and LAPTRUST co-existed for fifty one (51) years carrying out a similar mandate of providing retirement benefits to employees of local authorities save that:
- (a) LAPFUND was and still is a defined contribution scheme in which the benefit is based on the amount contributed by the employee, the employer and the return on investment of that amount whereas LAPTRUST was and still is a defined benefits scheme (in which benefit is computed using a formula that is based on years of service, salary at exit and a pension formula - regardless of the amount contributed by the employee and the employer);
  - (b) LAPFUND was and still is a provident fund that pays the benefit as a one-off lump sum while LAPTRUST was and still is a pension fund paying part of the benefit in lump sum and part as monthly drawdown during the lifetime of a pensioner;
  - (c) LAPFUND is established under an Act of Parliament while LAPTRUST is established under the *Local Government (Local Authorities Pension Trust) Rules, 2007* (the LAPTRUST Rules, 2007).
72. That the co-existence subsisted until year 2011 when the 1<sup>st</sup> Petitioner established the Local Authorities Pension Trust (Umbrella) Retirement Fund (a defined contribution scheme) pursuant to the National Treasury Circular Number 18 of 2010 which required all public defined benefits schemes to convert to defined contribution schemes since the government found them to be unsustainable due to deficits in funding levels occasioned by the disconnect between contributions made vis-a-vis the benefits paid and poor investment decisions.
73. That over the years, members have been transferring from one scheme to the other at whim catalysed by vigorous marketing and cut-throat competition perpetuated by LAPTRUST which has always regarded itself as a superior scheme. Even after the management of the two schemes agreed not to transfer members to allow a smooth merger process, the then General Manager of LAPTRUST who is now the Group Managing Director of LAPTRUST and associated companies vehemently opposed the decision and insisted that members should be allowed to move at will. That he instigated members by releasing correspondence to them to push for transfer from LAPFUND to LAPTRUST.
74. The affiant narrates the background of efforts that have been made towards the merger of LAPFUND and LAPTRUST going back to 2006, much in tandem with the process as narrated in the replying affidavit of Dr. Julius Muia already set out above.
75. The affiant adds that one of the issues that was to be addressed was transfer of members between the two schemes which had caused confusion and losses to members.
76. The affiant depones that upon promulgation of the Constitution in 2010, Parliament commenced the legislative process with the aim of inter alia aligning affected institutions to the devolved system of Government including enactment of the County Governments Act, 2012.



77. That Section 132 of the County Governments Act provides as follows;
- “Subject to the transitional provisions herein, all members and officers of staff of a county government shall subscribe to an existing pension scheme for officers and staff of local government.”
78. That unknown to LAPFUND, LAPTRUST was secretly pushing an agenda behind the scenes to be the only scheme managing the retirement benefits for county employees by closing LAPFUND and taking over its operations.
79. That on 28<sup>th</sup> November 2012 in a joint meeting between the two schemes and representatives of the Ministry of Local Government, amendments to the County Governments Act No. 17 of 2012 and the Urban Areas & Cities Act were agreed upon which were meant to preserve the two schemes during transition to county governments awaiting the conclusion of the merger process and establishment of a new scheme into which the two would merge. According to LAPFUND, the agreed amendments included;
- (a) Deletion of section 132 and substitution with the following *inter alia*;
- (i) Section 132(1) there shall be established a pension scheme for members, officers and staff of the county governments which shall be a defined benefits scheme.
- (ii) Section 132(2) All members, officers and staff of county governments who immediately before commencement of this Act were members of the local authorities provident fund shall upon commencement of this Act continue to subscribe to the defined contribution provident fund
- (b) Deletion of section 49 and substitution with the following;
- “ All members, staff and officers of institutions set up under this Act shall subscribe only to the schemes established under section 132 (1) (2) and (4) of the County Governments Act 2012.”
80. The affiant alleges that in a bid to steal a match against LAPFUND, the Managing Director of LAPTRUST represented to the Permanent Secretary, Ministry of Local Government amended proposals intended to ouster LAPFUND as follows:
- (a) The existing pension scheme currently for officers and staff of local authorities is hereby re-established and subject to the transitional provisions herein, all members, officers and staff of a county government shall subscribe to the re-established scheme.
- (b) All members, officers and staff of focal authorities who immediately before the commencement of this Act were members of the defined contribution or the provident fund shall transfer their membership and accrued benefits to the re-established scheme.
81. The affiant avers that after the amendments to the two Acts, LAPTRUST started using the Section to the disadvantage of LAPFUND to the extent that the CoG issued Circular No. 1 of 2014 directing all counties to stop making contributions to LAPFUND.
82. The affiant states that the impugned Act does not conflict with any provisions of the Constitution, that the setting up of a scheme would not require expenditure of Kshs.1.5 billion as alleged as all that is required is drafting and registration of relevant trust deed and rules.



83. It is further the averment of the affiant that the government does not have control over the corporate entity established under the impugned Act as it provides for the Board of Trustees to appoint all persons and entities and to make all decisions in respect of recruitment of staff, managers, custodians and administrators of the scheme on behalf of the scheme.
84. Further, that funds of the scheme are vested in individual members. That the scheme does not force members to contribute to NSSF, does not designate retirement saving of county governments, violate the functional and institutional integrity of county governments or designate the retirement savings of county government, employees as public funds.
85. It is further the averment of the affiant that the impugned Act does not conflict with the provisions of the Retirement Benefits Act as it provides at section 45 that in case of a conflict between the Act and any provisions of the RBA the latter would prevail over subsidiary legislation. That should there be conflict between the Act and the Occupational Retirement Benefits Regulations, the impugned Act would prevail on the basis of hierarchy of statute.
86. The affiant depones that the provisions of the Act will only take effect after five years and there is plenty of time to put in place any procedures required under the Retirement Benefits Act.
87. It is further the affiant's averment that the impugned Act does not conflict with provisions of section 132 of the County Governments Act and section 49 of the Urban Areas and Cities Act. Further that the impugned Act cannot conflict with the Government Policy since statute is superior to policy.
88. It is the affiant's averment that no injury has been caused or is likely to be caused to the petitioners as the impugned Act shall not lead to intermingling of defined benefits obligations and defined contributions obligations, or alter the terms and conditions of employment of the Petitioners. That if there will be any alteration of terms then the same is justifiable as such future benefits are capable of alternation.
89. The affiant contends that alleged actuarial deficits stem from the 1<sup>st</sup> Petitioner's poor management and investment decisions, and that in any event such actuarial deficits are unsubstantiated and unproved.
90. The affiant concludes that the allegations in the petition are unfounded, in bad faith and an abuse of Court process. That the same allegations were made and lost before the National Assembly and the Senate during stakeholder participation.

### **Response by RBA**

91. The Retirement Benefits Authority filed replying affidavits of Charles Machira, its Chief Manager, Supervision, in response to Petition No 213, 222 and 230 of 2019 respectively, all sworn on 16<sup>th</sup> July 2020.
92. The thrust of the averments in the three replying affidavits is that the objects of the Retirement Benefits Authority are set out in section 5 of the Retirement Benefits Act. That the County Governments Retirement Scheme Act, 2019 conferred upon the Retirement Benefits Authority the obligation of transitioning the County Governments Retirement Benefits scheme under section 55 of the impugned Act. Further, that the RBA has not failed to carry out its obligations under the Retirement Benefits Act as alleged by the Petitioners.
93. It is the position of RBA, that by an advertisement in the Daily Nation and Standard Newspapers on 23<sup>rd</sup> October 2020, the Chief Executive Officer of the Board of the Local Authorities Provident Fund gave the impression to the public that LAPFUND is the County Government Retirement Scheme referred to under section 56 of the impugned Act.



94. Upon realisation of the same, the RBA's Chief Executive Officer wrote to caution the CEO of LAPFUND to stop giving such false impression as was created by the advertisements.
95. Mr. Machira denies that the provisions of the impugned Act offend any provisions of the Constitution or the Retirement Benefits Act or that it introduces inferior terms of employment for employees of county governments as alleged by the Petitioners.
96. It prays that the petitions be dismissed.

### **Response by County Pensioners Association**

97. The County Pensioners Association filed a replying affidavit of EZRA O. NGOGE, its Chairman which supports the position of the Kenya County Government Workers Union.
98. He avers that the following sections of the impugned Act are inconsistent with articles 2(4), 6(2), 10(2) (a), 27, 36, 40, 41, 43(1)(a), 118(1)(b), 174(c), (h), 186(1), 189 and 235(1) of the Constitution of Kenya 2010, as read with clause 14 of the Fourth Schedule and clause 6 and 15 of the Sixth Schedule thereof as follows;
  - (a) Section 3(c) of the Impugned Act, is inconsistent with the Constitution to the extent that it purports to relieve the National Government of the constitutional responsibility for providing social security to all citizens including members, officers and staff of County Governments.
  - (b) Section 6 undermines the functionality and institutional integrity of County Governments.
  - (c) Section 18 and 23 of the Impugned Act to the extent that it purports to lock out the current corporate administrator of the DB Scheme and the DC Scheme from administering the proposed scheme.
  - (d) Section 56(5) of the impugned Act by discriminating against the staff of the administrator of the DB and DC Schemes.
  - (e) Section 2 as read together with section 24 which excludes house allowance in the definition of pension emoluments
  - (f) Section 55 and 56 of the Impugned Act which fails to provide for the settlement of debts and actuarial deficits of the Laptrust DB scheme which must be settled by the National Government. The same also purports to compel the members, officers and staff of County Governments to join a pension scheme other than that which they have freely and voluntarily chosen, contrary to the provisions of article 36 of the Constitution.
99. He depones that the impugned Act is unconstitutional to the extent that:
  - (a) It was enacted after a mock public participation;
  - (b) It purports to relieve the state of its constitutional responsibility;
  - (c) It discriminates against the members of the DC and DB Schemes;
  - (d) It discriminates against the employees of county governments;
  - (e) It infringes on the constitutional rights of the County Government Employees to fair labour practices and;
  - (f) Infringes on the constitutional rights of County Government Employees to protection of private property.



