

# **The Mortgage Regulations – A guide to amendment of Scheme Rules and the challenges thereon**

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# Retirement Benefits & Housing

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- Legislative Framework - Retirement Benefits Act.
- Retirement Benefits Scheme – Trustee responsibility.
- Constitution of Scheme - Act of Parliament or Trust.
- Relationships – Sponsor/Trustee/Members *interse*.
- RBA – Responsibility to oversee established framework.
- Objects – provision of retirement benefits.
- Section 38(1A) – Member may assign proportion of benefits to secure a mortgage loan from such institutions and on such terms as may be prescribed in regulations made by the Minister (2009).

# Year 2009 Regulations

- 3 ■ The Retirement Benefits (Mortgage Loans) Regulations.
- Assign 60% of appropriation of benefits for the purpose of:-
    1. **Acquiring** immovable property on which a house has been erected;
    2. **Erect** a house on immovable property owned by member or jointly owned with spouse or occupied;
    3. **Add, alter** or carry out **repairs** to a house owned by the member or the member and his spouse or occupied house;
    4. **Securing finance** or waiver, as the case may be, for deposits, stamp duty, valuation fees and legal fees, or other transaction fees.

# Year 2009 Regulations Un-attractive

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- ❖ Mortgage Loans using retirement benefits as security attracted very low interest.
- ❖ Lending institutions and Members of Schemes not appealed.
- ❖ Objective of home ownership not lost.
- ❖ Government and pension schemes pursued.
- ❖ Government introduced development agenda on home ownership.
- ❖ Some schemes practiced it silently.
- ❖ Lending Institutions remained un-accommodating.
- ❖ Alternatives became necessary evil.

# Revisiting the law - 2020

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- ✓ April 2020 Parliament amended the Retirement Benefits Act.
- ✓ 38(1A) the Retirement Benefits Act was amended to read as follows:- *(1A) Notwithstanding the provisions of subsection (1), a prescribed proportion of the benefits accruing to a member in a scheme may be assigned and used by the member to secure a mortgage loan or to purchase a residential house from such institutions and on such terms as may be prescribed in regulations made by the Minister.*
- ✓ The amendment only included the highlighted phrase.
- ✓ Scheme members can thus access their benefits for purpose of purchasing a residential house
- ✓ The purchase shall be **from institutions** and under **Regulations** made by the CS.

# Commencement of 2020 – Regulations - 1

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- Special Issue Kenya Gazette 25<sup>th</sup> September 2020 LN 192 – Published.
- Regulations provide for the procedure of partial access to benefits for purposes of purchasing the residential house.
- Key Proposed provisions:-
  1. Amending scheme rules to provide for purchase of house.
  2. The ceilings of the amount to be accessed (40% DC and 40% DB determined by Actuary) all ceiling of Kshs. 7M).
  3. Used for purchase residential house only not construction.
  4. Role of trustees in the process – *encumbrance on property!*

# Amend Scheme Rules to comply

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## 2009 Regulations

- 1. Application for approval.
- 2. Security for a Facility.
- 3. Proportion of assignable benefits.
- 4. Transfers to another Registered Scheme or Institution.
- 5. Duties of trustees in relation to the assignment of benefits
- 6. Redemption of guarantee
- 7. Suits against the Trustees

# Amend Scheme Rules to comply

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## 2020 Regulations

- 1. Application for approval.
- 2. Eligibility.
- 3. Utilization of other funds.
- 4. Determination of assignable benefits.
- 5. Restrictions.
- 6. Duties of trustees in relation to purchase of Residential Houses.
- 7. Reports
- 8. Expenses



# ISSUES - 1

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## 1. Definitions

The definition of “institution” has been expanded to include “*any other entity offering a residential house for sale*”.

**Clarity Required:** Does the phrase “**any other entity**” include a private legal or natural person other approved property institutions and financial institutions?

**2. Regulations 14(4)** – Allows a member to utilize his/her accrued benefits from all schemes where such member is a participating.

**Clarification:** Does this include utilization of benefits accrued in NSSF?

Do the provisions of Regulations align themselves properly with NSSF Act or any other funded scheme established under a written law?

# ISSUES - 2

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**3. Regulation 15(2)** - A member is permitted to utilize his/her benefits only once for the purchase of a residential house under these Regulations.

**Clarification:** Scheme members participate in different retirement benefits schemes during their career.

Does this Regulation prohibit a member from applying in a new for a house purchase where he/she has joined after leaving the previous scheme where he /she accessed the benefits to buy a house?

**4. Regulation 15(4)** - A member who is paid a pension by the scheme, or who has taken early retirement, or has attained retirement age shall not be eligible to utilize a portion of the member's retirement benefits to purchase a residential house.

**Clarification:** What is the object of this limitation?

# Issues - 3

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**5. Regulation 15(8)** – The regulation empowers trustees to encumber the title of the residential house to prevent the transfer of the house to any other person.

**Clarification:** Upon acquisition of private property, a person has a right to own the property without interference from the state (Article 40 of the Constitution).

Under land laws a person may encumber a title upon demonstration of a legal interest.

Which legal interest will trustees demonstrate to justify the encumbrance?

The issue is not whether they have to encumber, the issue in land law is what is their legal interest in the property.

RBA Regulations may not be able to amend the legislative provisions in Land law statutes.

# ISSUES - 4

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- ❖ **6. Regulation 16** – The duties of trustees under these regulations include:-
  - ❖ consider applications under regulation 13 and determine whether or not they comply with the provisions of the Act and these Regulations;
  - ❖ verify the institutions from which the purchase of the residential house is to be made in accordance with these Regulations;
  - ❖ ensure the terms of sale between the member and the vendor of the residential house are documented;
  - ❖ retain copies of titles of all purchases of residential houses under these Regulations; and keep and maintain records of all transactions relating to the purchase of residential houses under these Regulations.

# ISSUES - 5

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**7. Regulation 16** – The duties of trustees under these regulations -

## Clarification:-

- 1) The obligations of trustees exceed the known duties of trustees and exceed into managing property purchases for scheme members.
- 2) Where trustees do not have skill and knowledge on land transactions, can they outsource this function to lawyers at the cost of the scheme?
- 3) In the event of a dispute relating to these transactions, will trustees' liability be met by the scheme funds?
- 4) Will trustees have the capacity to keep all the titles of purchased property ? Or the same will be outsourced to bank deposit saves at the expense of scheme?

## 8. Taxation of Accessed Benefits

**Clarification:** The Regulations transfer the costs and taxes of the transactions (Regulation 19) to the member purchasing the house.

The Income Tax Act requires trustees to deduct and remit taxes for any benefit payment to the member.

The Regulations are unclear whether the amount paid out of the scheme to the vendor of the property will be tax exempt or will be paid after income tax has been applied on it.

# Discussion

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- **Note:- “Absence of tension is not evidence of peace”!**

- **Asante.**