



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 202 OF 2019

(Before Hon. Lady Justice Hellen S. Wasilwa on 10th December, 2020)

KENYA NATIONAL UNION OF NURSES.....PETITIONER

VERSUS

THE TRUSTEES OF THE COUNTY PENSION FUND.....1ST RESPONDENT

THE BOARD OF TRUSTEES LOCAL AUTHORITY PENSION FUND...2ND RESPONDENT

THE COUNTY PENSION FUND FINANCIAL SERVICES LIMITED....3RD RESPONDENT

HON. HOSEA KILI.....4TH RESPONDENT

THE COUNCIL OF GOVERNORS.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

THE AUDITOR GENERAL.....7TH RESPONDENT

RETIREMENT BENEFITS AUTHORITY.....8TH RESPONDENT

LAPTRUST RETIREMENT SERVICES LIMITED.....9TH RESPONDENT

AND

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

JUDGEMENT

1. Before this Honourable is the Petition dated 29/10/2019, in which the Petitioner seeks the following reliefs:-

i. A declaration that Laptrust is a public entity and that the same is subject to a public audit by the 7th Respondent pursuant to the Public Audit Act and the Public Procurement and Disposal Act.

ii. An order of prohibiting the 2nd Respondent from executing the functions of the Board of Trustees until a public audit on Laptrust is done by the 7th Respondent as provided under the Public Audit Act and the Public Procurement and Asset Disposal Act and assisted by the 8th Respondent;

iii. An order of prohibiting the 2nd Respondent from executing the functions of the Board of Trustees until a review and an investigation on the affairs of Laptrust is conducted of the 8th Respondent and the Interested Party;

iv. An order prohibiting the 4th Respondent, Hon. Hosea Kili, from acting as the Chief Executive Officer of Laptrust until he is examined and cleared by the Interested Party and/or until a review and an audit is conducted by the 7th Respondent

assisted by the 8th Respondent;

v. A permanent order stopping the 4th Respondent from acting as the Managing Director, Trustee and or Chief Executive Officer of the 2nd Respondent's Fund for reason of conflict of interest;

vi. An order directing the 5th Respondent to follow the legal process in nationalizing the 1st Respondent and/or converting to be a public entity, before it is admitted as a pension scheme for county workers;

vii. An order prohibiting and stopping the 3rd Respondent, CPF Financial Services Limited, from operating from Laptrust registered Offices and/or move its office, all operations and/or activities from Laptrust Premises and/or offices on L.R. No. 209/4866.

viii. An order of mandamus directing the 2nd Respondent to rename, repaint and rebrand all Laptrust buildings, offices and/or premises with the emblem of the Trust comprise of a corporate logo, a slogan, flag and colours as described under Rule 5 of the Local Government (Local Authorities Pensions Trust) Rules, 2007.

ix. An order of eviction, the 1st Respondent's Fund from operating from Laptrust registered Offices and/or move its office, all operations and/or activities from Laptrust Premises and/or offices on L.R. No. 209/4866.

x. An order stopping all the activities, operations and affairs of the 1st and 3rd Respondents until an investigation and a public audit on Laptrust is variously conducted by 7th Respondent;

xi. A declaration that the purported executive order issued by the 5th Respondent directing the Petitioner's members and other county workers to join the 1st Respondent's Pension Scheme, is illegal, unlawful and therefore null and void.

xii. A declaration that the purported executive order issued by the 5th Respondent, directing the Petitioner's members and other county workers to join the 1st Respondent's Pension Scheme, is inconsistent with Articles 10(2), 41(1), 41(2) (b) and (c), 73 and 232 of the Constitution and Section 19(1) (a) of the Employment Act;

xiii. An order quashing the purported executive orders by the 5th Respondent, directing the Petitioner's members and other county workers to join the 1st Respondent's Pension Scheme.

xiv. A declaration be issued under Articles 10(2), 41(1), 47(1) and 201(a) of the Constitution that Rule 3(6) of the Local Authorities Pension Trust Rules, 2007 is unconstitutional, because it offends the national values and principles of governance, causes lack of transparency and accountability in a public entity;

xv. A declaration that the legal opinion issued by the 6th Respondent on via letters dated 12th December, 2013 and 24th January, 2017 on the status of Laptrust Fund and CPF Financial Services Limited violates articles 73 and 232 of the Constitution on the values, responsibilities and guiding principles of leadership, public service and integrity, therefore null and void;

xvi. The costs of, and incidental to, this petition be awarded to the Petitioner as against the Respondents.

Background

2. The Petitioner is a duly Registered Trade Union representing 27,000 members who are employees of the 47 County Governments and has signed 47 Recognition Agreements with the 47 County Governments on their behalf instituted the instant Petition in its capacity as the legitimate labour organization with the mandate to represent the interests of nurses on matters employment and labour pursuant to the provisions of the Labour Relations Act No. 14 of 2007.

3. The Petitioner avers that LAPTRUST (later referred as the Trust), formerly Kenya Local Government Officers Superannuation (KLGOS) Fund was established pursuant to Legal Notice No. 313 of 1963 with a mandate to provide pension to Public Officers of the defunct local authorities under the Pensions Act.

4. Further on 15th December 2005 KLGOS Fund Limited by a special resolution of the trustees changed its name to the Local Authorities Pension Trust (LAPTRUST) limited by guarantee.

5. The Petitioner avers that subsequently in the year 2007 the then Minister for Local Government published the Local Authorities Pension Scheme Rules that established the Trust as the successor of KLGOS Fund and its Board subject to the Retirement Benefits Act.

6. The Petitioner contends that the Board of Trustees of the scheme through a special resolution changed the name of Trust to Laptrust Retirement Services Limited and the changes effected at the Companies registry on 1st April, 2011. It however maintained that this change was illegally done without the approval of the Retirement Benefits Authority as required under Regulation 16 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000.

7. The Petitioner further contends that it is unclear whether the assets of the 2nd Respondent's scheme were vested in the Laptrust Retirement

Services Limited, the 9th Respondent herein.

8. The Petitioner maintains that at some point the 9th Respondent was forced to seek a legal opinion from the Office of the Attorney General, the 6th Respondent on the incorporation of Laptrust Retirement Services Limited and/or whether it existed as a public or private entity, which opinion was to the effect that the Trust was in fact a public entity and therefore any conversion without the requisite approval was improper.