100. It is further his averment that the impugned Act is in conflict with the Retirement Benefits Act and section 132 of the County Governments Act because it will:
- (a) Lead to joining of the Defined Benefits Obligations and the Defined Contribution Obligations despite the structural differences in the two types of schemes and the prevailing regulatory norms,
  - (b) Adversely and unjustifiably alter the terms and conditions of employment of the employees of the County Governments,
  - (c) Lead to the illegal and irregular merger of the DB Scheme into another scheme without proper and adequate provision for its actuarial deficits and liabilities,
  - (d) Unjustifiably forestall the contracts between the two schemes and its various sponsors within the County Governments,
  - (e) Lead to unnecessary and unjustifiable wastage of funds invested by the DB Scheme,
  - (f) Lead to the unnecessary and unjustifiable loss of employment and,
  - (g) Place the private pension savings of the members of the DB Scheme under the direct control and management of the national government.

#### **Response by Nakuru Water and Sanitation Services Company Limited**

101. Nakuru Water and Sanitation Services Company Limited filed an affidavit of James Gachathi Ng'ang'a, its Managing Director sworn on 5<sup>th</sup> February 2020 in which he deposes that its employees are members of both LAPFUND and LAPTRUST. That section 6 of the impugned Act discriminates against water companies as it does not allow the water companies, their sponsors and their members who form part of the existing schemes any representation in the Board of Trustees of the scheme established by the impugned Act.
102. That the impugned Act threatens the right to social security of its members, some of whom are employees of the water companies, by reducing the amount of emoluments to be contributed by both the employer and the employee thereby reducing the pension earnings of members contrary to section 138(1) of the County Governments Act.
103. That the impugned Act limits the period under which its members are to be paid their monthly pension emoluments to a maximum period of 5 years.
104. That the impugned Act has removed the insurance benefit currently catered for by the existing schemes and enjoyed by its members thereof, and transferred the responsibility to provide the insurance benefit from the scheme to the sponsors. That this is unprocedural and unconstitutional as it was done without consulting the sponsors.
105. It is the position of the Nakuru Water Company that the impugned Act is unconstitutional to the extent that proper public participation was not carried out to the detriment of water companies. That Sponsors of the scheme who are adversely affected by the impugned Act will suffer irreparable loss which cannot be compensated.
106. In response to Petition No. 036 of 2022 the County Executive Committee Member, Finance and the County Government of Kakamega filed the replying affidavit of Lawrence Omuhaka, the Chief Officer In Charge of Public Service and Administration and Secretary to the Advisory Committee, County Government of Kakamega. He contends that LAPFUND is not a pension scheme or an



existing scheme envisaged under section 132 of County Government Act and section 49 of Urban Areas and Cities Act and further that the County Government of Kakamega has never been subject to the provisions of the Local Authorities Provident Fund Act or signed a memorandum of understanding with LAPFUND.

107. He depones that during the 16<sup>th</sup> Executive Committee meeting held on 17<sup>th</sup> September 2019 the members of the Public Service and Administration presented a memorandum on execution of Deed of Adherence for the sponsorship of employees in the County Pension Fund. The Memorandum requested the cabinet to approve as follows:
- (i) The Execution of Deed of Adherence under the County Pension Fund to enable update with the fund.
  - (ii) That all new employees who joined the service of the County after the first general election under the Constitution of Kenya 2010 be enrolled as a term and condition of employment to County Pension Fund.
  - (iii) That with effect from August contributions will be channelled to County Pension Fund (CPF) after completion of all the paper work.
  - (iv) That the County Government of Kakamega jointly with other County Governments within the Republic of Kenya shall own the County Pension Fund and shall participate in all its activities as required of a sponsor under the Retirements Benefits Authority.
  - (v) That the transfer of employees to CPF will not result into loss of benefits for the members.
108. That in compliance with section 132 of the County Government Act and the Constitution 2010 and in relation to the 16<sup>th</sup> Executive Committee held on 17<sup>th</sup> September 2019, the Cabinet approved the Deed of Adherence whereupon all employees who joined the service of the County on permanent and Pensionable terms were to be enrolled in the County Pension Fund as a mandatory requirement.
109. That the decision to transfer the benefits of permanent and pensionable employees to County Pension Fund (CPF) was informed by the benefits offered from the defined contributions plan operated by CPF which are superior to the provident fund scheme that is offered by LAPFUND.
110. That legally the employer has a right to move the service provider's pension scheme for its staff provided it provides better services and no consent of the employee is required as stipulated in the County Government Act.
111. That the staff and officers who are employed by the County Government have a constitutional right to social security which includes the right to pension hence the reason why the Petitioner's benefits/ monies were transferred from LAPFUND which is a provident fund to LAP TRUST which is a pension scheme also known as CPF.
112. That an employer is required under the law to determine the retirement benefit scheme for its employees. Specifically section 33 of the Retirement Benefits Act provides as follows:
- Notwithstanding the provisions of any written law for the time being in force, an employer may with the approval of his employees pay any statutory contributions in respect of such employees into any scheme fund prescribed for that purpose.
113. That the employees approval was obtained whereupon the County Government of Kakamega together with the County Pension Fund carried out sensitization exercise of all staff through public



participation from 9<sup>th</sup> – 14<sup>th</sup> October 2019 before the employees benefits were transferred to the County Pension Fund.

114. That the said sensitization exercise was aimed at achieving the following:
  - (a) Sensitizing the staff about the essence of being enrolled in a Pension Scheme.
  - (b) Sensitizing the staff about the security of their benefits (monies)
  - (c) Sensitizing the staff about the consequences of the shift from a provident fund to a pension scheme.
115. That the scheme prescribed under section 33 of the Retirement Benefits Act and section 132 of the County Government Act currently is the County Pension Fund (CPF) formerly known as the LAPTRUST (Umbrella Retirement Fund).
116. That the County Pension Fund is an Umbrella Pension Scheme registered by the Retirement Benefits Authority (RBA) in April 2011 under its previous name LAPTRUST (Umbrella) Retirement Fund, for local government employees in Kenya.
117. That the contributory scheme for CPF is in the ratio of 12% of basic salary plus house allowance for employees and 15% of basic salary plus house allowance for employers while in LAPFUND the contribution ratio was 7.5% of basic salary for employees and 15% of basic salary contributed by the Employer.
118. That the increase in what the employee is to contribute towards the County Pension Fund is in accordance with the recommendation of the 19<sup>th</sup> Executive Committee meeting held on 7<sup>th</sup> November, 2019 as approved by the Cabinet.
119. That the Petitioner has not raised any complaints with the County Human Resource Advisory Committee, the Kakamega County Public Service Board or the Public Service Commission and has therefore failed to exhaust the alternative mechanisms of resolving the dispute as provided under the County Government Act hence the suit is prematurely before this Court.
120. The affiant further depones that no constitutional right of the Petitioner has been violated nor has there been any breach of the County Government Retirement Scheme Act as the Act is not operational. That the suit is bad in law, does not disclose any cause of action against the County Government of Kakamega and is therefore an abuse of Court process.

### **Analysis and Determination**

121. In view of the number of Petitions that have been consolidated into this suit and the very large number of parties involved who are in excess of 165, further in view of the fact that some of the parties appear in two or more capacities with some appearing in one as Petitioner, in another as Respondent and in yet another as Interested Party, further in a bid to create order in the manner in which the hearing was conducted, the parties agreed to group themselves into two broad categories, the first being those contesting the validity of the impugned Act and the second constituting those supporting the same.
122. All the parties contesting the validity of the impugned Act in their pleadings including all Petitioners and the Interested Parties supporting them, will loosely be referred to as Petitioners. The group comprising of the Respondents and Interested Parties supporting the validity of impugned Act will be referred to as Respondents.



123. During the hearing, the Petitioners were led by Senior Counsel Githu Muigai assisted by Dr Muthomi Thiankolu while the Respondents were led by Senior Counsel Ngatia.
124. It is common ground that until November 2010, employees of Local Government Authorities were covered under two retirement benefits schemes LAPTRUST a pension scheme and LAPFUND, a provident fund scheme. It is further common ground that LAPTRUST was established in 1929 as a Defined Benefits (DB) Scheme under an irrevocable trust. For this reason the amount of contribution by the employee and/or employer (the Sponsor) was not relevant to the amount of pension that was payable, which was based on the average of the last three years' salary and calculated based on a formula set out in the Trust Deed and Rules of the Scheme.
125. LAPFUND on the other hand was established in 1960 as a provident fund scheme. It was a defined contribution scheme with benefits pegged on the contributions made by the employer (the Sponsor), the employee and interest accrued thereon. The whole amount was withdrawn upon retirement or leaving service in circumstances that allowed the member employee to withdraw benefits.
126. In November 2020, the Government made a policy shift through Treasury Circular No 18 of 2010 issued on 24<sup>th</sup> November 2010. The circular is titled "Public Service Retirement Benefits Schemes Approval By The Treasury Prior To Registration By The Retirement Benefits Authority (RBA)". In the circular the Permanent Secretary, Treasury outlined the several policy shifts that had been adopted by the Government. Among them was the maintenance of scheme funding at the statutory level of 100%, conversion of Defined Benefits retirement schemes into defined contribution schemes not later than 1<sup>st</sup> July 2011 guided by the [Retirement Benefits Act](#) and Regulations and guidelines issued by RBA.
127. As a direct consequence of the circular, LAPTRUST commenced the process of conversion from a DB to DC scheme which it successfully did and the scheme was approved and registered by RBA on 27<sup>th</sup> May 2011 (date of the certificate of Registration of LAPTRUST (Umbrella) Retirement Fund.
128. Section 132 of the [County Government Act](#) and section 49 of the [Urban Areas and Cities Act](#) provide as follows –

Section 132 of the [County Government Act](#)

132. Pension schemes

Subject to the transitional provisions herein, all members, officers and staff of a county government shall subscribe to an existing pension scheme for officers and staff of local government.

