THE SUPREME COURT OF KENYA

ASSOCIATION OF RETIREMENT BENEFIT SCHEMES VS. THE ATTORNEY GENERAL & 3 OTHERS

SC PETITION NO. E017 OF 2024

DATE OF JUDGMENT: 15th May, 2026

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Court, by a majority of 4:1, allows the appeal.

Background

The Public Procurement and Asset Disposal Act (PPADA) was enacted in 2015 to give effect to Article 227(1) of the Constitution, which requires that all procurement of goods and services by State organs and public entities be done through a system that is fair, equitable, transparent, competitive, and cost-effective. Section 2 (o) of the PPADA lists "pension fund for a public entity" as one of the twenty (20) entities constituting public entities to which the PPADA applies. The said pension funds were previously not listed in the repealed Public Procurement and Disposal Act, 2005. Following the enactment of Section 2(o) of the PPADA, aforesaid, all pension funds of public entities had to comply with the provisions of the PPADA as far as procurement and disposal of their assets are concerned.

The appellant, an association of stakeholders in the retirement benefits industry in Kenya, petitioned the High Court for a declaration that Section 2 (o) aforesaid is unconstitutional. It was the appellant's case that they did not fall in the category of a public entity but instead are registered under Section 23 of the Retirement Benefits Act (the RB Act) as an irrevocable trust, which constitutes a private arrangement between the employee and the employer as the grantor of the trust by remitting their funds for purposes of retirement.

The High Court dismissed the petition, finding that retirement benefits schemes and funds are public bodies within the meaning of Section 2(o) and are subject to State regulation and supervision, and held that there was nothing unconstitutional about Section 2(o) of the PPADA. On a first appeal, the Court of Appeal upheld the decision of the High Court, adding 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.

The appellant, aggrieved by that decision, appealed to the Supreme Court as a matter of general public importance.

The Supreme Court delineated the following issues for determination:

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; and*

ii) *What reliefs should issue?*

Upon consideration, the Supreme Court, by a majority of 4:1, allows the appeal for the following reasons:

Issue 1: In determining whether an entity is a public entity, courts must consider its establishment, personnel, functions, funding, and 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. Consequently, the Court finds 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 upon retirement. 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. 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. 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 be bound by the provisions of the PPADA.

Issue 2: The Court declares 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.

The Judgment of the Court of Appeal is therefore set aside.

<u>Dissenting Opinion of Njoki Ndungu, SCJ</u>

The learned Judge delivered her dissenting opinion on 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.*

In determining whether an entity is a public entity, we must consider its establishment, personnel, functions, funding, and, the degree of control exercised by the State.

Issue 1: 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. The phrase "any other public entity" in Article 227 of the Constitution encompasses any entity fulfilling a public obligation. 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.

Issue 2: The language of Part IV of the Retirement Benefits Act, which provides for the regulation and supervision of schemes, clearly demonstrates government control. Section 32(3) of the Act infers a degree of State control as it empowers the State to dictate the framework, standards, and procedures for these funds. Therefore, the specific organizational structure is of lesser importance; what holds significance is the kind of control involved.

....