REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Njoki, Lenaola, & Ouko, SCJJ)

PETITION NO. E017 OF 2024

-BETWEEN-

ASSOCIATION OF RETIREMENT BENEFITS SCHEMES ..... APPELLANT

-AND-

THE ATTORNEY GENERAL .....1ST RESPONDENT
CABINET SECRETARY FOR THE NATIONAL TREASURY.....2ND RESPONDENT
PUBLIC PROCUREMENT REGULATORY AUTHORITY.....3RD RESPONDENT
THE RETIREMENT BENEFITS AUTHORITY.....4TH RESPONDENT

(Being an Appeal from the Judgment of the Court of Appeal at Nairobi (Karanja, Makhandia and Laibuta, JJ. A) delivered on the 28th April 2022, in Civil Appeal No. 283 of 2017)

Representation:

Mr. David Nyakundi, appearing together with Dr. Thiankolu Muthomi, Mr. Anthony Maruti and Ms. Sylvia Matasi for the Appellant
(Simba & Simba Advocates)

Mr. Christopher Marwa for the 1st, 2nd and 3rd Respondents
(Attorney General's Chambers)

Ms. Gloria Kosgei for the 4th Respondent
(Retirement Benefits Authority)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Public procurement is a constitutionally regulated function that lies at the heart of public finance management and national development in Kenya. Article 227(1) of the Constitution was enacted to ensure that all procurement of goods and services by State organs and public entities is done through a system that is fair, equitable, transparent, competitive, and cost-effective. Parliament in 2015, gave legislative effect to this constitutional command through the enactment of the Public Procurement and Asset Disposal Act, Cap 412C (PPADA). In its long title, the Act declares that it was enacted to give effect to Article 227 of the Constitution; "*to provide procedures for efficient public procurement and for assets disposal by public entities*; and for connected purposes". What constitutes public procurement and public entities? The former is defined in Section 2 of the Act to mean "*procurement by procuring entities using public funds*", while Section 2(o) lists "pension fund for a public entity" as one of the twenty (20) entities constituting public entities to which the PPADA applies. It is that definition that precipitated the petition by the appellant to the High Court, the central issue being the constitutionality of Section 2(o) of the Act, which extends the application of the public procurement framework to pension schemes of public bodies.

B. BACKGROUND

[2] Following the enactment of Section 2(o) of the PPADA, aforesaid, all pension funds of public entities have to comply with the provisions of PPADA as far as procurement and disposal of their assets is concerned. The appellant, an association of stakeholders in the retirement benefits industry in Kenya, whose membership includes retirement benefit schemes, employers, and service providers in that industry, petitioned the High Court for a declaration that Section 2 (o) aforesaid is unconstitutional.

[3] It was their case that they do not fall in the category of public entities but instead are registered under Section 23 of the Retirement Benefits Act (the RB Act) as an irrevocable trust; that this constitutes a private arrangement between the employee as the grantor of the trust by remitting their funds for purposes of retirement, and the Trustee who oversees the management of the funds; and further, that since the employer, who in this case is a public entity, is the sponsor of the pension fund, it remits its counterpart contributions in order to fulfil its obligations as an employer. Consequently, such a pension fund is autonomous and distinct from a public entity.

[4] The appellant therefore argues that their inclusion as public entities has resulted in onerous responsibilities being placed upon them with far-reaching financial implications to the detriment of the beneficiaries of the funds; that their inclusion in Section 2 (0) of the PPADA has caused a lot of unrest and paralysis in the pension industry in view of their limited resources to meet and implement procurement requirements under that Act.

[5] After the efforts by the appellant, through the Public Procurement Regulatory Authority (PPRA), to have Section 2(0) aforesaid reviewed came to naught, they sought the intervention of the High Court.

C. LITIGATION HISTORY

i) Proceedings at the High Court

[6] The appellant filed ***HC Petition No. 170 of 2016*** pursuant to Articles 22(1) & (2) and 258 (1) & (2) of the Constitution on its own behalf as well as on behalf of its membership, more so, pension funds of public entities.

[7] The nub of the appellant's petition was that the PPADA was enacted to give effect to Article 227 of the Constitution, which provides for the procurement of public goods and services by public entities. In the appellant's view, pension funds

of public entities are erroneously included in the definition of public entities for the following reasons:

i. A pension fund is a fund made up of money contributed by both the employer and employee for the employee's retirement benefits.

ii. The pension fund of a public entity is run separately from the sponsors, including the public entity that set it up.

iii. The Trustee Act and the law of trust generally provide that the management of a trust is vested in the Trustees who administer the fund on behalf of the fund members.

iv. A pension fund of a public entity is neither funded by the government nor is it functionally controlled by the State.

v. Trustees have legal ownership of the assets of the trust, whereas the members have beneficial ownership. Therefore, funds contributed to a pension fund of a public entity neither belong to the public entity nor form part of public money.

[8] The appellant averred that Section 2(o) of the PPADA is discriminatory as it places the onerous responsibility on pension funds of public entities to comply with the Act, but excludes those of private entities, despite all being registered under Section 23 of the RB Act. The effect, they posited, is that pension funds of public entities are placed in an unfavourable economic position compared to pension funds of private entities. Moreover, on account of the impugned provision, pension funds of public entities are subject to multiple regulatory obligations to which their counterparts, the private entities, are exempt, contrary to the right to equality and freedom from discrimination guaranteed by Article 27 of the Constitution.

[9] According to the appellant, the Section in issue has the effect of reducing benefits accruing to members of pension funds of public entities to meet the administrative obligations imposed by the PPADA. As such, the appellant argued that it infringes on its members' right to property contrary to Article 40 of the

Constitution. Furthermore, the appellant contended that Section 2(0) is inconsistent with Article 260 of the Constitution, which defines what constitutes a public entity or State organ.

[10] In the end, the appellant sought *inter alia*: a declaration that Section 2(0) of the PPADA is unconstitutional and therefore, null and void to the extent of its inconsistency with the Constitution; and a declaration that Section 2(0) of the Act is invalid as it infringes on the pension funds of public entities' right to property and freedom of equality.

[11] The Retirement Benefits Authority (the Authority), which was named as an interested party in the High Court, supported the appellant's petition.