Section 49 of the [Urban Areas and Cities Act](#)

49. Pension Schemes

All officers of a board shall, on the commencement of this Act, subscribe to an existing pension scheme approved by the Retirement Benefits Authority.

129. It is worth noting that under the LAPTRUST Umbrella Scheme "employer" is defined to include bodies other than the county governments as follows:

"A sponsoring local authority, reciprocating body, associated organization or any other company or organization which by a deed of adherence agrees to participate in the Fund by, inter alia, making contributions thereto on behalf of employees or a substitute of the



Employer who assumes this position upon execution of a deed of substitution and has been admitted to the Fund as a participating Employer and who is specified in the Special Rules.”

130. In view of the fact that both the *County Government Act* and the *Urban Areas and Cities Act* did not specify which of the two existing retirement benefits schemes between LAPFUND and LAPTRUST was the scheme referred to in the two statutes, there has been a tussle between the two schemes over which one of them should cover the employees of county governments.
131. It would appear that part of the reason for enactment of the impugned *Act* was an attempt to resolve this issue. Further, that this issue was the reason for failure of successive attempts to enact a statute to merge the two schemes and one of the major reasons for dissatisfaction with the impugned *Act* that led to the petitions that are the subject of this judgment. The petitions were disposed of by way of written submissions which were highlighted by the parties in open Court.
132. Having considered the very large volume of pleadings and submissions filed by the parties herein together with the supporting documents and authorities and having heard the parties, the issues arising for determination are in my view the following:
- (i) Whether this Court has jurisdiction to hear and determine the petitions;
  - (ii) Whether the Petitioners have locus standi to institute the petitions;
  - (iii) Whether the petitions are defective for joinder, misjoinder and nonjoinder of parties;
  - (iv) Whether the impugned *Act* is unconstitutional for violating the national values and principles of public participation;
  - (v) Whether sections 4(1), 6(2)(a), 6(6), 10(1), 12, 51, 52(2), 52(3) and 55 of the impugned *Act* are unconstitutional for violating the functional and institutional integrity of county governments;  

Whether sections 2, 4(3), 38(3)(b),(c), 52 and 55 of the impugned *Act* are unconstitutional for violating article 41 of the *Constitution* on the right to fair labour practices;
  - (vi) Whether sections 3(1)(c), 4(3), 6, 7, 18, 23, 52, 53 and 56(5) of the *County Government Retirement Scheme Act* are discriminatory, inconsistent with or violate the Constitution and/or undermine the authority of the Retirement Benefits Act and are therefore void;
  - (vii) Whether the County Pension Fund [previously known as the Laptrust (Umbrella) Retirement Fund] is the "existing pension scheme" for the members, officers and staff of the forty-seven county governments referred to in Sections 132 and 49 of the *County Governments Act*, 2012 and the *Urban Areas and Cities Act*, 2011;
  - (viii) Whether the implementation of the impugned *Act* will injure and/or harm the members, officers and staff of the forty-seven county governments as alleged in the petitions;
  - (ix) Whether the *County Government Retirement Scheme Act* has provided sufficient mechanisms and/or provisions to ensure the smooth transition of the closed schemes;
  - (x) Whether the Petitioners are entitled to the reliefs sought.



## Jurisdiction of the Employment and Labour Relations Court

133. The Attorney General filed a notice of preliminary objection in which it objects to the jurisdiction of this Court to hear and determine the consolidated petition within the meaning of Chapter 10 of the *Constitution* and section 12 of the *Employment and Labour Relations Act*. It is the position of the Attorney General that article 165 of the *Constitution* which establishes the High Court provides at article 165(3) and 165(5) that the Court has exclusive jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated infringed or threatened and to hear any question respecting the interpretation of the *Constitution* including:
- (i) the question whether any law is inconsistent with or in contravention of this *Constitution*;
  - (ii) the question whether anything said to be done under the authority of this *Constitution* or of any law is inconsistent with, or in contravention of, this *Constitution*;
  - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
  - (iv) a question relating to conflict of laws under article 191; and
  - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
134. That section 12(1) of the *Employment and Labour Relations Court Act* provides that:
12. Jurisdiction of the Court
    - (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the *Constitution* and the provisions of this *Act* or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—
      - (a) disputes relating to or arising out of employment between an employer and an employee;
      - (b) disputes between an employer and a trade union;
      - (c) disputes between an employers' organisation and a trade union's organisation;
      - (d) disputes between trade unions;
      - (e) disputes between employer organisations;
      - (e) disputes between an employers' organisation and a trade union;
      - (f) disputes between a trade union and a member thereof;
      - (g) disputes between an employer's organisation or a federation and a member thereof;
      - (e) disputes concerning the registration and election of trade union officials; and
      - (f) disputes relating to the registration and enforcement of collective agreements.
135. It is submitted that pursuant to the provisions only the High Court has jurisdiction to hear and determine questions whether any law is inconsistent with or in contravention with the Constitution as well as any matter relating to constitutional powers of state organs in respect of county governments



and any matter relating to the constitutional relationship between levels of government. Further, that only the High Court has jurisdiction to hear and determine a question relating to conflict of laws under article 191 of the Constitution.

136. It is submitted that the parties to the petition do not fall within any of the categories stated in section 12 of the impugned Act. The Attorney General cites and relies on the decision in the case of Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & another v Ann Wangui Ngugi & 524 others [2018] eKLR where the Court stated that the jurisdiction of the High Court is unlimited while the Employment and Labour Relations Court has limited jurisdiction.
137. The Attorney General further cited and relied on the decision in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others (2012) eKLR where the Court held that:
- “A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise Jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself Jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of Law has Jurisdiction to entertain a matter before it, is not one of mere procedural technicality: it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”
138. The Attorney General further relied on the decision in Kenya Ports Authority v Industrial Court of Kenya & 2 others, Civil Appeal No, 236 of 2012 where the Court of Appeal held that pension disputes are not trade disputes and the Labour Court has no jurisdiction to hear the same.
139. The Attorney General submitted that this Court has had occasion to examine incidences where it would have jurisdiction to determine a matter that involves a constitutional question in Kenya Council of Employment and Migration Agencies & another v Samuel Mwangera Arachi & 2 others (2015) eKLR where the Court held:
- “Whereas and from the foregoing provisions of the law, the Court has jurisdiction to adjudicate constitutional questions, these questions must arise within the broad relationship parameters set out under section 12 of the Act and further they can only be agitated by persons identified under section 12(2) of the Act acting in person or through authorized representative as stated earlier.”
140. For the Petitioners, it is submitted that the key question should be whether a dispute regarding pension arrangements is a dispute relating to employment and labour relations within the meaning of article 162(2)(a) of the Constitution and section 12(1) of the Employment and Labour Relations Court Act. The Petitioners pose the questions: Can the right to pension exist in isolation or detachment from employment? Can a person become entitled to a pension without being employed?
141. It is submitted that this Court has already answered these questions in the negative in Anne Wangui Ngugi & 524 Others (Civil Appeal No. 10 of 2014, by holding that retirement benefits “find their rooting” in the relationship between an employer and an employee. Therefore, the jurisdictional question is frivolous and akin to the vexed question of which came first between the egg and the chicken. It is submitted that the Court of Appeal has affirmed the jurisdiction of this Court in cases such as the instant one.
142. It is further submitted that the authorities referred to by the Attorney General are irrelevant and of no precedent value to the extent that the facts of the relevant cases are vastly different from the facts of the instant case. That as Mativo J. (as he then was) warned in Advanced Gaming Limited v Betting



*Control and Licensing Board & 2 others; Safaricom Limited (Interested Party)* [2019] eKLR (High Court Constitutional Petition No 271 of 2019, at paragraphs 125-126:

“A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it.... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found....The ratio of any decision must be understood in the background of the facts of the particular case. A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.”

143. It is further submitted that the Supreme Court has had occasion to set out guidelines for interpretation of such matters, of relevance being the observation that the Constitution should be interpreted in a holistic manner, within its context and in its spirit. That *In the Matter of the Kenya National Human Rights Commission*, Sup. Ct Advisory Opinion Reference No 1 of 2012; [2014] eKLR, the Court at paragraph 26 remarked:

“...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the *Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

144. It is further the submission of the Petitioners that in the case of *Speaker of the Senate & Another v Attorney General & 4 Others*, Sup Ct, Advisory Opinion No, 2 of 2013; [2013] eKLR, [paragraph 156], the Supreme Court further explicated the relevant principle as follows:

“The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitutions borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly [capture] express the minds of the framers, and the minds and hands of the framers may also fail to properly mind the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.”