9. The Petitioner further avers that in a sudden turn of events the 6th Respondent, by a letter dated 24th January, 2017 issued another legal opinion on the status of Laptrust and CPF Financial Services Limited which opinion contradicted the opinion issued by the same office on 12th December, 2013 where it advised inter alia that the Trust Fund is not a state owned entity but a statutory trust created and vested in the Trustees for the benefits of its members, that the assets of the Fund are properly vested in the Trustees registered as Laptrust Registered Trustees with CPT properly registered as a scheme administrator as required under Section 25B of the Retirement Benefits Act.

10. The Petitioner faulted this opinion from the 6th Respondent on the main ground that the said office failed to recognize the fact that the fund is a Public entity as it deals with Public funds. It is the Petitioner's contention that the fund is indeed public and that the Honourable Attorney General failed in his duty as the legal advisor of the Government and a protector of the interests of the public at large by declaring the Trust as not being a Public entity.

11. The Petitioner avers that the 4th Respondent herein is currently the Managing Trustee of the 1st and 2nd Respondents' Fund and the Chief Executive Officer of the 3rd Respondent a situation it maintains creates a serious conflict of interest contrary to the express provisions of Rule 18 (g) and Rule 20 of the Local Authorities Pension Trust Rules, 2007. It further maintains that in taking up multiple roles the 4th Respondent is in breach of the fiduciary responsibilities to Laptrust and is culpable of an offence. It further recommends that the Public funds should in-fact be subjected to public audit.

12. The Petitioner contends that the 1st, 2nd, 3rd and 4th Respondents should face the full force of the law in irregularly and unlawfully misappropriating public funds in establishment of a private company and that the 6th, 7th and 8th Respondents jointly and severally failed in execution of their various mandates in protecting the interests of the County Workers in Laptrust by ensuring that there is good governance, integrity, transparency and accountability in the management and running of Laptrust.

13. The Petitioner further contends that there was no policy directive and/or due diligence that was conducted or followed by the 1st, 2nd and 5th Respondents prior to the conversion of the Laptrust (Umbrella) Retirement Fund, a public entity to a private entity, the County Pension Fund and that the 5th Respondent's decision in adopting CPF ignored the County Governments Retirement Scheme Bill, 2018 which was duly passed by both the senate and National Assembly. It contends that this was done in complete violation of Articles 10(2), 41(1), 41 (2) (b) and (c) of the Constitution of Kenya, 2010 and Section 19 (1) (a) of the Employment Act, 2007.

14. The Petitioner avers that the 5th Respondent now seeks to force county government workers to enroll into a Pension Scheme whose management and that of the external administrator are fused into one person, the 4th Respondent thus creating a conflict of interest situation.

15. The Petitioner further avers that the 5th Respondent has further proceeded to endorse CPF for fraudulent purposes of siphoning, misappropriating and misusing the Pension contributions by County Government workers.

16. That the 3rd Respondent has proceeded to take over all Laptrust's buildings and have been renamed, painted and branded in the 3rd Respondent's colours with CPF Financial Services Limited, a private company now operating from Laptrust building within Nairobi County in complete disregard to the provisions of Rule 5 of the Local Government (Local Authorities Pension Trust) Rules, 2007 that requires the buildings to be rebranded in the emblem of the Trust comprising of its Corporate logo, Slogan, Flag and colours.

17. It is for the foregoing reasons that the Petitioner maintains that there is a need for Laptrust being a public trust dealing with public funds to be subjected to public audit by the 7th Respondent. It maintains that in doing so it will be in strict compliance to the provisions of Articles 10 (2) and 201 (a) of the Constitution of Kenya, 2010 and Rule 3 (6) of the Local Authorities Pension Trust Rules, 2007.

18. It further contends that the 5th Respondent's move violates its members right to fair Labour practices as protected under Article 41 of the Constitution of Kenya, 2010 and Section 19 (1) (a) of the Employment Act, 2007 as its members are now being forced to enroll into the County Pension Fund.

19. It further contends the 5th Respondent made a unilateral decision that all county workers should join the County Pension Fund without consulting the Petitioner in complete violation to the Petitioner's right to participate in the decision-making process on behalf of the members they represent.

20. The Petitioner maintains that there is no transparency, openness and accountability on the part of the 5th Respondent in the manner in which it chose to adopt the 1st Respondent's Fund as a pension scheme for county government employees even ignoring the recommendations of the Technical Committee on the establishment of a suitable County Pension Scheme and without reason or explanation proceeded to take-over the Laptrust (Umbrella) Retirement Scheme by the County Pension Fund.

21. The Petitioner further maintains the 5th Respondent's decision to adopt the 1st Respondent's scheme for all County Workers was done in gross violation to the provisions of Articles 10 (2), 41 (1), 41 (2) (b) and (c), 73 and 232 of the Constitution of Kenya and Section 19 (1) (a) of the Employment Act, 2007 and therefore amounts to an Administrative Action that is unfair, unlawful and unreasonable.

22. It is on this foundation that the Petitioner now seeks to protect the Laptrust Fund's and/or assets which are valued at KShs. 6.87 Billion for the year ended 31st December, 2018 by urging this Honourable Court to allow its Petition in terms of the reliefs sought therein.

23. The Petition is further supported by the Affidavit of **SETH AMBUSINI PANYAKO**, the Petitioner's General Secretary sworn on 29th October, 2019 in which he reiterates the averments made on the face of the Petition.

3rd Respondent's Case

24. In response to the Petition the 3rd Respondent filed a Replying Affidavit deponed by ISAAC K. MITEI, the Company Secretary of the 3rd Respondent on 25th November, 2019 in which he avers that the 3rd Respondent is duly registered by the 8th Respondent pursuant to Section 25B of the Retirement Benefit Act to act as an authorized Administrator of Retirement Benefit Schemes in Kenya.

25. He further avers that the 3rd Respondent changed its name to CPF Financial Services Limited on 3rd April, 2014 and is wholly owned by Local Authorities Pension Trust and the Laptrust (Umbrella) Retirement Fund respectively.

26. The Affiant confirms that the 3rd Respondent is the current Administrator of the 2nd Respondent, 1st Respondent and Laptrust Individual Pension Schemes, among others in the pension industry.