[12] For their part, the 1st, 2nd and 3rd respondents posited that the PPADA is meant to enforce the national values and principles of governance under Article 10 of the Constitution. The pension fund envisaged under the said Act has unique contractual obligations and contributions from public employees and public employers in private-public partnerships. Consequently, the management of such counterpart contributed funds on behalf of its public members should meet the requirements under PPADA. Moreover, by dint of Section 3(1) of the Interpretation and General Provisions Act, Cap 2, the functions of public entities are public in nature and therefore, the funds thereof should be accorded the same meaning and treated as such. In any event, the respondents argued that monies held and managed by public entities in the form of pension funds are likely to generate liability for the government whenever mismanagement or misappropriation occurs. As a result, such pension funds ought to be managed under the PPADA to ensure their sustainability and to protect the public from unscrupulous trustees and/or managers. Ultimately, they reiterated their position that the appellant had not demonstrated a violation of any constitutional provisions alluded to in the petition.

[13] By its judgment dated 9th March 2017, the High Court *(Mativo, J., as he then was)* identified two principal issues for determination: *whether the appellant, being a pension fund of a public entity, qualified as a public entity*; and *whether Section 2(o) of the PPADA was unconstitutional for allegedly infringing the appellant's constitutional rights.*

[14] On the first issue, the court held that pension schemes associated with public entities qualify as public bodies under the law. In reaching this conclusion, the court adopted the test developed by the Indian Supreme Court in ***International Airport Authority (R.D Shetty) Vs The International Airport Authority of India & Ors*** {1979} 1 S.C.R. 1042, which sets out the criteria for determining whether an entity constitutes an instrumentality of the State. Applying this test, the court found that the Authority met the relevant criteria, including the performance of functions of public importance, the existence of monopoly characteristics in service provision, and the presence of deep and pervasive State control.

[15] In its determination of the issue, the court also relied on Section 3(1) of the Interpretation and General Provisions Act, which defines a public body to include any entity performing functions of a public nature, whether permanently or temporarily. In the court's view, pension schemes of public institutions fall squarely within this definition due to the public character of their functions. This interpretation is reinforced by the RB Act, whose preamble and substantive provisions emphasize regulation, supervision, and ministerial oversight of retirement benefits schemes. The trial court treated as clear indicators of State control the regulatory powers vested in the Minister (now Cabinet Secretary) and the Authority over the management and administration of scheme funds.

[16] Taken together, these considerations led the trial court to conclude that retirement benefits schemes and funds are public bodies subject to State regulation and supervision. In reaching this conclusion, the court aligned itself with the reasoning of *Onguto, J.* in ***Githunguri Dairy Farmers Co-operative***

Society Ltd Vs Attorney General & 2 others [2016] KEHC 7104 (KLR), where it was held that the concept of a "public entity" under Article 227 of the Constitution should be interpreted broadly to encompass statutory bodies, parastatals, and privately managed entities that perform public functions under State oversight.

[17] On the second issue, the court, having reached the above conclusion, held that there was nothing unconstitutional about Section 2(o) of the PPADA. Consequently, it found that the appellant's petition lacked merit and dismissed it with costs to the 1st, 2nd and 3rd respondents.

ii. Proceedings at the Court of Appeal

[18] Aggrieved with the dismissal of the petition, the appellant filed in the Court of Appeal ***Civil Appeal No. 283 of 2017***, challenging the determination on nine grounds. The appellate court condensed those grounds into the following questions; *whether the appellant is a public entity within the meaning of Section 2 of the Act; if the answer is in the negative, whether application of the Act on the appellant and similar entities is justifiable; whether Section 2(o) of the Act is unconstitutional for; (i) being discriminatory contrary to Article 27 of the Constitution, (ii) restricting the appellant's freedom of contract contrary to Article 19(2) of the Constitution, and (iii) restricting the appellant's rights guaranteed by Article 40 of the Constitution*.

[19] For its part, the Authority supported the appellant's appeal, while the 1st to 3rd respondents opposed it on similar grounds as those they relied on in the High Court.

[20] By a judgment dated 28th April 2022, the Court of Appeal *(Karanja, Makhandia & Laibuta, JJ. A.)* upheld the High Court's judgment. It found that the retirement benefit funds established by public entities are public entities within the meaning of Section 2(o) of the PPADA. The appellate court held that although such schemes are not directly funded through the public exchequer, they operate

under statutory regulation and perform functions of a public nature under the RB Act. Further, their membership includes employees of public institutions, and their operations are subject to State supervision, which aligns them with the definition of a public body performing public functions. Consequently, the Court of Appeal expressed the view that subjecting them to procurement oversight under the PPADA was proper and justifiable.

[21] The court further held that Section 2(o) of the PPADA is constitutional and does not infringe on the appellant's rights. It found no basis for claims of discrimination under Article 27, observing that applying procurement laws to public entities but not to private institutions does not constitute unequal treatment. Similarly, the court rejected the argument that the Act restricts freedom to contract under Article 19(2) and violates the right to property under Article 40, reasoning that procurement regulation merely governs the process of acquiring goods and services and does not interfere with ownership or lawful use of assets. The court concluded that the application of the Act ensures accountability and prevents misuse of funds, and therefore does not violate the Constitution. The appeal was, for all these reasons, dismissed with costs.

[22] With the intention of approaching the Supreme Court, the appellant filed an application before the Court of Appeal under Article 163(4)(b) of the Constitution seeking certification that its intended appeal raises issues of general public importance. In a ruling dated 8th March 2024, the Court of Appeal in ***Civil Applic. Sup E007 of 2022***, certified the appellant's intended appeal to this Court in the following terms:

> *"We find that the applicant has demonstrated that the application does raise a substantive matter that needs clarification by the Supreme Court. The need for clarity* ***whether pension funds or pension schemes of public entities are public funds (sic)*** (public entities). *The clarification will involve interpretation of the Constitution and the Act in question, the subject matter of the matter."*

iii. Proceedings at the Supreme Court

[23] Pursuant to the certificate of the appellate court, the appellant has filed the instant appeal on six grounds faulting the determination of the Court of Appeal, for:

> *i) Holding that the appellant had not fully demonstrated the difference between public resources owned by the public through the State as opposed to private individuals who happen to be employees of the public entity;*
>
> *ii) Failing to find Section 2(o) of the PPADA unconstitutional and amounting to a violation of the appellant's members' rights;*
>
> *iii) Finding that all Retirement Benefits Schemes are public bodies and therefore subject to the procedures of the PPADA;*
>
> *iv) Failing to appreciate the statutory role of the RBA in regulating Retirement Benefit Schemes;*
>
> *v) Considering issues which were not presented before the court; and*
>
> *vi) Making a finding that the appellant is a public entity.*

[24] On the basis of the foregoing, the appellant seeks from the Court the following reliefs:

> *i. The appeal be allowed with costs;*
>
> *ii. The judgments of the Court of Appeal and the High Court be set aside entirely;*
>
> *iii. Section 2(o) of the PPADA be declared unconstitutional;*
>
> *iv. Issuance of a perpetual injunction to restrain the respondents from applying Section 2(o) of the PPADA;*
>
> *v. Any other relief that this Honourable Court may deem fit and appropriate in the circumstances.*

[25] In response, the Authority has filed a replying Affidavit dated 26th May 2025, sworn by its Deputy Director in charge of legal services.