145. It is submitted that the Employment and Labour Relations Court was established by the *Employment and Labour Relations Court Act* pursuant to article 162(2)(a) which grants this Court the status of the High Court, and confers upon this Court the jurisdiction in matters concerning employment and labour relations. Pursuant to article 162(3) of the *Constitution*, Parliament enacted the *Employment and Labour Relations Court Act*. Section 12(1) of the *Employment and Labour Relations Court Act* further provides for the jurisdiction of the Employment and Labour Relations Court (ELRC) in the following terms:
- (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the *Constitution* and the provisions of this *Act* or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—
    - (a) disputes relating to or arising out of employment between an employer and an employee;
146. It is submitted that the clear wording of the debarment of the High Court by the *Constitution* is that it “shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts under article 162(2).” On the other hand the ouster of its jurisdiction under section 12(1) of the *Employment and Labour Relations Court Act* is that the Labour Relations and Employment Court “shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the *Constitution* and the provisions of this *Act* or any other written law which extends jurisdiction to the Court relating to employment and labour relations including disputes relating to or arising out of employment between an employer and an employee;”
147. Section 12(1) of the *Employment and Labour Relations Court Act* provides for the Court to hear first, “all disputes referred to the Court in accordance with article 162(2) of the *Constitution*” and secondly disputes referred to it in accordance with the provisions of the *Employment and Labour Relations Court Act*. Thirdly it has jurisdiction to hear and determine matters referred to the Court under any other written law which extends jurisdiction the Court. In all the three circumstances, the matters ought to relate to employment and labour relations.
148. It is my view that the enumeration under subsections 1(a) to (j) are not exclusive or conclusive. The word before the enumeration is “including” which under *Black’s Law Dictionary* is defined as –
- “include, To contain as a part of something. The participle including typically indicates a partial list”
149. It is clear from the foregoing that the *Constitution* and the *Employment and Labour Relations Court Act* both define the jurisdiction of this Court to deal with employment and labour relations matters. There is no requirement that there must be an employee-employer relationship between the parties to the suit for the Court’s jurisdiction to be invoked. Indeed the *Constitution* is clear under article 165(5) that the High Court shall not have jurisdiction in matters falling within the jurisdiction of the Courts contemplated under article 162(2).
150. Pension and terminal benefits are terms and conditions of employment. The *Employment Act* at section 10(3) provides for terms and conditions of employment that must be contained in a written contract of employment as follows:
- (3) The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the instalment containing them, is given of—



- (a) any terms and conditions relating to any of the following—
  - (i) entitlement to annual leave, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee’s entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);
  - (ii) incapacity to work due to sickness or injury, including any provision for sick pay; and
  - (iii) pensions and pension schemes;

151. The impugned *Act* provides for changes in the definition of pensionable benefits for county government employees to exclude house allowance. To the extent that the said employees are members and have been contributing to the pension schemes in place before the enactment of the impugned *Act*, the *Act* constitutes an amendment in the terms and conditions of employment of affected employees, which is a matter within the jurisdiction of this Court.

152. In the case of *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) (8 February 2022) (Judgment) the Court observed as follows at paragraph 44

“Our interpretation of the provisions of section 12 of the *Employment and Labour Relations Court Act* is that the Employment and Labour Relations Court has jurisdiction to entertain any dispute or any contemplated dispute under section 12(1) but the dispute between the parties must be related to their employment and/or touching on labour relations. This is therefore to mean that the jurisdiction of the Employment and Labour Relations Court is not limited to the determination of disputes arising out of a contract of employment between an employee and an employer, the court can also determine any constitutional violations of the rights of any party arising from an employee-employer relationship. However, for the court to entertain a petition premised on the breach of a party’s fundamental rights under the Constitution, the alleged constitutional breach must be ancillary and incidental to the matters contemplated under section 12 of the *Act*. Our view is fortified by the preamble to the *Employment and Labour Relations Court Act*, 2011 which provides that it is:

“An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.”

[Emphasis added]

153. The same sentiments were expressed in the case of *Mackenzie Moulding Mogere & Another v Trustees of Telposta Pension Scheme & 4 others* [2017] eKLR the Court, while addressing a similar objection stated:

24. We have considered the issue of jurisdiction and, ultimately, we agree with the respondents that the High Court made no error in transferring the constitutional petition to the ELRC and the ELRC made no error in law in hearing and determining it. It is not a novel issue and we are content to follow the decision of this Court in the case of *Nellie Wanjala Opembe v Fibi Usita Aura & Another* [2016] eKLR where similar objections were raised.



This Court stated:-

“ In The matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011 (unreported) The Supreme Court succinctly addressed the question of jurisdiction thus,

“29. Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution; by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya) Limited* (1989) KLR 1, which bears the following passage (Nyarangi, JA at page 14):-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.”

30. The Lilian ‘S’ case establishes that jurisdiction flows from the law, and the recipient – Court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

This Court has pronounced itself in similar instances, on the question of whether the Employment and Labour Court has jurisdiction to consider constitutional issues. In the case of *County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others* [2015] eKLR it was posited that the Constitution does not establish a stand-alone constitutional court with exclusive jurisdiction to adjudicate upon constitutional issues. Similarly, in the case of *Prof Daniel N. Mugendi v Kenyatta University & Others* [2013] eKLR, which was concerned with the question of whether or not the Industrial Court had jurisdiction to determine issues concerned with the of violation of constitutional rights, this Court cited with approval the decision of Majanja, J in *United States International University (USIU) v The Attorney General & Others* [2013] eKLR where the learned judge in adopting the position of the *Gcaba v Minister of Safety and Security & Others* CCT 64/08(2009) ZACC 26 observed thus;

“Since the court is of the same status of the High Court, it must have jurisdiction to enforce labour rights in article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms is



incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within the matter before it.”

In furtherance of this position, with which we are in agreement, the same court in the case of *Prof Daniel N Mugendi v Kenyatta University & 3 others (supra)* observed thus;

“In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.”

25. To that learning, we may add another decision of this Court in *Judicial Service Commission v Gladys Boss Shollei & Another* [2014] eKLR where it was held:-

“[40] Article 23(1) & article 165(3)(b) of the Constitution grants the High Court powers to hear and determine questions involving redress of violations or infringement or threatened violations of fundamental rights and freedoms in the Bill of Rights. However, article 23(2) provides for legislation giving original jurisdiction to subordinate courts to hear and determine disputes for enforcement of fundamental rights and freedom. In addition, article 23(3) does not limit jurisdiction in the granting of relief in proceedings for enforcement of fundamental rights to the High Court only, but empowers “a court” to grant appropriate relief including orders of Judicial Review in the enforcement of rights and fundamental freedoms under the Bill of Rights. Also of note is article 20(3) that places an obligation on “any court” in applying a provision of the Bill of Rights to develop the law and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. These provisions confirm that the Constitution does not give exclusive jurisdiction in the enforcement of the Bill of Rights to the High Court, but anticipates the enforcement of the Bill of Rights by other Courts.”

26. It is beyond argument in this case that the issues that arose for determination in the Trust Deed related to the employment of the two appellants and are so interwoven that we cannot talk about one without reference to the other. Simply put, they concern employment and labour relations which is the remit of the ELRC under article 162(2)(a) of the Constitution and section 12 of the ELRC Act, enacted pursuant to article 162 (3). Furthermore, the dispute took a constitutional trajectory as there was alleged non-compliance with the right to fair administrative action and the legality of provisions for resolution of disputes in the RBA Act. That alone would entitle the court to consider and determine the dispute.



154. From the foregoing I find that the consolidated petition herein relates to terms and conditions of employment and this Court has jurisdiction to hear and determine the same. I thus find no merit in the preliminary objection raised by the Hon. Attorney General.

### **Whether the Petitioners have locus standi to file and prosecute this matter against the Respondents**

155. It is the submission of the Respondents that the Petitioners in Petition No 213 of 2019 and Petition 230 of 2019 lack locus standi to file and prosecute the petitions on the basis that the Petitioners do not fall within the provisions of section 12(2) of the *Employment Labour Relations Court Act* which provides:

2. An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

156. The Respondents rely on the decision in *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) (8 February 2022) (Judgment) where the Court observed that there was no employee-employer relationship between the litigants and the Court that had jurisdiction in the matter was the High Court.

157. In the case of *John Wekesa Khaoya v Attorney General* [2013] eKLR the High Court observed that the principle of locus standi has been greatly enlarged by articles 22 and 258 of the *Constitution*.

158. Article 22(1) and (2) provides –

22. Enforcement of Bill of Rights

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.

159. Article 258 provides:

258. Enforcement of this Constitution

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or



(d) an association acting in the interest of one or more of its members.

160. Both articles 22 and 258 make it the duty of every person to protect the constitution and give every person the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights or any provision of the Constitution had been contravened or was threatened with contravention.
161. In Petition 213 of 2019, the Petitioner describes himself as a public spirited individual and human rights defender. He states that he filed the petition in his capacity as the Executive Director of Kenyans for Justice and Development Trust, a legal entity founded in Kenya to uphold the rule of law and constitutionalism. In Petition 230 of 2019 the Petitioners are legal entities who are affected by the provisions of the impugned Act.
162. I find that both the Petitioners in Petition 213 of 2019 and Petition 230 of 2019 have *locus standi* under the expanded democratic space as envisioned in articles 22 and 258 of the Constitution of Kenya, 2010 to institute the petitions in the manner they did.

#### **Whether the petitions are defective for joinder, non-joinder or misjoinder of parties**

163. It has been submitted for the Respondents that the petitions are defective for non-joinder of the senate and National Assembly.
164. As submitted by the Petitioners, order 1 rule 9 of the Civil Procedure Rules provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties.
165. Further, the Attorney General has been joined to all the petitions. The Attorney General being the principal legal advisor to the government in my view sufficiently represents the interests of both the senate and national assembly. To this extents, I find no merit in the objection.