27. He however denies any form of under dealings and/or illegal dealings as purported by the Petitioner maintaining that such claims are scandalous and unsubstantiated. He maintains that the Trustees of the 1st Respondent and the 2nd Respondent entered into an Administration Agreement with the 3rd Respondent as required under the Retirement Benefits Act.

28. Mr. Mitei further denies the allegation raised by the Petitioner that all Laptrust Buildings have since been taken over, renamed, painted and branded in the 3rd Respondent's colours, emblems and logos and instead stated that the 3rd Respondent being a licensed Administrator of the 1st and 2nd Respondent does not hold any properties belonging to the 1st and 2nd Respondent. He further maintains that no evidence has been adduced by the Petitioner to prove that the 3rd Respondent has actually taken over any of the alleged buildings and properties.

29. He further avers that the Petitioner has failed to demonstrate to this Court its allegation of misuse, abuse and/or embezzlement of any funds of the 1st and 2nd Respondent by the 3rd Respondent maintaining that the funds and assets are kept in safe custody by the custodians of the scheme and invested by the Fund managers of the scheme as required under the Retirement Benefits Act.

30. He further avers that the Petition as filed fails to meet the threshold as the Petitioner has failed to elaborate anywhere in its Petition the particulars of the said violations and/or infringements. He therefore maintains that the Petition together with the Supporting Affidavit lack any semblance of a Constitutional violation and/or infringement and ought to be dismissed.

31. He further maintains that the Petition as filed is malicious since the Petitioner filed it being fully aware that the 3rd Respondent has complied with all the legal requirements governing the Scheme Administrators' and has obtained all the requisite approvals, authorizations and licenses.

32. He contends that the Petitioner has further failed to adduce sufficient evidence to support its Claims as against the Respondents and that the Petition as filed is frivolous, vexatious, bad in law, meritless and abuse to the Court process urging this Honourable Court to dismiss it in its entirety with costs to the 3rd Respondent.

6th Respondent's Case

33. In response to the Petition the 6th Respondent filed a Notice of Preliminary Objection dated 22nd November, 2019 raising the grounds that:-

i. This Honourable Court lacks jurisdiction to hear and determine any dispute relating to a retirement benefits or pensions scheme.

ii. The Petition is premature, fatally defective and should be struck out in limine as the same is filed without exhausting the statutorily provided remedies contrary to Section 46 and 48 of the Retirement Benefits Act Cap 197 Laws of Kenya.

34. In its rejoinder to the various responses the Petitioner filed a Supplementary Affidavit deponed by **SETH AMBUSINI PANYAKO**, its General Secretary on 14th September, 2020 in which he reiterates the grounds on the face of the Petition.

35. He further avers that the 1st, 2nd, 3rd and 4th Respondents have on several occasions approved and/or sanctioned payments of huge sums of money to various individuals without any logical explanation or justifiable reasons.

36. The Affiant maintains that the 1st, 2nd, 3rd and 4th Respondent have further converted Laptrust and CPF into a debt collection firm and/or create such an office with the intention to illegally, unprocedurally and irregularly siphon members of money from both Laptrust and CPF.

37. He avers that the 1st to 4th Respondents outsource the services of external sales agents knowing that Laptrust, CPF and CPF Financial Services have employees who would provide the same services at a cheaper and more reliable way.

38. He avers that the 4th Respondent's conflicting positions/titles as Managing Trustee of the 1st and 2nd Respondent's funds and the Chief Executive Officer of the 3rd Respondent has enabled him use the above mentioned persons to swindle money from the 1st and 2nd Respondent's funds.

39. He further avers that from the affidavits of the 3rd and 4th Respondents, no statements of audited accounts have been annexed which act clearly confirms their illegal dealings and concealment of their day to day activities from public scrutiny.

40. He maintains that Rule 3 (6) of the Local Authorities Pension Trust Rules exempts Laptrust and CPF from the provisions of the Public Audit act and the Public Procurement and Disposal Act that sanctions for an audit of public entities by the Auditor General.

41. He maintains that the 1st to 4th Respondents have lacked transparency, openness and accountability in their dealings with Laptrust and CPF Scheme Funds. Additionally, their actions lacked in good governance, integrity, transparency and accountability.

42. He further maintains that there is therefore need to have the accounts under the control of the 1st, 2nd and 3rd Respondent subjected to an audit by the Auditor General, the 7th Respondent herein and an explanation of the state of affairs be given to the Ethics and Anti-Corruption Commission, the Interested Party herein.

43. He contended that from the Affidavits filed by the 3rd and 4th Respondents in response to the Petition did not include any statements of audited accounts which clearly confirms its assertion that there has been some illegal dealings and concealment of the day to day activities from Public scrutiny.

44. The Petitioner maintains that the 1st, 2nd, 3rd and 4th Respondents have violated the provisions of Articles 10 (2) (c), 40 (1) and 43 (1) (e) of the Constitution of Kenya, 2010 and ought to be punished and/or condemned.

45. It is on this basis that the Petitioner maintains that its Petition is merited and therefore ought to be allowed as prayed.

46. Parties agreed to dispose of the Petition by way of written submissions.

2nd Interested Party's case

47. The 2nd Respondent filed a Replying Affidavit sworn by Ezra O. Ngoge, its Chairman, sworn on 17th July, 2020. The affiant deposes that while the Petitioners have placed a lot of emphasis on the public nature of the "DB Scheme", Laptrust is exempted from the definition of a public entity for the purpose of the Public Audit Act and Public Procurement and Asset Disposal Act by dint of Rule 3 (6) of the Local Authorities Pension Trust Rules, 2007.

48. The affiant deposes that the Petitioner is proposing the nationalising of Laptrust DB while at the same time muddling and confusing the Local Authorities Pension Trust (Laptrust) and LAPTRUST Retirement Services Ltd which are 2 separate and distinct entities and from which none was converted to form the other.

49. He deposes that the need to incorporate Laptrust Retirement Services Ltd arose after several years owing to a defect in the legal regime that governed Laptrust's predecessor and lack of corporate status.

50. He avers that the office of the Attorney General approved the registration of the Laptrust Retirement Service Ltd in 2002 and that Laptrust Administration Services Ltd was incorporated on 16th June, 2011. He avers that the latter applied for a change of name to CPF Financial Services Ltd and the change effected in 3rd April, 2014.

