

PENSION



## Pension Funds Are Exempt from the Strict Public Procurement and Assets Disposal Act

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### Introduction

The Supreme Court of Kenya has decisively insulated public sector pension funds from state procurement bureaucracies. In a landmark judgment in **Association of Retirement Benefits Schemes v Attorney General & 3 Others [2026] KESC 36 (KLR)**, the court ruled by majority that retirement schemes sponsored by public bodies do not inherit the "public entity" status of their sponsors. Consequently, such funds are not subject to the rigid procurement requirements of the Public Procurement and Asset Disposal Act, 2015 (PPADA).

This ruling draws an important distinction between public resources and trust property and clarifies the limits of state regulation over retirement benefit schemes, essentially buttressing fiduciary freedom and the constitutional protection of private property in Kenya.

### The Friction: Trust Efficiency -vs- State Bureaucracy

For years, public sector pension schemes operated under a regulatory cloud. Section 2(o) of the PPADA lumped retirement funds sponsored by county governments, state corporations, and public universities into the category of "public entities."

The practical fallout was a logistical nightmare for pension trustees. Instead of acting swiftly in the volatile investment market, trustees were forced to navigate slow, governmental tendering procedures just to appoint:

- Fund managers and custodians;

- Actuaries and auditors;
- Legal advisers and investment consultants.

This framework fundamentally misunderstood the nature of a trust. It treated beneficiary funds as standard government expenditure rather than private wealth held in trust for investment management.

### **Severing the Sponsor from the Fund**

The Association of Retirement Benefits Schemes (ARBS) launched a constitutional challenge to untangle this node. The core question before the Supreme Court was straightforward: *Do private retirement contributions become public funds simply because a state entity employs the contributor?* The Supreme Court's answer was an unequivocal no. The Court drew a strict legal boundary between public resources and trust property. The justices affirmed two foundational principles of trust law:

#### 1. Separation of Property

Once an employer (even a public one) pays contributions into a retirement scheme, those funds cease to belong to the employer. They transform into trust property governed strictly by the Retirement Benefits Act (RBA) and the law of trusts.

#### 2. Exclusivity of Benefit

Trust assets belong beneficially to the members and their beneficiaries, not the state.

From the foregoing, applying governmental procurement rules to private wealth held in trust constitutes an unjustified overreach of state regulation.

### **What This Means for Trustees and Fund Managers**

This judgment drastically simplifies the operational landscape for public sector retirement schemes across Kenya in the following aspects:

- **Agility in Appointments.** Trustees can now onboard fund managers, custodians, and professional service providers using flexible, market-driven criteria optimized for financial returns, rather than protracted PPADA timelines.
- **Fiduciary Primacy.** Trustees can fully prioritize their primary fiduciary duty—maximizing member value—without the threat of regulatory sanctions from the Public Procurement Regulatory Authority (PPRA).
- **Sanctity of Private Wealth.** The ruling reinforces a vital legal precedent, that money earmarked for Kenyan workers' retirement is private property, and the state cannot casually misclassify it to expand its regulatory reach.

## **Governance and Accountability are still Key**

Critics of the decision may argue that excluding pension funds from PPADA oversight creates opportunities for mismanagement or corruption. Such concerns are not entirely unfounded. Pension funds often manage huge sums of money in assets and therefore present obvious governance risks. Indeed, the government relied heavily on accountability and anti-corruption considerations in defending the legislation.

However, the Supreme Court was careful not to suggest that pension funds should operate without oversight. Rather, the Court distinguished between accountability and procurement regulation. The judgment recognises that accountability can be achieved through mechanisms tailored specifically to retirement schemes, including fiduciary obligations, RBA supervision, actuarial reviews, independent audits, and trustee governance standards. The ruling therefore does not remove oversight; it merely rejects the use of an inappropriate regulatory tool.

## **Is Your Pension Scheme Compliant?**

Don't let outdated regulatory assumptions slow down your investment strategy. Our experienced legal team stands ready to help you update your scheme's trust deeds, governance rules, and service agreements in line with this landmark judgment.

Get in touch with us to explore how this decision impacts your operations.

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