#### **Whether there was public participation in the enactment process of the County Government Retirement Scheme Act**

166. It is the averment of the Petitioners that there was no public participation before the enactment of the impugned Act. That the senate gave stakeholders two days which fell on a weekend between 29<sup>th</sup> November and 3<sup>rd</sup> December 2018 to study and make representations on the contents of the bill. That they were not given sufficient time for any meaningful engagement.
167. It is further the Petitioner's averment that they petitioned the senate over the conduct of the senate proceedings but received no response. Further that a single member of the senate presided over the purported public participation exercise in breach of the Senate Standing Order No. 192.
168. It is further submitted that both the Senate and National Assembly ignored views of not only the Petitioners but also the other key stakeholders in a bid to rush the process. That the request of the Intergovernmental Steering Committee of the summit to withhold consideration of the bill to facilitate proper public participation was also ignored.
169. It is further the averment of the Petitioners that the National Government failed to publish the Act in the Gazette and only did so long after the presidential assent and commencement of the Act which they aver to have been deliberate to avoid challenges to the Act.
170. It is further submitted that several stakeholders were not given an opportunity to present their views during public participation. These included County Public Service Boards and County Assembly Service Boards, County Pensioners Association and the Kenya County Government Workers Union.



171. It is further submitted that both LAPTRUST and LAPFUND draw membership from water companies which were never given an opportunity to present their views during the public participation exercise.
172. For the Respondents it is submitted that public participation over the impugned Act had been ongoing since 2006 when the idea of merging LAPFUND and LAPTRUST was first mooted. That the Petitioners participated in the National Assembly and in the Senate and the process was democratic. That the exercise was repeated on 9<sup>th</sup> April 2019. Thereafter several versions of the Act had been drafted and subjected to stakeholder participation.
173. The letters to the stakeholders is addressed to the following;
- (i) Cabinet Secretary – Ministry of Labour and Social Protection;
  - (ii) Cabinet Secretary – Ministry of Public Service, Youth and Gender Affairs;
  - (iii) Cabinet Secretary – The National Treasury;
  - (iv) Cabinet Secretary – Ministry of Labour and Social Protection;
  - (v) Cabinet Secretary – Ministry of Devolution and ASAL Areas;
  - (vi) The Chairperson, Human Resources, Labour and Social Welfare Committee, Council of Governors;
  - (vii) The Acting Chief Executive Officer, Retirement Benefits Authority;
  - (viii) Chief Executive Officer, Salaries and Remuneration Commission;
  - (ix) The General Secretary, Kenya Union of Nurses;
  - (x) The Group Managing Director/CEO, CPF Financial Services;
  - xi. The Managing Trustees, National Social Security Fund;
  - xii. The General Secretary, Kenya County Government Workers Union;
  - xiii. Chairman, Lapfund Board of Trustees;
  - xiv. Chairperson, County Assembly Forum;
  - xv. Chief Executive Officer and Secretary to the Board, the Local Authorities Provident Fund Board.
  - xvi. The Chief Executive Officer, State Corporations Advisory Committee
174. The letter dated 29<sup>th</sup> November 2018 reproduced below:

“Dear Sir,

Invitation To A Meeting To Deliberate On The County Government Retirement Scheme Bill, 2018 (national Assembly Bill No 10 Of 2018)

The Senate Standing Committee on I -about and Social Welfare is established under standing order 212(3) of the Standing Orders of the Senate and is mandated to inter alia –



Consider all matters relating to manpower and human resources planning, gender, culture and social welfare, youth, National Youth Service, children's welfare; national heritage, betting, lotteries and sports, public entertainment, public amenities and recreation.

The County Governments Retirement Scheme Bill. (National Assembly Bills No 10 of two was read a First Time in the Senate on Tuesday 13<sup>th</sup> November 2018 and was thereafter committed to the Senate Standing Committee on Labour and Social Welfare for consideration.

The Committee, at its 41<sup>st</sup> Sitting held on Thursday. 29<sup>th</sup> November 2018 considered the memoranda on the Bill and resolved to invite stakeholders, to a meeting to discuss views of respective organizations on the Bill.

The purpose of this letter is to invite you to a meeting with the Committee on Monday, 3<sup>rd</sup> December, 2018 in the Senate Chambers, Main Parliament Building at 10.00 am. The Bill may be found on the Parliament website of <http://www.parliament.go.ke/senate>.

Ms. Mwanate Shaban, Clerk Assistant (Cell Number – 0726953257, email [mwanateshaban@gmail.com](mailto:mwanateshaban@gmail.com)) is responsible for all arrangements relating to this matter.

Yours truly,

Signed

JM Nyegenye, Cbs

Clerk Of The Senate/secretary,

Parliamentary Service Commission”

175. It is clear from the letter that the retirees who were in receipt of pensions were not invited. It is further clear that none of the water services companies were invited to the stakeholders' meeting. The members of the Scheme who were still in employment and were to be affected by the *Act* were also not invited. Other beneficiaries of the Scheme such as widows, widowers and dependents of deceased pensioners or employees who were in receipt of pensions were not invited.
176. It has not been denied that the committee which eventually presided over the meeting on 3<sup>rd</sup> December 2018 consisted of the Chairperson alone and therefore was not properly constituted under the Standing Orders of the Senate.
177. Article 118(1)(b) requires Parliament to conduct its business in an open manner in public and to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.
178. In *Moses Munyendo & 908 others v Attorney General & another* [2013] eKLR it was held that the National Assembly and public institutions have a broad measure of discretion in how they achieve the object of public participation which may vary from case to case provided reasonable level of participation has been afforded to the public. Quoting Sachs J in *Minister of Health and another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) with approval where the Judge held:

“The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say; and that what amounts to a reasonable opportunity will depend on the circumstances of each case.”



[Emphasis added]

179. The importance of public participation is underscored by the fact that none less than seventeen (17) articles of the *Constitution* of Kenya provide for the same. Those that are most relevant to this suit include article 1 of the *Constitution* which emphasises the sovereignty of the people which may be exercised directly or through democratically elected representatives, article 10 which provides for national values and principles of governance to include participation of the people, article 35 on access to information, article 118 which instructs Parliament to facilitate public participation and involvement of the people in the legislative and other business of Parliament and its committees, article 119 on the right to petition Parliament, article 124 on proceedings in Parliament and its committees, article 201 which provides for public participation in financial matters, article 221 on public participation in the revenue and expenditure estimates for the budget and article 232 where public participation is one of the values and principles of public service.
180. Indeed Parliament, in recognition of the importance of public participation has published Factsheet No. 14 Titled Public Participation In The Legislative Process where under the general themes in public participation it is provided:
- “When a Bill has been introduced in the House and upon referral to the relevant committee, the committee places adverts in the Media requesting for public views. The Committee takes into consideration the views of the public while considering the Bill and preparing its report.”
181. In organising public participation the National Assembly Factsheet No 14 provides for five (5) steps as follows:
1. Creating awareness  
Placing adverts in mainstream media, both print and electronic. This helps in generating awareness and increases citizen interest to participate and give views.
  2. Involvement  
Identify the key stakeholders or interested groups including those directly affected and those that can offer solutions.
  3. Contacting the public  
Communicate to the stakeholders through writing and inviting them for meetings and requesting submission of documents or memoranda.
  4. Meetings  
Hold meetings to get views including field visits.
  5. Feedback mechanism  
Through drafting and tabling of the resultant report.”
182. The Factsheet provides that stakeholders should be provided with the necessary information to enhance credibility and witnesses invited in time and allowed sufficient time to prepare their oral or written submissions.
183. In *Kaps Parking Limited & another v County Government of Nairobi & another* [2021] eKLR, the Court considered several decisions on public participation and reached the following conclusions



which I have deliberately reproduced at length because of the relevance to the instant consolidated petition:

137. The manner in which public participation is carried out depends on the matter at hand. There is no straight-jacket application of the principle of citizen participation. However, any mode of undertaking public participation which may be adopted by a public entity must factor, in the minimum, the following basic four parameters. First, the public be accorded reasonable access to the information which they are called upon to give their views on. In other words, the mode of conveying the information to the public reigns. Second, the people be sensitized or be made to understand what they are called upon to consider and give their views on. In this case, the language used in conveying the information to the public becomes of paramount importance. For instance, if those affected by the intended decisions or the legislation are mostly illiterate, then such realities must be factored in deciding the mode and manner of conveying the information. Third, once the public is granted reasonable access to the information and is made to understand it, the public must then be accorded reasonable time to interrogate the information and to come up with its views. Fourth, there must be a defined manner in which the public or stakeholders will tender their responses on the matter.
  138. The effect of the above constitutional and statutory parameters is to ensure that public participation is realistic and not illusory. Public participation should not be a mere formality, but must accord reasonable opportunity for people to have their say in what affects them. In that way, the dictates of the Constitution and the law will be achieved.
184. In Mombasa Consolidated Constitutional Petition No. 159 of 2018 and 2018 of 2019 *William Odhiambo Ramogi & others v Attorney General & others* (unreported) in *Kaps Parking Limited & another v County Government of Nairobi & another* (*supra*) the Court observed:
115. The starting point is the *Constitution*. Article 2 inter alia declares the Constitution as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of the Constitution is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of the Constitution is invalid. Article 3 places an obligation upon every person to respect, uphold and defend the *Constitution*.
  116. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the *Constitution*, enacts, applies or interprets any law or makes or implements any public policy decisions.
  117. The Constitution also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -

“ Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution....”