51. He further avers that the shares held in Laptrust Retirement Services Ltd in CPF Financial Services were transferred to Laptrust. He further deposes that this ideally explains CPF's use of the premises of Laptrust as their registered offices as they are owned by Laptrust.

52. He avers that the funds and assets in Laptrust are private funds and do not belong to the government and the absence of government control is because it is a public trust solely for members and sponsors.

53. According to him, the effect of the Circular No. 18 of 2010 dated 24th November, 2010 is that Laptrust being a defined scheme would die naturally as defined benefits schemes could no longer register new members under the defined benefits regime.

54. He avers that on 16th June, 2014, following lengthy consultations with all stakeholders, the Council of Governors issued Circular No.1 pursuant to section 132 of the County Government Act which inter alia endorsed the DC Scheme which is managed by the 3rd Respondent and advising county governments to enrol all new employees into the DC Scheme.

55. He further avers that on 19th September, 2014 the Council of Governors issued Circular No.2 advising county governments to close the DB Scheme and the Laptrust DB to new members and cease making contributions to the DB scheme and the 4th Respondent in respect of all new employees.

56. He denies that conflict that arises out of the 4th Respondent being the Managing Trustee of Laptrust and the CPF Financial Services Ltd because it is legitimate expectation that the trustees appoint the managing trustee and a few other trustees to represent the trustees in the

board of directors of the scheme administrator to secure the interest of the trust.

57. He also maintains that the assets of the scheme are vested in Laptrust and not in Laptrust Retirement Services Ltd. He further avers that according to Rule 29 of the Local Authorities Pension Trust Rules, the trustee shall exercise administrative and managerial responsibilities over the trust through the managing trustee acting under authority delegated by the Board; and that the number of trustees in the board of trustees does not confer on the trustees a controlling power.

58. He avers that the Petitioners are trying to subject the management of the private pension savings of members, officers and staff of County Governments to the vagaries of politics contrary to the Retirement Benefits Act, the prevailing Government Policies and the prevailing global best practices on the management of the pension scheme funds by calling for an audit of pension funds yet an audit was carried out by Delloitte Kenya.

59. He contends that the Petitioners have also expressed desire to join Lapfund and have even signed a Memorandum of Understanding with Lapfund which is a competing pension scheme to the 1st and 2nd Schemes. He contends that Lapfund has launched a vicious scheme which has resulted in intractable wrangles and confusion among stakeholders.

60. He contends that the Petition is incompetent, vicious and abuse of the court process and prays that it be dismissed with costs.

Petitioner's Submissions

61. The Petitioner submitted that in its Supplementary Affidavit, it has demonstrated and provided evidence how the Respondents violated Articles 10 (2) (c), 40 (1) and 43 (1) (e) of the Constitution. It argued that it has also demonstrated how the 1st, 2nd, 3rd and 4th Respondents have used proxies, cohorts and employees in LAPTRUST and CPF to illegally and irregularly siphon funds from the 1st and 2nd Respondents' schemes.

62. It further argued that it has demonstrated how the 4th respondent's conflicting positions and/or titles as the Managing Trustee of the 1st and 2nd Respondents' Funds and the Chief Executive Officer of the 3rd Respondent has enabled him use individuals to swindle money from the 1st and 2nd Respondents' funds.

63. It submitted that the law applicable in the 1st and 2nd Respondents schemes does not allow the 7th Respondent to audit their accounts thus the 1st, 2nd, 3rd and 4th Respondents have taken advantage of this lacuna to siphon funds.

64. It submitted that the actions by the 1st, 2nd, 3rd and 4th Respondents lacked in good governance, integrity, transparency and accountability and that their actions violated the national principles of good governance as outlined under Article 10 (2) (c) of the Constitution.

65. It argued that the 1st, 2nd, 3rd and 4th Respondents have violated the right to acquire and own property conferred on the members of the 1st and 2nd Respondents' schemes by virtue of Article 40 (1) of the Constitution.

66. It argued that members of the 1st and 2nd Respondent's schemes have the constitutional right to social security under Article 43 (1) (e) of the Constitution therefore misusing these funds violates this right.

67. It argued that it has discharged its burden within the precincts of the decision in **Anarita Karimi Njeru v Republic [1979] KLR 154** that a person should set out with a reasonable degree of precision that which he complains and the provisions infringed. It further relied on the Court of Appeal decision in **Mumo Matemu v Trusted Society of Human Rights Alliance [2014] eKLR**.

68. It argued that LAPTRUST being a public trust should be subjected to public audit by the 7th Respondent because institutions such as NHIF and NSSF are audited by the 7th Respondent.

69. It submitted the Public Audit Act, the Public Procurement and Asset Disposal Act, the Public Finance Management Act provide for definition of Public entity, public funds and/or money. It submitted that section 3 (1) of the Public Audit Act provides that the 7th Respondent is to be guided by values, principles and requirements of the Constitution. It further submitted that Article 201 (a) of the Constitution provides for the principles of public finance.

70. It submitted that there is no rationality why LAPTRUST has to be treated differently from NHIF and NSSF which are public trusts audited by the 7th Respondent. It argued that Rule 3 (6) of the Local Authorities Pension Trust Rules, 2007 violates national values and principles of good governance as enumerated under Articles 10 and 201 of the Constitution.

71. It argued that it matters not whether the entity in question is a public or private entity, transparency and accountability may be fetched on private enterprises under article 10 of the Constitution as held in **Githunguri Dairy Farmers Cooperative Society Limited v Attorney General & 2 Others [2016] eKLR**.

72. It submitted that the 6th Respondent wrongly applied the principles in the **Githunguri Dairy case** and declared that LAPTRUST is not a state-owned entity but a public trust vested in the trustees to hold in trust of individual members of the scheme.

73. It argued that from the **Githunguri Dairy case**, it is discernible that a public entity is not simply a body which draws support for both operations and capital expenditure from the public exchequer but its purpose is to render public service. Additionally, a public entity should

include statutory bodies, parastatals, bodies established by statute but managed and maintained privately.

74. It argued that in line with the **Githunguri Dairy Case**, one would note that LAPTRUST is a public entity dealing with public funds thus it's unclear for the 6th Respondent to declare it a private entity.

75. It submitted that the 5th Respondent engaged the then trustees of LAPRUST (Umbrella) Retirement Fund who agreed to hand over the scheme to county government for its conversion into a universal pension scheme for all staff and officers of the County Government.