D. PARTIES' SUBMISSIONS

i. Appellant's Submissions

[26] In support of its appeal, the appellant reiterates the view it held before the two superior courts below; that Section 2(o) aforesaid is discriminatory and violates Article 27 of the Constitution for subjecting pension schemes of public entities to double regulation and extra compliance costs for services like, procurement planning, public advertising, and ministerial approvals, while private pension schemes remain under one regulatory regime. This unequal treatment, it argues, lacks rational justification and unfairly burdens public sector funded pension schemes. The appellant asserts that pension contributions are earned remuneration that vests immediately in the employee and is held in trust by pension fund trustees under a detailed, *sui generis* statutory framework established by the RB Act and the regulations. Moreover, by treating employees' private savings as public money and compelling their expenditure on unnecessary compliance measures, Section 2(o) infringes property rights protected under Article 40(2) of the Constitution. The appellant maintains that the purpose and effect of the impugned law, rather than its stated objectives, should determine its constitutionality; and that its practical effect is to undermine rather than enhance the constitutional guarantees of equality, freedom, and property.

[27] Invoking comparative jurisprudence and international law, including the World Trade Organization Agreement on Government Procurement and European Union Directive 2014/24/EU, the appellant notes that under global procurement frameworks, procurement laws apply only to acquisitions made with public funds, not to pension schemes whether public or private. It submits that Kenya's departure from this global standard in the enactment of the impugned law is arbitrary and irrational. Citing this Court's decision in ***Popat & 7 others Vs Capital Markets Authority*** [2020] KESC 3 (KLR), the appellant urges the

Court to find that regulation or supervision by a public authority alone does not make an entity "public." Accordingly, the appellant prays to the Court to allow the appeal.

ii. 1st, 2nd and 3rd respondents' submissions

[28] In their joint submissions, the 1st, 2nd and 3rd respondents explain that Section 2(o) of the PPADA was enacted pursuant to Article 227(2) of the Constitution, which mandates Parliament to prescribe procurement policies and procedures for public entities. They submit further that Article 227 is anchored in the national values set out in Article 10(2)(e) to achieve good governance, integrity, transparency and accountability, as well as Article 201(a), which requires openness and accountability in public finance. Accordingly, by requiring pension funds of public entities to comply with PPADA procedures, Parliament merely extended these constitutional safeguards to transactions that may involve public monies, even if indirectly; and that the inclusion of Section 2(o) is rationally connected to legitimate objectives, given the State's compelling interest in ensuring that entities closely associated with government adhere to fair and transparent procurement processes.

[29] The respondents submit that resources of pension funds of public entities are deployed in the performance of functions of a public nature. Even where contributions are privately earned, they are entrusted to funds established by statute for the benefit of public service beneficiaries. The management of such funds therefore, falls within the public regulatory domain. They argue that the differential treatment between public and private sector pension funds is justified, as the former are backed by the State and serve a discernible public interest. From a policy perspective, they contend that subjecting pension funds of public entities to procurement rules is sound, given that these funds are pooled contributions from employees (often public officers) set aside for their future welfare. It is therefore in the public interest that contracts for asset management, insurance services, technology, and similar services be awarded fairly and at the best value.

They caution that if such funds were permitted to bypass open tendering, the costs of procurement would likely be borne by members or, ultimately, by taxpayers. On this basis, the respondents maintain that there is nothing unfair in requiring entities that utilise public funds or benefit from public guarantees to submit to procurement oversight.

[30] With respect to the alleged violations of Articles 27 and 40 of the Constitution, the respondents submit that differential treatment between public and private sector pension funds does not amount to discrimination. They rely on the decision of this Court in ***British American Tobacco Kenya PLC Vs Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party)*** [2019] KESC 15 (KLR) to support the proposition that not every distinction constitutes discrimination as defined by the Constitution. They observe that Article 27 prohibits arbitrary discrimination or discrimination on the specified grounds. In the present case, they argue, the classification is clear, explicit and legitimate, as the Act applies only to entities that meet the statutory definition of a public entity. This classification is rationally related to the objective of safeguarding the public interest in procurement. It is well established, they submit, that the State may regulate public and private sectors differently, particularly where oversight of public funds is concerned. The appellant, they note, has not identified any constitutional or statutory provision that exempts pension funds from compliance with procurement laws.

[31] Finally, the respondents submit that while Article 40 protects against arbitrary deprivation of property, it does not confer immunity from regulatory measures governing the use of property. In the instant case, the State has not taken any property. Pension funds remain legally and beneficially owned by their members through their trustees. The PPADA does not transfer title or expropriate assets; it merely prescribes procedural requirements for the award of contracts. They argue that requiring open and competitive procurement does not diminish

the value of the property or the ultimate control exercised by its owners. On the totality of these submissions, the respondents contend that the appellant has failed to substantiate any violation of constitutional rights and is therefore not entitled to the reliefs sought and the appeal ought to be dismissed with costs.

iii. The Authority's submissions

[32] In a disconcerting strategic shift, and contrary to its position before the superior courts below and the sworn evidence in the affidavit filed before this Court, the Authority, in its written submissions, now opposes the appeal. It avers that it has reviewed its earlier position and now fully supports the reasoning and conclusions of the superior courts below on the constitutionality of Section 2(o) of the PPADA. The Authority argues that pension schemes established by public entities qualify as public entities within the meaning of the PPADA. This is because such schemes serve a public interest, operate under State supervision, and manage funds that originate from public resources. It maintains that Section 2(o) promotes the national values of good governance, integrity, transparency, and accountability under Articles 10 and 227 of the Constitution by ensuring that pension funds are managed prudently and ethically in the public interest. The provision, in its view, provides essential safeguards against mismanagement and corruption in the handling of public pension funds, aligning with the constitutional imperative of transparency in public financial administration.

[33] The Authority submits that regulating pension funds does not amount to deprivation of property, but is a lawful and proportionate measure to advance legitimate public interests. It contends that pension funds of public entities are held in trust for employees and remain subject to public oversight until they reach the beneficiaries.