.....
  119. Courts have also dealt with the concepts of public participation and stakeholders’ consultation or engagement. The High Court in Robert N. Gakuru & Others v Governor Kiambu County & 3 Others [2014] eKLR while referring to the South African decision in *Doctors for Life*



*International v Speaker of the National Assembly & Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) adopted the following definition of public participation: -

“According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.”

120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The *Black's Law Dictionary* 10<sup>th</sup> Edition defines “consultation” as follows: -

“The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.”

121. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders’ engagement. Speaking on consultation the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR quoted with approval Ngcobo J in *Matatiele Municipality and Others v President of the Republic of South Africa and Others (2)* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) as follows: -

“.....The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say....”

122. In a Three-Judge bench the High Court in consolidated Constitutional Petition Nos 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others* [2015] eKLR the Court addressed the concept of consultation in the following manner: -

“.... A public participation programme must show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.”

123. Consultation or stakeholders’ engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a Government agency or a public



officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.

124. The importance of public participation cannot be gainsaid. The Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* (*supra*) while dealing with the aspect of public participation in law making process stated as followed: -

“The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.

125. In *Matatiele Municipality v President of the Republic of South Africa* (2) (CCT73/05A), the South African Constitutional Court stated as follows:

“A commitment to a right to...public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect...”

126. The South African Constitutional Court in *Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others*, CCT 86/08 [2010] ZACC 5 discussed the importance of public participation as follows:

“...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.”

127. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* (*supra*) referred to *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR stated as follows:

“The mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party.



128. In *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others* (*supra*) the Court enumerated the following practical principles in ascertaining whether a reasonable threshold was reached in facilitating public participation:

- (a) First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
- (b) Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.
- (c) Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic v The Attorney General & Another ex parte Hon Francis Chachua Ganya* (JR Misc App No 374 of 2012. In relevant portion, the Court stated:

“ Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”
- (d) Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
- (e) Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot



merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

- (f) Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

185. Based on the above, public participation by the Senate would require that the public is notified through the media while the major stakeholders are in addition, invited by letter to submit their views. It is further a requirement that the stakeholders and the public in general, are given sufficient time to prepare their memorandum and to attend any meeting called to receive their views.
186. In the instant case there was no publication in the media inviting the public to participate in the legislative process. Further, there is no evidence that water company employees who were members of the affected schemes were invited together with the other identified stakeholders. Neither were retirees invited to submit their views. The associated organisations whose employees were members of the schemes were also not invited to give their views at the meetings called by the Senate for public participation. Other beneficiaries of the scheme such as widows, widower and dependants of deceased employees and pensioners whom the impugned Act would directly affect were not given an opportunity to give their views.
187. The list of sponsors who ought to have been invited to give their views is contained in the First, Second and Third Schedules to the Kenya (Local Government) (Pensions) Regulations 1963 and the Local Authorities Pensions Trust Rules, 2007.
188. Further, although public participation does not envisage that every view is taken into account, it must be shown that consideration was given to the views expressed and where appropriate, that the views were accommodated in the enactment of the legislation.
189. In the instant case, there were protests by the County Government Workers Union, CPF Financial Services, the Pensioners Association and water companies. This begs the question, if so many of the stakeholders' views were not taken, what was the purpose of the public participation?
190. The Retirement Benefits Authority, in its memorandum forwarded by letter dated 5<sup>th</sup> December 2018 after the alleged public participation made recommendations that:

“Prayer

The Authority is of the view that, since the Bill did not undergo any consultative process with the relevant stakeholders, including the Regulator, before it was tabled in Parliament, we beseech the Chairperson of the Committee to seek an extension from the National Assembly to allow for thorough stakeholder analysis of the Bill and further consultations before tabling of the committee's report in Parliament. We believe the consultations from a very critical part, in ensuring that the Act what will come into effect is one that has the good will of all the stakeholders.”

191. Further, by letter dated 5<sup>th</sup> July 2018 the Cabinet Secretary for Public Service recommended with withdrawal of the bill to facilitate further public participation and stakeholder consultations.



192. As was stated in *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC), quoted with approval in *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR where it was held *inter alia* that:

“For the opportunity afforded to the public to participate in a legislative process to comply with section 118(1), the invitation must give those wishing to participate sufficient time to prepare. Members of the public cannot participate meaningfully if they are given inadequate time to study the Bill, consider their stance and formulate representations to be made. Two principles may be deduced from the above statement. The first is that the interested parties must be given adequate time to prepare for a hearing. The second relates to the time or stage when the hearing is permitted, which must be before the final decision is taken. These principles ensure that meaningful participation is allowed. It must be an opportunity capable of influencing the decision to be taken. The question whether the notice given in a particular case complies with these principles will depend on the facts of that case.”

193. From the foregoing, I find that the public participation in respect of the impugned *Act* did not meet the requirements of the Constitution. First, the Committee before which the public participation meeting was held was improperly constituted as it did not have a quorum as set out under the Standing Orders of the Senate. Secondly, there was no advertisement in the media notifying members of the public of the bill, as envisaged under the parliamentary guidelines for public participation.

194. Thirdly, there was no sufficient time, the stakeholders having been given only one full working day to prepare for the meeting. Fourth, critical stakeholders were not invited to give their views on the Act. These were the retirees, water service organisations and employees who were members of the scheme. Indeed none of the employees who were members of the affected schemes were ever notified to enable them present their views either directly to the Senate or Parliament, or through their representatives.

195. For these reasons the impugned *Act* is unconstitutional for lack of public participation.

### **Whether the impugned Act is unconstitutional**

196. It is the position of the Petitioners that section 4(1) and (3), 6(2)(a), 6(6), 10(1), 12, 51, 52(2), 53(3) and 55 of the impugned *Act* are unconstitutional for violating the functional and institutional integrity of county governments.

197. Further, that sections 2, 4(3), 38(3)(b) and (c), 52 and 55 of the impugned *Act* are unconstitutional for violating article 41 of the Constitution on the right to fair labour practice.

198. It is further the averment of the Petitioners that sections 18, 23, 53, 55 and 56(5) of the impugned *Act* are discriminatory and thus violates article 27 of the *Constitution*.

199. The Petitioners submit that the impugned *Act* violates the functional and institutional integrity of county governments to the extent (*inter alia*) that:

- (a) Section 4 (1) purports to set up a pension scheme for county governments —
  - (i) when the constitutional mandate of the National Government in relation to pension schemes for county governments is limited to policy formulation and setting standards (see *inter alia* Clause 14 of the Fourth Schedule to the Constitution);
  - (ii) yet the National Government is not an employer of county government employees;



- (iii) despite county governments' collective and overwhelming preference for a different pension scheme (i.e. the DC Scheme);
  - (b) Section 6(2)(a) empowers the Principal Secretary for Finance to sit in the Board of Trustees for a pension scheme for the members, officers and staff of the forty-seven county governments;
  - (c) Section 6(6) to the extent that it empowers the Cabinet Secretary for the National Treasury to appoint trustees to a pension scheme for the members, officers and staff of the forty-seven county governments;
  - (d) Section 10 empowers the Cabinet Secretary for the National Treasury to remove from office trustees of a pension scheme for the members, officers and staff of the forty-seven county governments;
  - (e) Section 12 empowers the Cabinet Secretary for the National Treasury to fill vacancies in the board of trustees of a pension scheme for the members, officers and staff of the forty-seven county governments;
  - (f) section 51 empowers the Cabinet Secretary for the National Treasury to make regulations for the management of a pension scheme for the members, officers and staff of the forty-seven county governments;
  - (g) Sections 52(2) and 55 provide for the revocation of the DB Scheme without payment of liabilities that the National Government owes to the scheme; and
  - (h) Section 52(3) to the extent that it purports to revoke the trust deed and rules of a pension scheme that enjoys the collective and overwhelming preference of county governments (ie the DC Scheme).
200. The Petitioners submit that there is no constitutional, legal, policy or rational basis, post-2010, for the National Government to domineeringly:
- (a) establish a pension scheme for the members, officers and staff of the forty seven county governments;
  - (b) control the management of the scheme through the power of appointment and removal of trustees;
  - (c) make regulations for the management of the scheme; and
  - (d) do all the other things the impugned Act purports to enable the National Government to do.
201. For the Respondents it is submitted that article 6(2) provides for the relationship between county governments and national governments to be based on independence, inter-dependence and mutual consultation and cooperation. That county governments have limited powers to make laws that bind the county only while they cannot make laws that bind all counties like the impugned Act which is the preserve of parliament.
202. That the Intergovernmental Relations Act is based on the principle of consultation and cooperation between national and county governments and the establishment of structures and mechanisms for Intergovernmental Relations Act is based on the principle of consultation and cooperation between national and county governments and the establishment of structures and mechanisms for intergovernmental relations.