76. It submitted that LAPTRUST includes both a defined benefit and defined contribution scheme hence the decision by the 5th Respondent to adopt the 1st Respondent's Funds as pension scheme is nationalising a private entity without following due procedure. It argued that there is no policy directive and/or due diligence that was conducted or followed by the 1st, 2nd and 5th Respondents prior to conversion of the Fund to a private entity, the County Pension Fund.

77. It argued that the 5th Respondent ignored the County Governments Retirement Scheme Bill 2018 which had been passed by both the National Assembly and the Senate that has now become law and that it also failed to maintain the status quo in having the workers retain the existing pension scheme being LAPTRUST and LAPFUND in line with section 132 of the County Governments Act.

78. It further contended that there was no public participation or consultation of the members, stakeholders and/or sponsors of LAPTRUST (Umbrella) Retirement Scheme in having the said scheme taken over by the County Pension Fund, which is a violation of Article 10 (2) (a) of the Constitution.

79. It submitted that the legal underpinning of public participation is found in articles 10 (2) & 174 of the Constitution as well as sections 87 & 115 of the County Governments Act. It relied on the decision in **British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 Others [2017] eKLR** that the concept of public participation and consultation was entrenched since promulgation of the Constitution. It further relied on the case of **Legal Advice Centre & 2 Others v County Government of Mombasa & 4 Others [2018] eKLR**.

80. It submitted that in making the decision to adopt CPF in manner that was unlawful, not transparent and without consulting or engaging the Petitioner, the 5th Respondent denied the county government employees their rights which amount to unfair labour practice in contravention of Article 41 (1) & (2) of the Constitution.

81. It submitted that pursuant to Article 41 of the Constitution as read with section 19 (1) (a) of the Employment Act, there is so far no agreement between the 5th Respondent and the Petitioner agreeing to have the Petitioner's members enrol to the County Pension Fund.

82. It contended that it is a requirement under section 19 (1) (a) of the Employment Act, the scheme in question should have been approved by the Commissioner for Labour. It further contended that the County Pension Fund has not been approved by the Commissioner for Labour and as such the move to have it adopted as the scheme of choice for County workers is in contravention of section 19 (1) (a) Employment Act.

83. It relied on Rule 4 and 5 of the Local Authorities Pension Trust Rules, 2007 and submitted that the actions by the 3rd Respondents in taking over the offices of the trust and rebranding them to their own colours, slogan, logos and flags is contrary to Rules of the Local Authorities Pension Trust Rules, 2007.

84. It argued that the intertwined matters in the Petition are outside the jurisdiction of the Retirement Benefits Authority Chief Executive Officer under section 46 of the Act or the Retirement Benefits Appeals Tribunal under section 48 of the Retirement Benefits Act.

85. It argued that the 1st, 2nd and 6th Respondents Preliminary Objection is lacking in merit and merely intend delay the hearing of the Petition. It submitted that the issue to be determined in the Petition herein is not limited to alternative /special dispute resolution mechanisms set out under section 46 and 48 of the Retirement Benefits Act.

86. It submitted that as held in **Arthur Njoroge Nganga v Laptrust (Umbrella) Retirement Fund Board of Trustee & another [2018] eKLR** the jurisdiction of the Chief Executive Officer of the Retirement Benefits Authority under section 46 of the Act is complimentary to other available jurisdictions such as this court's jurisdiction.

87. It argued that the 1st, 2nd and 6th Respondents have not exhibited the decision(s) of the manager, administrator, custodian or trustees of the schemes envisaged or contemplated under section 46 of the Retirement Benefits Act. It submitted that in line with the Court of Appeal decision in **Rashid Odhiambo Allogoh & 245 Others v Haco Industries Limited Civil Appeal No. 10 of 2008** it is trite law that the availability of other lawful causes of action is no bar to a party who alleges a contravention of his rights under the Constitution.

88. It submitted that they are not seeking deregistration of the 1st and 2nd Respondents Scheme or appointment if an interim administrator thus Sections 28 and 45 (2) of the Retirement Benefits Act, Regulation 1 of the Retirement Benefits (Forms and Fees) Regulations, 2000 as read with Form N2 of the First Schedule thereof and Rule 5 of the Retirement (Minimum Funding Level and Winding –up of Schemes) Regulations 2000 are inapplicable.

89. It submitted that the Preliminary objections offend the express provisions of Section 73 (3) of the Labour Relations Act as read together with Section 2 of the Labour Relations Act which give authority to an authorised representative or a General Secretary of a trade union to file a Petition.

90. It argued that the Preliminary Objections offend the law as expounded in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Limited (1969) EA 696** and submitted that the preliminary objections are incurably defective in law.

Submissions by the 1st, 2nd and 9th Respondents

91. The 1st, 2nd and 9th Respondents submitted that the contention which the Petitioner has dishonestly omitted to bring out is between Lapfund and the County Pension Fund with regards to which of the two is and has been “the existing pension scheme”. They submitted that this question is pending before this Honourable Court in ELRC Petition 230 of 2019.

92. They relied on the Supreme Court decision in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR** that a court may not arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

93. They submitted that Article 162 (3) of the 2010 Constitution gives Parliament authority to determine the jurisdiction of this Court and that this is provided for under Section 12 of the Employment and Labour Relations Court Act, 2011. They submitted that this court has no jurisdiction to entertain the Petition and application thus it must down its tools as the matters presented in both pleadings are beyond the scope of Section 12 (1) of the Employment and Labour Relations Court Act.

94. They maintained that the fora for resolution of the dispute are the Chief Executive Officer of Retirement Benefits Authority and the Tribunal established under sections 46 to 49 of the Retirement Benefits Act.

95. They submitted that the Petitioner skipped the more appropriate dispute resolution forum for addressing its grievances. They submitted that in **Geoffrey Muhinja & another v Samuel Muguna Henry & 1756 Others [2015] eKLR**, the Court of Appeal held that litigants must exhaust the dispute resolution mechanism that exists outside Courts before invoking the court’s jurisdiction.

96. They submitted that to find that the Court has jurisdiction would not only defeat the laid down principles on jurisdiction but would also amount to usurpation of a jurisdiction which neither the Constitution nor the Employment and Labour Relations Act confers on this Court.