[34] On the allegation of discrimination under Article 27, the Authority posits that distinguishing between public and private pension schemes is lawful, reasonable, and justifiable. In any event, public pension schemes are funded by public resources and are subject to the constitutional framework of accountability and

transparency, unlike private schemes, which rely on private funds and are free to regulate themselves within the bounds of the law. Equally, referring to ***British American Tobacco Kenya PLC Vs Cabinet Secretary for the Ministry of Health & 2 others*** *(supra),* the Authority argues that differentiation based on rational and legitimate objectives does not constitute unfair discrimination. The Authority avers that Section 2(o) of the PPADA reinforces the State's statutory mandate under the RB Act to protect members' savings from corruption and mismanagement. Consequently, it urges the Court to uphold the constitutionality of Section 2 (o) of the PPADA and dismiss the appeal with costs.

E. ISSUES FOR DETERMINATION

[35] This appeal, having been certified by the Court of Appeal by its ruling of 8th March 2024 as one involving a matter of general public importance, we set out below the solitary question *(i)* it framed, with our own slight variance in the following terms:

> *i) Whether pension funds or pension schemes of public bodies are "public entities" to which the provisions of the Public Procurement and Asset Disposal Act apply.*
>
> *ii) What reliefs should issue?*

F. ANALYSIS AND DETERMINATION

[36] It is a cardinal rule that a party aggrieved by the decision of the Court of Appeal has only two parallel paths to take to this Court; either as of right if the case involves the interpretation or application of the Constitution; or in a case in which the matter has been certified as involving a question of general public importance. The Petition filed in this Court on 12th May 2024 is specifically expressed to be brought under Article 163(4)(b) of the Constitution. Indeed, it was brought pursuant to a certificate granted by the Court of Appeal, with a single question as outlined above. However, the parties' submissions have focused more and more on

the interpretation and application of Articles 27 and 40 of the Constitution: the right to equality and freedom from discrimination, as well as the right to property.

[37] We need to remind counsel and parties, as we have done in the past, for example in the case of ***Bia Tosha Distributors Limited Vs Kenya Breweries Limited & 6 others*** [2023] KESC 14 (KLR) that;

> ***"...our jurisdiction stems from the Constitution itself, and also from Statute. While it is for the litigant to choose which jurisdiction to invoke, once that decision is made, the same must meet our set threshold. In this instance, the appellant maintains that this Court has jurisdiction as the determination subject to the appeal regards the constitutionality of the appellant's rights. The appellant invokes article 163(4)(a) of the Constitution in approaching us. That being the case, the issue of certification under article 163(4)(b) does not arise. This is because, as we held in Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others SC Civil Application No 35 of 2014 [2015] eKLR it bears restating that the litigant coming before the Supreme Court has the duty of categorizing his or her case, so as to beckon the constitutional opening under which the matter falls. The court cannot exercise concurrent jurisdiction simultaneously".*** (Our emphasis)

[38] The appellant, having consciously elected to move under Article 163(4)(b) of the Constitution, the Court and parties are bound by the issues framed by the Court of Appeal, and as the Supreme Court may recast on a review. We must emphasize that while the Court has a duty to resolve the certified issue(s), it has to, in resolving the issue(s), focus on the substantial question of law that was certified. It does not merely answer and stop at the pre-framed question in isolation. We stated in ***Steyn Vs Ruscone*** [2013] KESC 11 (KLR), that a case will be certified as one

involving a matter of general public importance if the Court is satisfied that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest, and further that:

> ***"60....it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below."***

[39] The question at the heart of this appeal is the constitutionality of Section 2(o) of the PPADA, which brings pension schemes of public entities within the ambit of public procurement law. Strictly, what is before us, on the basis of the framed question, is not how the appellate court interpreted or applied the Constitution, which would be the correct question to ask in an appeal brought as of right, but rather whether the appellate court erred in holding that the term "public entity" in Section 2(o) of the PPADA includes a pension fund for a public entity. Although the answer to the framed question will ultimately entail a consideration of Article 227(1) of the Constitution, that is not the central issue. The arguments before the Court of Appeal for certification were not so much about the violations of constitutional rights but rather whether the definition of a pension fund held by a public entity that is governed under the precincts of private trust property can legally be defined as a public entity as provided under Section 2(o) of the Act.

[40] The appellant, therefore, assails the provision on the basis that by treating members' privately earned pension savings as public funds and compelling their use for procurement compliance, the provision is in contravention of Article 227 of the Constitution, which was not intended to apply to private funds. For their part, the respondents argue that Section 2(o) has a constitutional grounding in Article 227(2) of the Constitution; the provision is anchored in the national values of good

governance, integrity, transparency, and accountability under Article 10, as well as the principles of openness and accountability in public finance under Article 201.

[41] The Authority, on the other hand, departs from its declared position before the two superior courts below, and now aligns itself with the 1st 2nd and 3rd respondents. The Authority supports the argument that Section 2(o) is constitutional. It maintains, like the other respondents, that public sector pension schemes qualify as public entities for purposes of the PPADA by virtue of their statutory foundation, public interest character, and State oversight.

[42] Some of the stated objects and functions of the Authority are to regulate and supervise the establishment and management of retirement benefits schemes; to protect the interests of members and sponsors of the retirement benefits sector; and to advise the Cabinet Secretary on the national policy to be followed with regard to retirement benefits schemes and to implement all Government policies relating thereto. The Authority therefore holds a critical role as the regulator, supervisor, and promoter of the retirement benefits industry. As the guardian of members' and sponsors' interests, and as the body charged with ensuring compliance with the law, fostering industry growth, and promoting good governance, it is surprising, as it is appalling, that a body entrusted with such huge responsibilities can approbate and reprobate in such a contest. It is unconscionable for the Authority to resile from its position earlier expressed on oath before the courts below that; *"...a pension fund sponsored by an Employer, whatever the description of the Employer, was not itself a public entity within the contemplation of Article 227 of the Constitution-found in Chapter 12 of the Constitution which deals with Public Finance.....the impugned Section 2(o) violated the rights of the members of pension funds sponsored by public sector Employers, to acquire and own property in association with others. This is because it put on these pension funds the burdensome and expensive requirements of setting up and staffing procurement departments using*

members' pensions while also exposing the pension funds to potentially endless procurement litigations at great cost to the members' pensions."