203. That under the Fourth Schedule to the *Constitution* it is the role of the national government to set standards in respect of social security and professional pension schemes. That the averment by the Petitioners that the impugned *Act* gives overbearing powers on the 2<sup>nd</sup> Respondent and mirrors a state corporation has neither been substantiated nor proved.
204. The threshold for constitutionality of statutes has been the subject of various decisions of the Courts. In the case of *Katiba Institute & another v Attorney General & another* [2017] eKLR the Court cited with approval the case of *Plum & another v Attorney General* [2002] 2 E. A where the Constitutional Court of Uganda stated:
- “To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the constitution, the impugned statute or section thereof shall be declared unconstitutional...”
205. There is no doubt that the impugned *Act* establishes the pension scheme as a state corporation under the supervision of the Cabinet Secretary responsible for National Treasury.
206. Under the Fourth Schedule to the *Constitution* of Kenya, the responsibility of consumer protection including standards for social security and professional pension plans is assigned to the National Government.
207. My understanding of this is that the Government would have oversight in terms of policy and regulation of social security and professional pension plans.
208. Social security in my view would be reckoned with reference to articles 43 of the *Constitution*. Article 43(1)(e) specifically makes reference to the role of the government to be the provision of appropriate social security to persons who are unable to support themselves and their dependants. I thus do not agree with the Respondents that either the Fourth Schedule to the *Constitution* or article 43 requires the national government to be involved in the administration of pension schemes for county governments in the manner envisaged in the impugned *Act*.
209. To my understanding, pensions are employment benefits to be managed by employers under private contracts. The national government is therefore only under the obligation to make provision for pensions for its employees within the context of private employment contracts.
210. For these reasons I agree with the Petitioners that the decision of the government to get involved in the management of pensions for county government employees is a violation of not only the Fourth Schedule to the *Constitution* but also article 6 of the *Constitution* which provides that the government at the national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation.
211. By regulating pension for county government employees the National Government enters into the realm of regulating terms and conditions of service of employees of county governments. This is incompatible with the provisions of article 6 of the *Constitution* and the overarching principle of devolution as espoused in the *Constitution*. To this extent the impugned *Act* is unconstitutional



## Whether the impugned Act conflicts with the provisions of Article 41 of the Constitution

212. It is the submission of the Petitioner that the impugned Act adversely alters the existing terms of employment for members, officers and staff of county governments by exclusion of housing allowance in the computation of pensionable emoluments in violation of articles 41 of the Constitution which provides for fair labour practices. That Section 4 of the impugned Act provides for inferior terms compared to those under rule 78 of Legal Notice No. 50 of 2007 and rules 7, 8, 9, 12 -15 of the special rules of the DC Scheme.
213. It is further the Petitioners' averment that the liabilities and actuarial deficits of the DB Scheme which are largely attributable to non-remittance of contributions by the defunct local authorities, and which are a liability of the national government by virtue of clause 6 of the 6<sup>th</sup> Schedule to the Constitution, have been excluded by section 38(3)(b) and (c). That the consequence of this omission is that 19,680 members, 7,351 pensioners and 1,800 beneficiaries of the DB Scheme shall never be paid their pension if the impugned Act is implemented.
214. It is submitted that section 10(3)(iii) of the Employment Act recognises pensions and pension schemes as part of the terms and conditions of employment to be specified in an employment contract. That section 26 of the Act provides that the terms set out in the contract of service, agreed in a collective agreement or contract or enacted by any written law or decreed in a judgement, award or order of the Employment and Labour Relations Court, where more favourable, shall apply.
215. It is further submitted that section 10(5) of the Employment Act provides that any changes in terms of employment must be in consultation with the employee and must be notified to the employee in writing.
216. Further, that section 57 of the Labour Relations Act recognises terms and conditions of service agreed upon through a collective agreement.
217. It is therefore the submission of the Petitioners that such terms and conditions of employment including pension cannot be altered to the disadvantage of an employee without consultation of the employee.
218. For the Respondents it is submitted that the impugned Act conforms with the Constitution. Specifically it is submitted that under section 8(3) and (4) of the Salaries and Remuneration Commission (Remuneration and Benefits of the Other Public Officers) Regulations, pensionable salaries are defined as basic salary. That allowances payable to state and other public officers are to be excluded from computation of both pension and gratuity. It is further submitted that an employer can change the pension arrangement for members of their staff without consultation of the employee.
219. It is further submitted that under the Retirement Benefits Act membership of retirement schemes are determined by the employer. That the scheme cannot be freely and voluntarily chosen by an employee. That once an employee joins employment membership of the scheme is automatic.
220. Fair labour practice as provided in article 41 of the Constitution has reference to fair remuneration, reasonable working conditions and right to join and participate in activities and programs of trade unions as set out in article 41(2) of the Constitution. What constitutes fair labour practice is therefore contextualised within the facts of specific circumstances.
221. As was stated by the Court in *George Onyango Akuti v G4S Security Services Kenya Limited* (2013) eKLR, and again in *Elizabeth Washeke & 62 others v Aritel Limited & another* (2013) eKLR, fair



- (unfair) labour practice is a flexible term not capable of precise definition and it is left to the Courts to define and determine what conduct or practice would amount to fair or unfair labour practice.
222. The definition of pensionable emoluments in the impugned *Act* excludes housing, transport and any other allowances from pensionable emoluments. The direct consequence of this is that the amount of pension that an employee would be entitled to would be less under the new scheme established in the impugned *Act*. This in itself would amount to unfair labour practice and a violation of both article 41 of the *Constitution* and section 26 of the *Employment Act*.
223. In addition it would amount to the amendment of the terms of employment to the detriment of employees and violate the employee's rights under article 43(1)(e) as it would reduce the social security that the employee would otherwise have been entitled to under the existing schemes. It would further violate section 13 of the *Employment Act* which provides that the employee must be consulted before any changes especially if negative, can be made to his terms of employment. It would further amount to a violation of the collective bargaining agreement between the county governments and associated institutions and the County Government Workers Union.
224. The same action would violate the provisions of section 132 of the *County Government Act* which provides that members, officers and staff of county governments, shall subscribe to an existing pension scheme for members, officers and staff of local governments. The *County Governments Act* did not envision the setting up of a new Scheme for members, officers and staff of county Governments.
225. The government approved the pegging of pensionable pay to basic salary and house allowance as an exception to the policy of the government on pension schemes in the letter dated 21<sup>st</sup> July 2011 from the Permanent Secretary/Treasury. The letter is reproduced below:

“Prof Karega Mutahi, CBS

Permanent Secretary

Office of the Deputy Prime Minister &

Ministry of Local Government

Jogoo house, Taifa Road

NAIROBI

Dear

RE: Implementation Of Treasury Circular No 18/2010 Laptrust Umbrella Retirement Benefits Scheme

Request For Partial Waiver Of Certain Aspects Of The Circular

Reference is made to your letter ref: MLG 1308 dated 13<sup>th</sup> July 2011 and the subsequent consultative meeting held at the KICC on 18<sup>th</sup> July 2011. I acknowledge the special challenges faced by Trustees of the captioned Scheme in implementing Treasury Circular No. 18/2010. However, it is important that the purpose issuing the Circular is achieved.

As you may be aware, the Treasury established the Retirement Benefits Authority (RBA) to regulate the management of retirement benefits schemes owing to the challenges then faced in funding such schemes and ensuring that benefits were paid to members as they retired. Public sector schemes have particularly faced a funding challenge owing to non-payment of the required contributions and lack



of prudent investment guidelines for the scheme funds. Further a number of such schemes had skewed funding rules that placed an onerous burden of funding benefits on already cash strapped public service institutions. The rules resulted in minimal contribution by employees to the cost of funding the schemes and in some cases the schemes were non-contributory.

It is for this reason that the RBA released letter ref. RBA/COM/GN/212 dated 10<sup>th</sup> March 2010 to all public service scheme trustees, requiring them to have their schemes cleared by the Treasury before registration. Since then, a number of schemes have complied and been cleared or guided on the necessary amendments to their documents.

The Treasury Circular No. 18/2010 was intended to reinforce me requirements and ensure harmonisation of public service retirement benefits schemes. You will agree with me that this is particularly critical for the captioned Scheme which is expected to act as an umbrella scheme for the county governments when they establish their retirement benefits schemes. The provisions of the Circular will ensure that such schemes remain sustainable into the future. Please note that the circular does not take away or vary benefits already accrued by the scheme members before the implementation date.

In view of the foregoing, I will only approve the following amendment to the provisions of the Circular.

Clause 3(a) of the Circular is hereby amended to allow Members of the Laptrust Scheme to use basic salary plus house allowance as the pensionable emoluments under the Scheme, provided that Members' contributions shall not at any time be reduced below the current 12% of PE.

All other provisions of the Treasury Circular No. 18/2010 and the general amendments communicated to all schemes will apply to the captioned Scheme.

You may therefore proceed to communicate the foregoing to the Scheme management and Members.

Yours

Joseph Kinyua, Cbs

Permanent Secretary/treasury”

[Emphasis added]

226. This policy direction which was specific to county government pension schemes has not been amended by the government. The impugned *Act* is therefore in conflict with and a derogation from the policy of the government which authorised the inclusion of house allowance as an exception in the definition of pensionable emoluments for county government employees and which therefore crated a legitimate expectation upon which such pension schemes were established. It is therefore my finding that the definition of pensionable emoluments in the impugned *Act* would amount to unfair labour practice and a violation of article 41 of the *Constitution*.

### **Whether the impugned Act conflicts with the Retirement Benefits Act**

227. The impugned *Act* does not make any provisions for the payment of unremitted funds. In fact, section 38(3) specifically provides:



- (3) For the avoidance of doubt, nothing in this *Act* is intended to or may be construed as providing for or dealing with —
- (a) taxes;
  - (b) the imposition of charges on a public fund or the variation or repeal of any of those charges;
  - (c) the appropriation, receipt, custody, investment or issue of public money;
  - (e) the raising or guaranteeing of any loan or its repayment except as provided in any written law; or
    - (a) matters incidental to any of those matters.
228. These provisions are in direct conflict with the *Retirement Benefits Act* which provide that contributions by the employee vest immediately while contributions by the employer vest upon the employee completing one year in service. The impact of this is that all money in the scheme for all employees who have completed at least one year in service are vested in the employee. The employer or any other body cannot deal in such funds without the consent of the employee.
229. Indeed section 33 of the *Retirement Benefits Act* provides that:
- 33.
- Statutory  
(1) contributions Notwithstanding the provisions of any written law for the time being in force, an employer may, with the approval of his employees, pay any statutory contributions in respect of such employees into any scheme fund prescribed for that purpose:
- Provided that where such payment involves a transfer of funds from another scheme fund, the employer shall, at least sixty days before commencing such payment, give written notice thereof to the Authority and to the trustees of the scheme fund from which such funds shall be transferred.
- (2) In this section, the expression “statutory contributions” means contributions required under the provisions of a written law to be paid into a retirement benefits scheme.
230. Such funds can therefore only be transferred with the consent of the employee. To this extent sections 5 of the impugned *Act* is in conflict with section 33 of the *Retirement Benefits Act*.

