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LEGAL ALERT



Supreme Court Declares Public-Sector Pension Schemes Are Not Subject to Procurement Laws



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The Supreme Court of Kenya in Association of Retirement Benefits Schemes v Attorney General & 3 others (Petition E017 of 2024) [2026] KESC 36 (KLR) (15 May 2026) (Judgment), by a majority decision (Koome CJ, Mwilu DCJ, Lenaola and Ouko SCJJ; Ndungu SCJ dissenting), held that Section 2(o) of the Public Procurement and Asset Disposal Act (PPADA), which classified pension funds of public entities as “public entities” subject to public procurement laws, was unconstitutional to the extent of that inclusion.

The dispute arose pursuant to Section 2(o) of the PPADA which had included retirement benefit schemes sponsored by public bodies under the public procurement regime. The Appellant, the Association of Retirement Benefits Schemes, argued that pension funds are private trust arrangements established under the Retirement Benefits Act (RB Act), funded through employee and employer contributions, and held in trust for members rather than constituting public funds. The Appellant, on that basis, challenged the constitutionality of Section 2(o) of the PPADA.

The High Court and Court of Appeal had previously upheld the provision, reasoning that public sector pension schemes perform public functions, are regulated by the State, and therefore qualify as public entities subject to procurement oversight. However, the Supreme Court in its Judgment, overturned those decisions.

Supreme Court held that once the contributions made into an employee’s account in the pension scheme, it ceases to be public property. The funds become part of a private trust fund, held and

managed by trustees for the exclusive benefit of the members. The Supreme Court also found that 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. To the contrary, their functions and powers are, by the provisions of the RB Act, defined and governed by the terms of a trust deed.

The Supreme Court emphasized that Article 227 of the Constitution, 2010 applies only to procurement by “state organs” and “public entities” using public money. The Apex Court consequently found that pension funds established by public employers do not meet that constitutional threshold to qualify as a public entity because, once contributions are paid into the scheme, they cease being public money and become private trust property held for employees’ benefit.

The Supreme Court went further to hold that contributions by both employer and employee constitute the employees’ private property, derived from earned income and held in trust for the employees’ benefit.

In the upshot, the Supreme Court distinguished between public oversight and State ownership or control. It held that the defining feature of entities contemplated under Article 227 of the Constitution is the use of public money appropriated through the budgetary process. Pension funds, even when sponsored by public employers, are not financed through public appropriations but through employees’ savings held in trust.



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Consequently, the Supreme Court declared Section 2(o) of the PPADA inconsistent with Article 227(1) of the Constitution and void to the extent that it subjected pension funds of public entities to public procurement systems.

Implications of the Decision on Retirement Benefit Funds Established by Public Entities

The decision has major legal, operational, and financial implications for public sector retirement benefit schemes, they include:

1) **Removal from the PPADA procurement regime:** pension schemes sponsored by public entities are no longer required to comply with the procurement procedures under the PPADA, including tendering requirements, procurement planning, advertising, approvals, and procurement litigation processes.

2) **Recognition of pension funds as private trust property:** the Judgment firmly establishes that pension contributions belong to employees and beneficiaries, not to the sponsoring public employer or the State. This reinforces the trust structure under the RB Act and protects pension assets from being treated as public finances.

3. **Enhanced operational autonomy of trustees:** trustees of public sector retirement schemes regain autonomy in procuring services such as fund management, actuarial services, administration systems, insurance, custodial services, and investment advisory services without being bound by the rigid PPADA framework.

4) **Reduction in compliance and administrative costs:** the Appellant argued that compliance with

PPADA imposed significant costs through procurement departments, tender procedures, advertising, and litigation risks, thereby diminishing members' retirement benefits. The Judgment removes these obligations, thereby reducing operational expenses borne by schemes.

5) **Potential increase in procurement flexibility and efficiency:** retirement schemes can now procure investment and professional services quicker and competitively within the framework of trust law and RB Act governance standards, which may improve investment responsiveness and fund administration.

6) **Continued regulation under the RB Act:** although exempted from PPADA, public sector pension schemes remain regulated under the RB Act and under the oversight of the Retirement Benefits Authority. The Court clarified that regulation by the Authority continues, but such regulation does not convert the schemes into public entities.

7) **Precedential clarification of "public entity":** the decision narrows the constitutional meaning of "public entity" for procurement purposes and may influence future disputes involving entities that are regulated by government but funded privately.

8) **Possible legislative and policy reforms:** the Court acknowledged concerns about accountability and corruption risks in pension schemes but held that such concerns cannot justify unconstitutional expansion of procurement law. Parliament or regulators may therefore consider developing sector-specific procurement or governance rules for retirement schemes outside the PPADA framework.

The decision marks a major development in Kenya's pension and public procurement jurisprudence.

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This alert is for informational purposes only and should not be considered or interpreted as legal advice. If you have any questions or require clarification, please feel free to contact the authors John Mbaluto, Deputy Managing Partner (john@oraro.co.ke) and Steven Odhiambo, Associate (steven@oraro.co.ke) – or your usual contact at our firm for legal guidance.



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