[43] In stark contrast to the foregoing, the Authority now states in an affidavit filed in this appeal sworn on 26th May 2025 by Antony Kiarahu, the Deputy Director in charge of Legal Services that Section 2(o) of the PPADA is *"beneficial to members of the pension funds of public bodies, and in the absence of an alternative statutory safeguard, it protects members of such schemes from trustees who might want to engage in corrupt and underhand dealings resulting in misappropriation of their funds. Difficulties in compliance can be overcome by outsourcing the procurement functions to the parent public body, or in the alternative, a bespoke procurement procedure for retirement benefits schemes can be prescribed in a regulation".* And when the appeal came up for hearing Ms. Kosgei, for the Authority, left no doubt over their new position, stating that they were abandoning the position that they had previously advanced before the High Court and the Court of Appeal, and were opposing the appeal.

[44] While by Rule 22 of the Supreme Court (General) Practice Directions, a party may abandon any point taken in the lower courts, this does not extend to statements of fact made in an affidavit. What the Authority has done amounts to amending their affidavit sworn evidence. It is a settled principle of law that an affidavit cannot be amended, especially the substantive depositions, which are the subject matter of the oath. Having pointed out the fallacy of the Authority's changed position, we turn to consider the substantive question posed herein.

[45] The resolution of the question whether a pension fund or scheme for a public entity ought to comply with Section 2(o) of the PPADA depends on the interpretation to be given to that Section. As we do so, the broader constitutional objectives that Parliament sought to advance in regulating procurement by entities associated with the State must be borne in mind.

[46] One of the established canons of statutory interpretation, as articulated in ***Commissioner of Income Tax Vs Menon*** [1985] eKLR and subsequently

acknowledged by this Court in ***Popat & 7 others Vs Capital Markets Authority*** *(supra)*, is that a statute must be construed in light of the social, economic, and historical context that informed its enactment. An appreciation of that context is therefore necessary in determining whether the impugned Section 2(o) represents a legitimate extension of constitutional values and public interest considerations, or whether, as the appellant contends, it amounts to an unjustified and disproportionate intrusion into their private funds.

[47] While the PPADA lies at the center of the dispute before us, it is equally important, for contextual appreciation, to trace the historical background that informed the enactment of the RB Act. That background is comprehensively set out in the affidavit sworn by Dr. Edward Odundo, the Chief Executive Officer of the Authority, in support of the appellant's petition in the High Court as follows:

> "*a) that prior to 1997 the retirement benefits industry in Kenya was largely unregulated, hence it faced numerous problems such as mismanagement of scheme funds, inadequate funding of schemes and arbitrary investment of scheme funds without independent professional advice. There was lack of protection of the interests of members, dominance of sponsors in scheme affairs and absence of transparency which resulted in investment decisions being made with vested interests as opposed to interests of members or the economy as a whole.*
>
> *b) That the Retirement Benefits Authority Act was therefore enacted to cure problems emanating from lack of regulation; to provide regulatory framework for the retirement benefits industry to streamline the industry and gain the required confidence from stakeholders and employees to enable them save more for retirement and contribute towards the national effort of raising the domestic saving rate".*

[48] From the foregoing, it is clear that the mischief behind the enactment of the RB Act was to address the systemic abuse, opacity, and arbitrariness; to regulate and professionalize the retirement benefits industry, addressing mismanagement,

lack of transparency, and weak protection of members' interests. It is common knowledge that before the promulgation of the Constitution 2010, procurement processes were frequently marked by non-competitive tendering, patronage, inflated costs, corruption, and weak accountability mechanisms. Public resources were routinely exposed to wastage and misappropriation, with procurement decisions often driven by vested interests rather than value for money or in the public interest. The RB Act, therefore, sought to safeguard retirement savings through prudent, accountable, transparent and independent management of scheme funds. Ultimately, the Act aimed to restore public confidence in pension schemes and promote increased domestic savings for retirement.

[49] The PPADA, on the other hand, is declared to be:

> **"AN ACT of Parliament to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes."** (Our emphasis).

According to Section 4, the Act applies to "**all State organs and public entities."** (Our emphasis).

[50] Article 227 of the Constitution, on the other hand, requires that;

> **"227. (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."**

The PPADA was therefore enacted as the legislative vehicle to operationalise these constitutional imperatives, replacing the hitherto fragmented and discretionary procurement practices with a uniform, rules-based framework subject to oversight, accountability, and enforceable standards. The law was intended to eliminate opaque procurement practices in the public service involving public resources.

[51] The operative words in Article 227(1) of the Constitution, the preamble to the PPADA, and Section 4 aforesaid are "public entities" and "State organs". Applying one of the canons of statutory interpretation, that a statute must be construed in light of its historical context that informed its enactment, it will be recalled that the PPADA was assented to on 18th December 2015 and came into force on 7th January 2016, repealing the Public Procurement and Disposal Act, 2005. It is a common factor that the 2005 Act did not include pension funds of public entities within the definition of a "public entity." That provision was introduced through Section 2(o) of the PPADA to give effect to Article 227 of the Constitution and was therefore an entirely new law.

[52] The determination of the framed issue requires a nuanced analysis of what constitutes a "public entity" under Article 227 of the Constitution and the PPADA, because the two provisions restrict procurement of goods and services to "*State organ or any other public entity*". State organs and any other public entity must be construed e*jusdem generis* to give effect to the fact that the two are similar and extend to pension funds for a public entity. A State organ, by definition in Article 260, means "*a commission, office, agency or other body established under the Constitution*". From this definition, a pension fund for a public entity does not qualify as a State organ or even a public entity.

[53] Although in ***National Hospital Insurance Fund Management Board Vs Kenya Union of Commercial Food and Allied Workers & another; Attorney General (Interested Party)*** [2025] KESC 37 (KLR), this Court was dealing with the test for classifying a public officer, the overriding word remains "public". The Court said:

> ***"In the instant matter, four key questions in determining whether any person is a public officer, within the meaning of the Constitution, will apply:***

a. Is the person concerned in an office in the national government, the county government or the public service?

b. Does that person receive remuneration or benefits payable by the Consolidated fund or directly by moneys provided by Parliament?

c. Does that person perform a function within a state organ or a state corporation?

d. Was the person holding public office under the terms of the former Constitution?

If one or more of those questions were answered in the affirmative, then the person concerned would rightly be considered within the proper meaning of the term 'public officer'."

By parity of reasoning, we find that in determining whether an entity is a public entity, we must consider its establishment, personnel, functions, funding, and, we may add, the degree of control exercised by the State. The mere fact that an entity performs functions of public interest or of a public nature does not, without more, clothe it with the character of a public entity. The legal personality, autonomy in decision-making, and source of funding are critical indicators.