97. They argued that the DC Scheme was properly registered as the Pension Scheme for the members, officers and staff of county government in strict adherence to the law. They further admitted that the Petitioner has not adduced evidence to demonstrate otherwise as required under Section 107 and 109 of the Evidence Act.

98. They submitted that the DB Scheme is not a state-owned entity and thus cannot be subject to public audits. They further submitted that the Petition has not met the threshold set out in the **Anarita Karimi Case** to the extent that he has not furnished reasonable particulars of the alleged violations.

99. They submitted that the Petitioner does not deserve the Orders of this Court as it failed to exhaust the available mechanisms of resolving the dispute as provided under the Retirement Benefits Act, 1997. They therefore urged the Court to strike out both the Petition and Application.

Submissions by the 3rd and 4th Respondents

100. The 3rd and 4th Respondents reiterated the 6th Respondent’s position that this Honourable Court does not have jurisdiction to hear and determine this Petition and the need for a party to exhaust all other processes availed by other statutory dispute resolution organs. They averred that the Retirement Benefits Act has provided for Alternative Dispute Resolution Mechanisms mandating any aggrieved party to exhaust the provided Alternative Dispute Mechanisms before going to Court.

101. On the issue of jurisdiction, they further submitted that the Petitioner has not established any employer employee relationship between the Petitioner’s members and them and therefore this court cannot assume jurisdiction and adjudicate on this matter. That since it is trite law that jurisdiction is everything, where a Court of law lacks jurisdiction to entertain a matter it automatically cannot sit to hear and determine the matter. They therefore submitted that in light of the aforementioned, this Court ought to dismiss the Petition with costs.

102. They relied on the Supreme Court case, **Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) vs. Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR** wherein the Court stated that:-

“We do not see how a pensioner falls within the listed category of persons and parties that can make an application or institute proceedings before the Court. From the foregoing it is thus clear that the Employment and Labour Relations Court had no jurisdiction to hear and determine a dispute that relates to trustees of a pension scheme and members of the scheme particularly where the said members are no longer employees of the Sponsor. Besides, the trust so established as a pension scheme retains autonomy from both the Sponsor and the employees hence its regulation by the Authority.”

103. On the issue of doctrine of exhaustion, they cited the following Court of Appeal cases; **Bethwell Allan Omondi Okal v Telkom (K) Ltd (founder) & 9 others [2017] eKLR; International Centre for Policy and Conflict and 5 others -vs- The Hon. Attorney-General & 4 others [2013] eKLR** and **Kibos Distillers Limited & 4 others vs Benson Ambuti Odega & 3 others [2020] eKLR**.

104. They submitted that the Petitioner has failed to plead and prove with the requisite degree of precision, the specific rights which have been violated, the manner in which they have been violated and the persons against whom such a complaint of violation has been made.

105. They submitted that the Petitioner has further failed to provide any evidence in the form of a list, to support its claim that indeed its members have subscribed to the 2nd Respondent's pension scheme and how the alleged actions of the Respondents have affected its members. It was their submission that there is thus no viable way by which the Petitioner's assertions of violation of its members' rights can be substantiated and they cite a myriad of cases including **Anarita Karimi Njeru v Attorney General** and **the Supreme Court case of Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** at para 349.

106. As regards the reliefs sought by the Petitioner against the 3rd and 4th Respondents, they submitted that under Section 107 of the Evidence Act, he who asserts must prove but that the Petitioner herein has made several allegations and failed to support them with any factual evidence. That a grant of the order sought in the Petition against the 4th Respondent is tantamount to this Court terminating the employment of the 4th Respondent yet the Petitioner has evidently not established to the required threshold for this Honourable Court to grant the injunctive order sought.

107. On the issue whether Rule 3(6) of the Local authorities Pension Trust Rules, 2007 is unconstitutional, the 3rd and 4th Respondents submitted that a key principle of determining constitutional validity of a statute is by examining its purpose and effect as stated in **Olum and Another v Attorney General [2002] EA**. To this end they noted that the said rule establishes and/or brings out the distinct fact of Laptrust as a private entity and the purpose of the said rule is to therefore exclusively protect the private funds of members of the pension scheme from any uncalled-for state interference of any form. That it accordingly follows that the effect of the said rule is to safeguard the pensioners' monies.

108. They further submitted that the assertions that Laptrust is treated differently from other pension schemes and shielded from the avenues of public audit are unfounded and lack merit as Laptrust is still mandated to adhere to the constitutional principles of transparency and accountability. That the Petitioner has also not demonstrated how the said rule infringes on the rights of any of its members and it is for these reasons they submit that Rule 3(6) of the Local authorities Pension Trust Rules, 2007 is constitutional.

109. They further relied on **Cyprian Andama v Director of Public Prosecution & another; Article 19 East Africa (Interested Party) [2019] eKLR** where the High Court observed that both purpose and effect are relevant in determining constitutionality and that either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.

110. On the issue of whether or not Laptrust is a public entity, the 3rd and 4th Respondents submitted that pension funds are contributions from savings/income of the individual members of the public and not from public funds. That pension scheme funds are therefore not public bodies within the meaning of the law and should not be classified as such and that it is improper to subject such private entities to the provisions of the Act.

111. They further submit that the issue can only be decided upon consideration of the functional character of the Trust and particularly the issue as to whether the Trust receives any direct financial support from the State or performs any key function under State supervision to help it run as a public entity. The answer to these is that the Trust is administered by the Board of Trustees and the State is in no way involved in its day to day activities nor does the State provide funding to the Trust.

112. They also cited the case the **Githunguri Dairy case** which established what a public entity and private entity is. The 3rd and 4th Respondents note that in applying the principles in the **Githunguri Dairy case**, Laptrust is not a state-owned entity but is a public trust vested in the trustees to hold in trust for individual members of the scheme. It is their submission that Laptrust cannot be said to be a public entity by dint of regulation and ought to be considered a private entity. That as such, Laptrust cannot fall under the jurisdiction of The Public Audit Act and Public Procurement and Disposal Act.

113. The 3rd and 4th Respondents submitted that this Honourable Court is vested with the discretion to award costs by Rule 26 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and further by Section 12(4) of the Employment and Labour Relations Court Act.

114. They further submitted that the Petitioner is not entitled to costs of this suit since it has failed to meet the competency threshold of a constitutional Petition and has come to this Court without exhausting the alternative dispute Remedies that have been provided by statute. That in light of this, costs be awarded to the 2nd and 3rd Respondents.