**Whether the County Pension Fund (Previously known as LAPTRUST (UMBRELLA) Retirement Fund is the existing pension scheme for members, officers and staff of the County Governments**

231. Section 132 of the *County Governments Act* and Section 49 of the *Urban Areas and Cities Act* provide as follows:
132. Pension schemes Subject to the transitional provisions herein, all members, officers and staff of a county government shall subscribe to an existing pension scheme for officers and staff of local government.
49. All officers of a board shall, on the commencement of this Act, subscribe to an existing pension Pensionscheme approved by the Retirement Benefits Authority.  
Schemes



232. It is contended by the Petitioner that the existing Pension scheme referred to in the two statutes refers to the County Pension Fund (previously LAPTRUST (Umbrella) Retirement Fund. The Petitioners contend that this position is supported by countless policy directives and assurances by the Cabinet Secretary, National Treasury and the RBA to the Local Authorities Pension Trust Board of Trustees. The Petitioners refer to a letter dated 23<sup>rd</sup> December, 2010 at Exhibit GK – 4 (Page 166) of the replying affidavit of George Kwetho for the 3<sup>rd</sup> Respondent in Petition No. 213, letter dated 7<sup>th</sup> March, 2010 (Exhibit GK – 6 (page 172 of Petition No. 213), Circular No. 18 of 2010, Letter dated 23<sup>rd</sup> September, 2013 (Exhibit GK – 12 at page 626, letter dated 13<sup>th</sup> November, 2013 page 629, letter dated 20<sup>th</sup> November, 2013 (Exhibit GK 14 at Page 632) and the Legal Opinion from the Attorney General (Exhibit GK -18) at page 651 of the same affidavit
233. It is further the Petitioner’s contention that the Attorney General and Cabinet Secretary, National Treasury did not deny or disown the contents of the letters and legal opinion.
234. LAPFUND disagrees. It states that section 132 of the County Governments Act was engineered by LAPTRUST in a bid to push it out of business.
235. The RBA through the Affidavit of Charles Machira sworn on 16<sup>th</sup> July, 2020 contends at paragraph 19 that neither the County Governments Act nor the Urban Areas and cities Act make any provisions as to which specific retirement benefits scheme county employees should belong.
236. The terms “Pension Fund” and “Provident Fund” are defined in the Trustees (Perpetual Succession) Act as follows:-

“pension fund” means a fund established under trusts subject to the law of Kenya, in connection with an undertaking or combination of undertakings carried on wholly or partly in Kenya, being a fund which the main purpose is—

- (a) the provision of superannuation allowances on retirement to persons employed in the undertaking or combination of undertakings in connection with which the fund is established; or
- (b) the provision of pensions during widowhood to the widows of persons who are or who have been so employed and of periodical allowances to or in respect of children of those persons; or
- (c) the assurance of capital sums on the death of persons who have been so employed,

**whether or not the fund has been approved and registered pursuant to and for the purposes of the Income Tax Act (Cap. 470);"provident fund" means a fund whether or not approved and registered pursuant to and for the purposes of the Income Tax Act (cap. 470), which is established under an irrevocable trust and which is established by or on behalf of an employer with the principle object of providing for the payment of lump sums to his employees in respect of their service with him upon their leaving that service after a specified period thereof, or to any of the dependants, or to the estate, of any of those employees on their death while in that service;**

237. There is no dispute that LAPTRUST is a pension scheme while LAPFUND is a provident Fund. It is further not in dispute that before the enactment of the County Governments Act and the Urban and Cities Act the employees of County Governments were members of both schemes. A provident Fund by definition is a defined contribution scheme as the benefits payable to the members is an aggregate



of the employee's contribution, the employer's contribution and the interest earned from investment of both. Based on the foregoing, the policy changes contained in the Treasury Circular No. 18 of 2010 could only have been directed at LAPTRUST as LAPFUND was already compliant.

238. I do not think it was the intention of parliament to lock out any of the two schemes when enacting the two statutes. If this was the intention, nothing prevented Parliament from expressly stating so. Indeed the letter dated 13<sup>th</sup> November 2013 states in part:

“consequently, this letter serves to confirm that the Ministry of Devolution & Planning is amenable to the said amendments as approved by the National Treasury and request that your good office considers the same fit for registration as the D.C Scheme has been endorsed as one of the Retirement Benefits Schemes to offer pension and other related benefits for officers, staff and members of County Governments”

[Emphasis added]

239. The letter dated 20<sup>th</sup> November, 2013 also makes the same reference at the penultimate paragraph at page 633 of the replying affidavit referred to above where it states:

“This letter therefore seeks to confirm that LAPTRUST (umbrella) Retirement Fund has been endorsed as one of the schemes to offer pension and other related benefits to the members, officers and staff of County Governments.”

[Emphasis added]

240. For these reasons it is my view that the reference to existing pension scheme in section 132 of the *County Governments Act* and section 49 of the *Urban and Cities Act* must of necessity refer to both LAPFUND and LAPTRUST.

241. It is therefore in my view, the County Governments in their capacity as employers to define the categories of staff to be eligible for membership of either of the schemes as was the intention at the inception of the two schemes.

242. With respect to Petition No 36 of 2022, the Petitioner is an employee of the County Government of Kakamega. It is not clear whether the Petitioner filed the petition in her capacity as an employee or in her capacity as the Area Branch Secretary of the Kenya County Government Workers Union.

243. If she filed the petition in her capacity as Area Branch Secretary, then the petition would be incompetent as the *Labour Relations Act* provides for the manner of instituting trade disputes by trade unions at section 62(1) thereof as follows:

- (1) A trade dispute may be reported to the Minister in the prescribed form and manner—
  - (a) by or on behalf of a trade union, employer or employers' organisation that is a party to the dispute; and
  - (b) by the authorised representative of an employer, employers' organisation or trade union on whose behalf the trade dispute is reported.

244. Section 73(3) of the *Labour Relations Act* provides for the procedure of referring duties to this Court as follows:

- (3) A trade dispute may only be referred to the Industrial Court by the authorised representative of an employer, group of employers, employers' organisation or trade union.



245. Authorised representative is defined at section 2 of the *Labour Relations Act* to mean:

“authorised representative” means—

- (a) the general secretary of a trade union;
- (b) an employer or the chief executive officer of an employer;
- (c) the secretary of a group of employers;
- (d) the chief executive or association secretary of an employers’ organisation; or
- (e) any person appointed in writing by an authorised representative to perform the functions of the authorised representative;

246. The Petitioner, not being an authorised representative would have no capacity file a representative dispute or petition on behalf of the union or union members.

247. If the petition is filed in the Petitioner’s capacity as an employee of the County Government of Kakamega, the procedure for resolution of dispute is as provided in section 77 of the *County Government Act* as follows:

77. Appeals to the Public Service Commission

- (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision.
- (2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—
  - (a) recruitment, selection, appointment and qualifications attached to any office;
  - (b) remuneration and terms and conditions of service;
  - (c) disciplinary control;
  - (d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of the Constitution;
  - (e) retirement and other removal from service;
  - (f) pension benefits, gratuity and any other terminal benefits; or
  - (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.
- (3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.
- (4) The Commission shall not entertain an appeal more than once in respect to the same decision.



- (5) Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review and the Commission may admit the application if—
- (a) the Commission is satisfied that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or
  - (b) there is an error apparent on record of either decision.
- (6) An application for review under subsection (5) shall be in writing and made within the time prescribed by the Commission in regulations governing disciplinary proceedings, but the commission may entertain an application for review later if, in the opinion of the Commission, the circumstances warrant it.

248. The prayers sought in the petition concern pension deduction remittances which fall under the above Section.

249. For the foregoing reasons, I find that the petition is incompetently filed by the Petitioner before this Court, is incurably defective and premature, having not exhausted the procedure provided for under the County Government Act. The same is accordingly dismissed.

### **Conclusion**

250. From the conclusions I have reached above, it is my finding that the County Governments Retirement Scheme Act, 2019 is unconstitutional for lack of public participation and for being in conflict with article 1, 2(1) and (4), 3(1), 6, 10, 35, 40(2)(a), 4(1), 43(1)(e), 118, 191(3)(b) and 258 of the Constitution of Kenya(a)

251. The impugned Act is further in conflict with the County Government Act and the Urban and Cities Act, the Retirement Benefits Act and the Employment Act.

252. Article 2 of the Constitution provides that the Constitution is the supreme law of the Republic and therefore any statute in conflict with the Constitution is invalid. I therefore declare the County Governments Retirement Scheme Act as unconstitutional and therefore null and void.

253. In view of the fact that the consolidated petition is a public interest petition, every party shall bear its costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 20<sup>TH</sup> DAY OF DECEMBER 2022**

**MAUREEN ONYANGO**

**JUDGE**