[54] A retirement benefits scheme is defined in Section 2 of the RB Act as a scheme under which persons are entitled to benefits in the form of payments, determined by age, length of service, amount of earnings or otherwise and payable primarily upon retirement, or upon death, termination of service, or upon the occurrence of such other event as may be specified. It is a scheme established by employers for the benefit of the employees. Under Sections 23, 24, and 26 of the RB Act, any person who is proposing to establish a pension fund (defined as a sponsor) must apply to the Authority for a certificate of registration of the pension fund as an

irrevocable trust. Therefore, the essential character of a pension fund established under the RB Act is that of an irrevocable trust. This legal structure effects a fundamental transformation. It involves contributions from both the employee and the public employer. Once the contributions are made into an employee's account in the scheme, it ceases to be public property. They become part of a private trust fund, held and managed by trustees for the exclusive benefit of the members. The trustees, managers, administrators and custodians of a pension fund sponsored by an employer do not execute Government functions and are not remunerated from the Consolidated Fund or from money authorized by Parliament. Their functions and powers are, by the provisions of the RB Act, defined and governed by the terms of a trust deed.

It was therefore in error for the two courts below to conclude that pension funds perform duties of a public nature and are public bodies. A pension fund, being a private trust, does not have any quality in common or bear any similarities with State organs or public entities listed in Section 2 of the PPADA.

[55] In ***Albert Chaurembo & 7 others Vs Munyao & 148 others,*** [2019] KESC 83 (KLR), this Court stated, in relation to a pension scheme, as follows:

> ***"148 ... Besides, the trust so established as a pension scheme retains autonomy from both the Sponsor and the employees, hence its regulation by the Authority [RBA]"***

With this autonomy, it matters not that the sponsor is a public entity. Pension, just as a salary, is a benefit to the employee. Extrapolating the findings of the courts below would be absurd, as that would be tantamount to asserting that merely because an employee earns a salary from a public entity, then the employee's expenditure should equally be regulated as part of public funds.

[56] It must follow from the foregoing analysis that the public entity contemplated in Article 227 (1) of the Constitution must be one that meets the attributes listed in Section 2, (save for Section 2 (o), the subject of this appeal). The common

denominator in that list is that a public entity must use "public money" for purposes of procurement. Article 227 is located in Chapter Twelve of the Constitution. The entire Chapter deals entirely with the subject "Public Finance". It is in Part 6, which is concerned with the "Control of Public Money". "Public Money" is defined in the Public Finance Management Act, Cap 412A, as money that comes into possession of, or is distributed by, a national government entity and money held by national government entities in trust for third parties, and any money that can generate liability for the Government. The PPADA defines Public Money to include:

> **"... monetary resources appropriated to procuring entities <u>through the budgetary process, as well as extra budgetary funds,</u> including aid, grants and loans, put at the disposal of procuring entities by donors".** (Our emphasis).

[57] Save for one entity, all the entities (twenty) listed in Section 2(o) that are to be subjected to Article 227(1) of the Constitution to constitute *"a State organ or any other public entity"* are those entities that use public money for procurement, namely; national or county government, any organ or department of the national or county government, the Judiciary, Commissions, Independent Offices, State corporations, the Central Bank of Kenya, cities and urban areas established under the Urban Areas and Cities Act; companies owned by public entities; constituencies; Kenyan diplomatic missions; bodies using public assets in contractual undertakings, including public–private partnerships; entities in which the national or county government has a controlling interest; educational institutions maintained or assisted out of public funds; among other entities, all of which use public money appropriated through the national budget to procure both goods and services. Those public entities and State organs are not only regulated by the State but also funded through the public exchequer, hence the high premium imposed on transparency and accountability on issues of public finance in procurement. There was never any intention by the makers of the Constitution to

include private enterprises and private pension funds and in particular a segment of the funds sponsored by public entities, as part of the public finance and funds. A pension fund established by a public entity, though regulated by the Authority, is neither an entity created by the State, used for Government purposes, performing its functions on behalf of the State nor controlled by the Government.

[58] In contrast, the money contributed by employees and employers into a Pension Fund established by the employer is not public money or the employer's money but employees' private property comprising basic salary, which constitutes the minimum compensation for work rendered. They are personal savings held in trust for the employee. That is why, in defined benefit schemes, the benefits of an employee will be fully vested in the employee after a specifically defined period. A scheme cannot withhold a member's benefits on behalf of a sponsor for any reason whatsoever because the scheme is a separate entity from the sponsor, and the sponsor does not have any right to interfere with the benefits. Once an employer makes deposits with the fund, pension, and/or scheme, these funds cannot be traced back to the employer. The only beneficiary is the employee. That is why when an employee leaves employment, their contributions and, in most cases, a portion or all of the employer's contributions are portable and can be transferred to another scheme. It is for this reason that Section 32 of the RB Act requires that every scheme (other than a scheme fully funded out of the Consolidated Fund) must have a scheme fund into which all contributions, investment earnings, income and all other related monies are to be paid. All the monies in the fund must at all times be maintained separately from any other funds under the control of the trustees or the manager.

[59] We have set out the foregoing considerations to demonstrate that a pension fund, whether of a public or private entity, is a savings vehicle established and administered privately by trustees, managers, custodians and administrators for the sole benefit of employees. The trustees, managers, administrators and custodians of a pension fund sponsored by a public entity are not public officers or

employees of the sponsor. They are also not remunerated from the Consolidated Fund or from money authorized by Parliament. Their functions and powers are defined and executed through a trust deed. The safety of a pension fund is enhanced by its structure. The Trustees' key role is to safeguard the interests of the fund's members at all times. By appointing an independent Fund Manager, to invest the scheme funds, an independent Custodian, to look after the pension assets, cash and other investments, and a Fund Administrator to maintain accurate records of all contributions and all benefits paid to members, the Trustees guarantee good governance, transparency and accountability with regard to decisions made on behalf of members.

[60] From the legislative history, it appears to us that the PPADA excluded certain bodies previously recognized under the 2005 Act or the pre-2010 constitutional regime. For example, PPADA has excluded the co-operative societies established under the Co-operative Societies Act. In ***Githunguri Dairy Farmers Co-operative Society Ltd Vs Attorney General & 2 Others*** [2016] KEHC 7104 (KLR), which was cited with approval by both superior courts below, the High Court held that cooperative societies do not constitute public entities for purposes of Article 227 of the Constitution, for the reason that they are neither funded by the State nor subject to State control or functional regulation.