Submissions by the 6th Respondent

115. In opposition to the Petition filed the 6th Respondent maintained that this Court lacks Jurisdiction to hear and determine this matter by dint of the provisions of Section 12(1) of the Employment Act and Section 46 and 48 of the Retirement Benefits Act and as such urged this Court to proceed and dismiss it with costs to the Respondents.

116. The 6th Respondent maintains that the Petitioner ought to have first engaged with the CEO of the Retirement Benefits to look into its grievance, and if dissatisfied they ought to have had appealed to the decision of the CEO to the Tribunal.

117. The 6th Respondent further argued that the Petitioner has failed to exhaust the statutorily provided mechanisms for dispute resolution as provided under Sections 46 and 48 of the Retirement Benefits Act and as such this Court lacks the requisite jurisdiction to deal with the matter as the same is premature and contrary to the doctrine of ripeness. To buttress this argument the 6th Respondent cited and relied on the Court of Appeal decision in the case of **Geoffrey Muthinja & Another Vs Samuel Muguna Henry & 1756 Others (2015) eKLR** on the issue of the doctrine exhaustion.

118. The 6th Respondent further cited the Court of Appeal decision in the case of **Kenya Ports Authority Vs Industrial Court of Kenya & 2 Others, Civil Appel No. 236 of 2015** where the Court held that Pension disputes are not trade disputes and the Labour Court has no

jurisdiction to hear the same.

119. On the issue of Jurisdiction, the 6th Respondent further cited the following decisions **Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & Another Vs Ann Wangui Ngugi & 524 Others (2018) eKLR** and **Mary Wambui Munene Vs Peter Gichuki Kingara & 6 Others (2014) eKLR**.

120. In conclusion the 6th Respondent urged this Honourable Court guided by the cited authorities to find that matters touching on retirement benefits and pension do not fall under the Jurisdiction of the Employment and Labour Relations Court as outlined in Section 12 of the Employment and Labour Relations Court Act. He therefore urged this Court to find the Petition as filed devoid of merit and proceed to dismiss it in its entirety with costs to the Respondents.

8th Respondent's submissions

121. The 8th Respondent submitted that its role and function is outlined under section 5 of the Retirement Benefits Act. It submitted that this position was buttressed on **Republic v Retirement Benefits Authority ex parte Moses O. Ondingo & 5 Others [2018] eKLR**.

122. It submits that pursuant to Rule 3 (6) of the Local Authorities Pension Trust Rules a, the Public Procurement and Assets Disposal Act and as read with the 6th Respondent's legal opinion, it was rightfully advised on the status of the Local Authorities Pension Trust and the CPF Financial Services Limited.

123. It submitted that since the Act came into effect after the Laptrust rules were made it would mean that Laptrust be deemed as a public entity for purposes of the Public and Assets Disposal Act. It submitted that pursuant to Section 22 and 22 A of the Retirement Benefits Act, Parliament intended the threshold for holding the positions of trustees, manager custodian or administrator highly. It argued that it has no cause to decline or revoke an opinion by the 1st to 7th Respondent as well as the 9th Respondent and the Interested Party.

124. It relied on the case of **Kenya Ports Authority vs The Industrial Court of Kenya, Interested Party, Kenya Dock Workers Union & Another [2012] eKLR** that demonstrate that a retirement scheme can only fall within the Retirement Benefits Act.

125. It submitted that it is deemed as having a transitional function in ensuring that the existing schemes merge into the new entity, by the provision of section 56 (6) of the County Governments Retirement Scheme Act. It submitted that it is willing and ready to take all the necessary actions in the fulfilment of its mandate to cure any mischief.

126. I have considered the evidence and submissions of the Parties herein. The issues for this Court's determination are as follows: -

- 1. Whether this Court has jurisdiction to deal with this Petition.**
- 2. Whether the Petition has merit**
- 3. What remedies this Court can grant in the circumstances.**

Jurisdiction

127. The issue of this Court's jurisdiction has already been exemplified in many decisions. The jurisdiction of this Court is found at Section 12 (1) of the ELRC Act 2016 which states as follows:-

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 unions organisation;
- d. disputes between trade unions;
- e. disputes between employer organisations;
- f. disputes between an employers' organisation and a trade union;
- g. disputes between a trade union and a member thereof;
- h. disputes between an employer's organisation or a federation and a member thereof;
- i. disputes concerning the registration and election of trade union

j. officials; and

k. disputes relating to the registration and enforcement of collective agreements.’

128. The issues of pension as much as they touch on an employee or a former employee has however their determination and mandate drawn from the Retirement Benefits Act.

129. The main contention by the Petition herein is that the 5th Respondent relying on recommendation of a technical committee endorsed and resolved to adopt the County Pension Fund which would take over Laptrust (Umbrella Retirement Fund) an existing Umbrella Scheme as the Scheme of choice to offer retirement benefits to members, officers and staff of the County Government.

130. The Petitioner also complains that vide a circular dated 16/6/2014, the 5th Respondent requested all Chairmen and Secretaries of the County Public Service Boards (CPSBs) to execute the directives given so as to enable implementation of the resolution by the County Council Governors.

131. The Petitioner in addition alleges that on 24th November 2014 in a meeting on the implementation of the County Pension Scheme between the 5th Respondent, County Assembly Forum, County Assembly Service Boards and the CPSPs, a resolution was passed to adopt the 1st Respondent’s Fund which was to be owned by the County Governments.

132. Accordingly, the 5th Respondent engaged the then Trustees of Laptrust (Umbrella) Retirement Funds who agreed to hand over the Scheme of the County Government for its conversion into Universal Pension Scheme for all staff and officers of the County Government.

133. The Petitioner further avers that it was the decision of the 5th Respondent not to establish a new scheme as the same would be a waste of public resources and for that reason, it considered commenting Laptrust (Umbrella) Retirement Fund to the County Pension Fund.

134. The Petitioner has expressed dissatisfaction in regard to the aforesaid issues and others that there is no policy directive and/or due diligence that was conducted or followed by the 1st, 2nd and 5th Respondents prior to the conversion of the Laptrust (Umbrella) Retirement Fund, a public entity to a private entity, the County Pension Fund.