[61] The appellate court erred in equating the words "regulation, supervision and promotion of retirement benefits schemes" in the preamble to the RB Act with State ownership of all pension funds and even went ahead to declare that "...***all retirement benefits schemes are public entities,*** *it follows that the application on them of the Act is a matter of course.*" The effect of this is to bring all retirement benefits schemes of all kinds under the PPADA. That holding is *ultra vires* Article 227 of the Constitution. The question before the superior courts and indeed before this Court has remained one of a pension fund for a public entity and not of all retirement benefits schemes.

[62] While there can be no doubt that the State regulates pension funds through the RB Act and regulations made under it, just like it regulates almost every aspect of human life, the mere role of regulation or supervision of pension schemes does not change the character of a private enterprise into a public status contemplated in Article 227(1) of the Constitution. The terms "regulation" and "supervision" are used in Part IV of the Act not as an equivalent to the operational control or ownership that characterizes a public entity. In terms of the test, this Court in ***Outa & another Vs Okello & 5 others*** [2014] KESC 20 (KLR)**,** held that the degree of control exercised by the State and the source of funding are critical considerations. Retirement benefit schemes are funded by private contributions, not the exchequer, and trustees retain autonomy in day-to-day management. The test requires more than mere regulatory oversight; it requires such a degree of control that the entity can be seen as an instrumentality of the State. The retirement benefit schemes lack this character. Consequently, the explicit inclusion of these funds in Section 2(o) of the PPADA appears to us to be a statutory expansion that stretches the constitutional concept of a "public entity" beyond its ordinary meaning and intended scope under Article 227. The learned appellate court Judges, therefore, erred by failing to find that the language of Section 2(o) of the PPADA was ambiguous in the circumstances, and that its words broaden the definition of a public entity beyond that envisaged by Article 227 of the Constitution.

[63] Having correctly set out the nature of a public entity in the first part of this passage, the Court of Appeal went ahead to provide a wrong answer in the end:

> ***"Accordingly, a public entity may be defined as an organisation or body which has a legal identity, and whose establishment is designed to serve a public, as opposed to a private interest, need or benefit. The question is – are the appellant and all retirement benefits schemes such entities? Indeed, they are."***

[64] We conclude with this passage from ***Albert Chaurembo & 7 others*** *(supra)* to stress the exact character of a pension scheme:

> ***"139. The Law Dictionary defines a pension scheme as: A retirement plan offered by an employer. Funds come from both employee and employer. The employers' managers make sure the funds are in there upon retirement. They do this by investing in fixed income or equity securities. Merriam-Webster Dictionary defines a pension scheme as: an arrangement made with an employer to pay money to an employee after retirement.***
>
> ***140. The above comparative broad definitions leave no iota of doubt that at the core of a pension scheme is a relationship between an employer and an employee. It is apparent in this case that the savings to the Scheme were from the deductions of proceeds of the employment relationship between the respondents and the Authority".***
> (Our emphasis)

[65] Based on what we have stated so far, we entertain no doubt that a pension fund sponsored by a public entity was not contemplated in the enactment of Article 227 of the Constitution to be an entity that was intended to undertake public procurement and thereby to be bound by the provisions of the PPADA. This conclusion is buttressed by the National Public Procurement and Asset Disposal Policy, 2020, whose overall objective is to standardize the public procurement and asset disposal system, defining in clear terms how public procurement is to be conducted "at both levels of government" in order to achieve value for money. The policy defines "a public entity" as, ***"...any department, agency, organ or other unit of the government that uses public funds in whole or in part for the procurement of goods, works or services"*** and "Public

Procurement" to mean **"procurement by procuring entities using public funds".**

[66] Therefore, for the reason that Section 2(o) of the PPADA purports to subject a pension fund sponsored by a public entity to public procurement laws, the inevitable conclusion that we must come to is that, to that extent, the Section is inconsistent with Article 227 of the Constitution. In making this declaration, we have taken into account the principles governing such a declaration as enunciated by this Court in ***Cabinet Secretary for the National Treasury and Planning & 4 others Vs Okoiti & 52 others; Bhatia (Amicus Curiae)*** [2024] KESC 63 (KLR), that, there is a general but rebuttable presumption that a statutory provision is consistent with the Constitution; that the party that alleges inconsistency has the burden of proving such a contention; that in construing whether statutory provisions or part thereof offend the Constitution, courts must subject the same to an objective inquiry as to whether they conform with the Constitution; that the court must determine the object and purpose of the impugned statute and consider the mischief which the statute sought to cure and/or arrest; that the court must clearly set out what provision is unconstitutional by juxtaposing the offending provision against the Constitution; and that the court must clearly and with precision explain the finding of unconstitutionality.

[67] Ultimately, we find merit in the appeal and accordingly allow it. We set aside the judgment of the Court of Appeal dated 28th April 2022, and in terms of Article 2(4) of the Constitution, declare Section 2(o) of the PPADA inconsistent with Article 227(1) of the Constitution and therefore void to the extent that it subjects pension funds for a public entity to the application of public procurement systems.

G. COSTS

[68] Bearing in mind that this matter was certified as one of general public importance and the principles on the award of costs enunciated in ***Rai & 3 others Vs Rai & 4 others*** [2014] KESC 31 (KLR), we are constrained to order that parties should bear their own costs.

DISSENTING OPINION OF NJOKI NDUNGU, SCJ

[69] I have read the majority decision in this appeal, and while I agree that this Court has jurisdiction and is properly seized of the matter, I respectfully dissent from the majority's reasoning, conclusions, and final orders regarding the following issue:

i. ***Whether pension funds or pension schemes of public bodies are "public entities" subject to the Public Procurement and Asset Disposal Act.***

I will deal with this issue *seriatim*.

[70] The majority judgment comprehensively sets out the factual background and the parties' submissions. I will not repeat those details here, except where necessary to clarify my reasoning.

[71] I agree with the majority that this determination on whether the pension funds of public bodies constitute "public entities," requires an analysis of the entity's establishment, personnel, functions, funding, and the degree of State control.

[72] What is a public entity? Section 3 (1) (d) of the Interpretation and General Provisions Act, defines a **"*Public body" as...***

> ***(d) any authority, board, commission, committee or other body, whether paid or unpaid, which is invested with or is performing, whether permanently or temporarily, functions of a public nature."***

[73] According to ***Halsbury's Laws of England (3rd ed., 1959, Vol. 30, p. 682, para. 1317)***, a "public authority" is a body that performs public or statutory duties for the public benefit rather than private profit. An authority is not

precluded from being a public body simply because it generates a profit for the public benefit.