135. The Petitioner further avers that the 1st, 2nd, 3rd and 4th Respondents have irregularly and unlawfully appropriated public funds from the Laptrust (Umbrella) Retirement Fund. He avers that the said Respondents are in violation of Articles 10(2) (c), 40(1) (e) and 43(1) of the Constitution of Kenya.

136. The 3rd and 4th Respondent have submitted that this Court has no jurisdiction to deal with the above matter. the Respondents avers that Retirement be handled under the Retirement Benefits Act (RBA).

137. Section 46 of the Retirement Benefits Authority provides as follows:-

1. “Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established.

2. A copy of every request under this section shall be served on the manager, administrator, custodian or trustees of the scheme”.

138. Section 48 of the Retirement Benefits Act also provides as follows:-

1. “Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made thereunder may appeal to the Tribunal within thirty days of the receipt of the decision.

2. Where any dispute arises between any person and the Authority as to the exercise of the powers conferred upon the Authority by this Act, either party may appeal to the Tribunal in such manner as may be prescribed”.

139. From the Petition herein, the contention between the Petitioners and the Respondents is about certain acts by the Chief Executive Officer under the Retirement Benefits Act.

140. In SC Petition 3 of **2016 Albert Chaurembo Mumba & 7 Others (sued on their own behalf and on behalf of predecessors and/or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme vs Maurice Munyao and 145 Others (suing on their own behalf and on behalf of the Plaintiff and Other Members/Beneficiaries of Kenya Ports Authority Pension Scheme (2019) eKLR** the Court held as follows:-

”[146] In our view, once a member leaves the employment of a Sponsor, by becoming a pensioner, there is no longer a relationship of employer-employee that exists between such a pensioner and the sponsor. The relationship that exists in that case becomes that of trustee and beneficiaries (members) of a trust and that relationship is governed by the Retirement Benefits Act, Trustee Act Cap 167 of the laws of Kenya and the general common law on the law of trusts. It is important to note that nowhere in the Employment and Labour Relations Court Act is there jurisdiction conferred on the Employment

and Labour Relations court to resolve issues between trustees of a pension scheme and members of the scheme (pensioners).

[147] In Abdalla Osman & 628 others v Standard Chartered Bank (K) Limited & 11 others ELRC Cause No. 59 of 2018 [2018] eKLR, a case with factual similarities to the instant case, the trial court made the point clear by stating that:

“In the case of the suit herein is between former employees of the first respondent and their former employer on one hand and also between pensioners and their respective pension schemes. Under section 12 of the ELR Act this Court has jurisdiction to determine disputes between employers and their employees and by extensions, former employees and their former employers. The said jurisdiction is donated by the said Act pursuant to provisions of Article 162 (2) (a) of the constitution of Kenya. There is therefore an inherent jurisdiction of this court to entertain any sort of dispute which arise from the context of employer employee relationship.”

However, the Court of Appeal in Civil Appeal No.236 of 2012 Kenya Ports Authority (supra), held that pension disputes are not included within the definition of a trade dispute consequently the then Industrial Court did not have jurisdiction to hear and determine pension disputes. That the then Industrial Court acted in excess of its jurisdiction in determining the dispute involving the Scheme, a jurisdiction that was reserved for the Authority.

[148] From the foregoing, we are inclined to agree with the Court of Appeal based on our understanding of section 12(2) of the Employment and Labour Relations Court Act which states:

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

We do not see how a pensioner falls within the listed category of persons and parties that can make an application or institute proceedings before the court. From the foregoing it is thus clear that the Employment and Labour Relations Court had no jurisdiction to hear and determine a dispute that relates to trustees of a pension scheme and members of the scheme particularly where the said members are no longer employees of the Sponsor. Besides, the trust so established as a pension scheme retains autonomy from both the Sponsor and the employees hence its regulation by the Authority”.

141. In Court of Appeal No. 191/2014 Bithwell Allan Omondi Okal vs Telkom eKLR, the Court of Appeal held that it agrees that the Applicant has a constitutional right of access to justice and as such should be accorded the reliefs that a Court is authorized to give, however a party must exhaust all other processes availed by other statutory dispute resolution organs before moving to Court. The Court of Appeal stated as follows:-

“The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others, Petition No. 552 of 2012, and Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425”.

142. The Court of Appeal reaffirmed this position in Kibos Distillers Limited and 4 Others vs Benson Ambuti Odega and 3 Others (2020) eKLR where it held as follows:-

“A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute.

Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance”.

143. The Court has much similar finding in Staff Pension Fund and Kenya Commercial Bank Staff Retirement (dc) Scheme 2006 and Another vs Anne Wangari & 524 Others (2018) eKLR and in Geoffrey Muthinja & Another vs Emanuel Muguna Henry & 1756 Others (2015).

144. In Osman & 628 Others vs Standard Chartered Bank (K) Limited and 11 Others (2018) eKLR, the Court also rendered itself as follows: -

“I have found that, although the court has jurisdiction to entertain disputes brought by employees against their employers or disputes relating to their rights as employees or former employees, there is however an alternative procedure provided by statute to deal with pension disputes, namely Section 46 and 48 of the Retirement Benefits Act. I have further found that under the doctrine of exhaustion, the court ought to withhold its jurisdiction in favour of the alternative dispute resolution mechanism provided by the constitution or statute.... Consequently, I down my tools at this juncture and refer this dispute to the CEO of the Retirement Benefit Authority to determine it on the merits under section 46 of the Retirement Benefits Act. Considering the age of the suit, I direct that priority be accorded to the matter. No order as to costs”.

145. Having considered the above cited authorities and having considered the reliefs sought by the Petitioner herein, it is my considered view that though this Court has jurisdiction to deal with employer-employee issues, when it comes to issues of pension funds, the right forum to handle this is spelt out in the Retirement Benefits Act, which process commences with ADR process before proceeding before the Retirement Benefits Authority Tribunal. The findings are then appealable before this Court.

146. I therefore find that the Petitioner rushed to this Court before exhausting the process laid down in the law and therefore this Court has no jurisdiction to handle this Petition.

147. In order to avoid miscarriage of justice, I will strike out this Petition so that the Petitioner is free to pursue their rights in the right forum. I will not delve into the other issues I would have determined due to lack of jurisdiction.

148. There will be no order of costs.

Dated and delivered in Chambers via zoom this 10th day of December, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Otieno for 3rd and 4th Respondent – Present

Odhiambo for 1st, 2nd and 9th Respondents – Present

Petitioner – Absent