[74] In ***Ramana Dayaram Shetty Vs. International Airport Authority of India*** (AIR 1979 SC 1626) and ***Ajay Hasia Vs Khalid Mujib Sehravardi*** (1981 AIR 487 SC), the Supreme Court of India established specific tests to determine whether a corporation is an instrumentality of the State. The tests are based on the following:

> ***(i) The source of the share capital;***
>
> ***(ii) Whether State control is "deep and pervasive";***
>
> ***(iii) Whether the corporation enjoys monopoly status;***
>
> ***(iv) Whether the functions are of public importance and closely related to governmental functions; and***
>
> ***(v) Whether the corporation assumed functions formerly performed by a government department.***

[75] A public entity is not merely a body funded by the public exchequer; it must also serve a public purpose or render public service. I therefore respectfully disagree with the majority's finding that performing functions of public interest does not, without more, characterize an organization as a public entity.

[76] The diverse nature of public services makes rigid classification difficult. Beyond traditional governance, the modern state operates various public enterprises and functions. If an entity's functions are of public importance and closely related to governmental duties, that factor is relevant to its classification. Most public bodies exist independently of the Government unless their establishing instrument dictates otherwise. Nevertheless, the services they offer are public, which characterizes them as public authorities (see ***Tamlin Vs. Hannaford*** [1951] 1 K.B. 18, 24).

[77] Regarding pension funds for public entities, the RB Act defines a "retirement benefits scheme" as any arrangement—established by law or instrument—providing payments based on age, service, or earnings. These schemes provide financial security and serve a broad social policy goal: protecting citizens in old age and ensuring population welfare. This elevates them to a public function, as they serve a collective social need and remain subject to government oversight.

[78] In assessing whether a function is of a public nature, courts often apply the "but for" test: would the government inevitably have to regulate the activity but for the existence of the non-statutory body? In ***R Vs Advertising Standards Authority, ex parte Insurance Services*** (1990) 2 Admin R 77, the court held that in the absence of a self-regulatory body, its functions would undoubtedly be exercised by the state.

[79] Consequently, I agree with the Court of Appeal's finding that the Appellant and all retirement benefits schemes are public entities established to perform public functions. They are public bodies insofar as their membership is not restricted to private schemes. As the Court of Appeal correctly noted:

> ***"Accordingly, a public entity may be defined as an organization or body which has a legal identity, and whose establishment is designed to serve a public, as opposed to a private interest, need or benefit. The question is – are the appellant and all retirement benefits schemes such entities? Indeed, they are."***

[80] In my view, the phrase "any other public entity" in Article 227 of the Constitution encompasses any entity fulfilling a public obligation. I concur with the court in ***Githunguri Dairy Farmers Co-operative Society Ltd Vs Attorney General & 2 Others*** [2016] KEHC 7104 (KLR) that "public entity" requires an extended meaning. It should include statutory bodies, parastatals, and bodies established by statute but managed privately—such as universities and

professional societies—as well as private bodies fulfilling key functions under state supervision.

[81] This principle is articulated in the persuasive case of ***Sukhdev Vs Bhagatram*** [1975] 3 SCR 619 at 658, where the court observed that institutions performing functions fundamental to society are, by definition, government agencies. United States jurisprudence similarly holds that the concept of private action must yield to State action when public functions are performed (see **Arthur S. Miller, "The Constitutional Law of the Security State," 10 Stanford Law Review 620 at 664**).

[82] Another relevant factor is whether pension funds for public bodies fulfill their obligations or functions under government supervision. While I concur with the majority that the State regulates pension funds through the RB Act and its accompanying Regulations, I respectfully dissent from the holding that such regulation does not elevate a private enterprise to the public status contemplated by Article 227(1) of the Constitution. The majority prioritizes legal personality, decision-making autonomy, and funding sources as critical indicators; however, I maintain that specific organizational structure is secondary to the nature and degree of control exercised.

[83] While the majority finds that the State regulates pension funds through the RB Act and Regulations made under it, I am inclined to respectfully take issue with its holding that the role of regulation or supervision of pension schemes, does not change the character of a private enterprise into a public status contemplated in Article 227(1) of the Constitution, and that the legal personality, autonomy in decision-making, and source of funding are critical indicators. This is because, in my view, the specific organizational structure is of lesser importance than the significance of the kind of control involved.

[84] I concur with the High Court's finding that the language of Part IV of the RB Act, which provides for the regulation and supervision of schemes, clearly

demonstrates government control. Furthermore, Section 32(3) of the Act infers a degree of State control by providing:

> ***"Subject to the provisions of this Act, the Minister may, in consultation with the Authority, make regulations with regard to the funding, vesting, custody, management, application and the transfer of scheme funds and the accounting for such funds."***

[85] Although this provision does not mandate direct government management, it empowers the State to dictate the framework, standards, and procedures for these funds. The scope of this authority—covering funding, vesting, custody, management, application, transfer, and accounting—encompasses nearly every operational and financial aspect of the funds, granting the government significant influence.

[86] For the sake of judicial consistency, I adopt the same reasoning regarding the tests established in ***Ramana Dayaram Shetty Vs International Airport Authority of India****, (supra)* specifically: (ii) whether State control is "deep and pervasive"; and (iv) whether the functions are of public importance and closely related to governmental functions.

[87] Having established that pension funds for public bodies meet these requirements, I find the position taken by both the High Court and the Court of Appeal to be correct, in that those particular pension funds constitute public entities subject to the Public Procurement and Asset Disposal Act (PPADA) under Article 227 of the Constitution. Consequently, I am of the opinion that Section 2(o) of the PPADA is perfectly in line with the provisions of the Constitution.

[88] In light of the foregoing reasons, I would have found no merit in this appeal. I would have dismissed the appeal and upheld the decisions of the High Court and the Court of Appeal in their entirety. However, as these views are in the minority, the decision of the Court shall be in accordance with the majority.

H. ORDERS

[89] In the premise, we issue the following orders:

i) ***The appeal dated 9th April, 2024 and filed on 12th May, 2024 is hereby allowed.***

ii) ***The judgment of the Court of Appeal dated 28th April 2022 in Civil Appeal No.283 of 2017 is hereby set aside.***

iii) ***It is hereby declared that Section 2(o) of the PPADA is inconsistent with Article 227(1) of the Constitution and therefore void to the extent that it subjects pension funds for a public entity to the application of public procurement systems.***

iv) ***Each party will bear their own costs of the appeal before this Court.***

v) ***We hereby direct that the sum of Kshs. 6,000/- deposited as security for costs upon lodging of this appeal be refunded to the depositor.***

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **15th** Day of **May 2026.**

.....
M.K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....	.....
P.M. MWILU	**NJOKI NDUNGU**
DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original.

REGISTRAR
SUPREME COURT OF KENYA