

REF: APTAK SG SUBMISSIONS AT THE LAUNCH OF THE RETIREMENT BENEFITS AUTHORITY STRATEGIC PLAN 2024-2029 AND RETIREMENT BENEFITS SECTOR CONVENTION HELD ON 29th AND 30th AUGUST 2024

1. Background

Retirement Benefits Authority was established following a study of the pensions industry of Kenya in the mid 1990s. The constitution, legal framework and experience then was different from what it is today.

Later in 2010, Kenya propagated a new constitution. Both the Retirement Benefits Act and the Regulations made thereunder are strange to the dynamics of the new constitution and experiences present now.

In my very humble understanding, the problem is the regulatory environment vis-a-vis our experiences, expectations and constitutional dispensation. Our dreams should be aligned to our present-day experiences and expectations.

Any expectation that Retirement Benefits Authority or the industry may do much without corresponding legal and constitutional alignment may be misplaced.

It is my view that we need to engage in a comprehensive review of the legislative environment.

2. Harmonization

The President, Deputy President, Speakers of Parliament, Chief Justice and the Deputy Chief Justice all draw their non-contributory pension from the Consolidated Fund. The Governors and Members of the County Assemblies are agitating for similar provision. Members of Parliament are doing minimal contribution.

All these schemes are not registered or regulated by the Retirement Benefits Authority nor do they pay any levy to the regulator of the pensions industry.

These situations appear unsuitable when the rest of the citizenry is subjected to defined contribution pension schemes, regulated and pay a levy to the Retirement Benefits Authority.

i. We suggest that we should endeavour to harmonize and make provision of pension equal to the citizens.

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ii. In the alternative, recommend a new pension law to replace the current Retirement Benefits Act to require all formal employees (whether public or Private sector) to participate on a mandatory basis in licensed pension fund companies of their choice. The law should provide that system shall be a Defined Contributory system with a set minimum contribution rate. The pension companies will compete with the National Social Security Fund and among themselves with a regulated cost of administration. The new framework will achieve: –

- Sector harmonization and fairness;
- Bring to an end fragmentation and a clamour for specialist pension arrangements for certain categories of public or even private sector workers;
- Enhanced coverage because all formal sector workers will participate and evidence of participation will be a requirement for receipt of certain public services;
- NOTE: if this is adopted, then there should be sufficient transition period from the current system to the new system.

3. Unremitted Contributions

There are enough elaborate provisions in the law. The Trust Deed and Rules of every scheme bind the sponsor to compliance with the scheme rule. The rules give liberty to the trustees to recover summarily from the sponsor, contributions which have not been remitted.

The procedure for civil summary recovery is simple. The court process is written in the Debts (Summary Recovery) Act. The preparatory steps are set out in section 53A of the Retirement Benefits Act.

These provisions are meant to enforce the common law elements of “irrevocable trust” stated in section 24 of the Retirement Benefits Act and heightening of debts under the Trustee Act.

Failure to remit contributions is a criminal offence under the Retirement Benefits Act. There is an expression in the Retirement Benefits Act for in-house prosecutors to arraign offenders under the Act.

There are other crimes under the Penal Code when contributions are deducted and not utilized for the purpose for which it is desired. I remember when I served the Retirement Benefits Authority, we had an engagement with the police on the investigation and enforcement of this law.

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When the trustees are reluctant to enforce the law on civil recovery, Retirement Benefits Authority may invoke its powers under the Retirement Benefits Act. We have in mind the power of removal of trustees and appointment of interim administrator.

This issue is sufficiently settled in the law.

We request that you do consider enforcement as opposed to making more laws around it.

The further amendments made in the Retirement Benefits Act to introduce Retirement Benefits Authority and Kenya Revenue Authority as able to recover unremitted contributions will attract avoidable litigation. In my view these provisions should be deleted in their entirety.

Under the proposed new system, the transition period should be used, among other things, to settling the unpaid contributions, transfer of individual accounts to the schemes of their choice, registration of pension companies, restructuring Retirement Benefits Authority supervisory framework, etc.

4. Investments

One of the seven (7) elements of irrevocable trust is that the trustees must at all times remain in control and possession of the pension funds. This provision makes it unacceptable for the trustees to choose a joint investment in circumstances where another person is the investor through which the investment is being made.

We suggest that this conversation be facilitated by revision of the law to give such permission.

It is worth assessing the value of having a Fund Manager in a pension scheme where investments are made in government securities or guaranteed funds.

In such cases, we may not need a Fund Manager.

Again, we may need to examine what Retirement Benefits Authority does when it registers a Fund Manager or the Custodian.

I suggest that these service providers be let to render services in a pension scheme when they are licensed by the Capital Markets Authority as fund managers and authorised depositories respectively.

It is ideal that all authorised depositories must be banks within the meaning of the Banking Act.

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The Investment Guidelines is a good tool for choice of investments.

We suggest that we do place the minimum investment in each class and leave the trustees to decide the maximum.

In the alternative, it may be estimated that the industry skill and knowledge has matured. If the answer is in the affirmative, then the mandatory requirement of Fund Managers can be relaxed and left to the discretion of trustees, or, in the new system to the directors of the pension company.

However, we recommend that custody services should be mandatory to ensure security of assets.

5. The Trustees

The human trustees have frequently complained that they have been unfairly targeted. They have cited: -

1. Limitation of the term of office;

This provision has created undue advantage in that the frequent changes of the trustee is not applied on the service providers. New trustees will inevitably rely on the service providers for the historical memory of the scheme thereby rendering the trustee vulnerable. There are other disadvantages, some that we have made representations before.

2. Training;

The time for the training of trustees has been capped to five days. It is not foreseeable that new trustees will be able to sufficiently learn and be able to implement the various dimensions of the scheme administration and management within such a short time.

3. Remuneration;

The trustees have been given a provision for allowances and capped to five meetings. It is not practical to only have 5 meetings when the exigencies of a scheme require more meetings.

4. Approval of Foreign Travel.

This requirement has both legal and constitutional displeasure.

5. Discrimination.

The Trust Corporation Regulations or guideline instructions do not have any of the items 1 to 4 above. The trustees do not consider the omission to be justified much as it is not necessary to apply any of the 4 terms.

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We recommend that the above requirements be removed from both the statute and guidelines.

If the proposed new pension system in the National Pensions Policy is adopted, then these issues of trusteeship will vanish. The pension company will have a board of directors who, under the law meet a certain criterion. The law will set a limit of administration cost and shareholders of the pension company will set the term limit of those directors.

6. Trustee Development Program Kenya

This program is fairly useful.

Trustees have complained that it lacks credibility when the College of Insurance is the only player alone doing the following: -

1. Determine the venue, days and hours of training;
2. Set the curriculum;
3. Teach the curriculum;
4. Set the examination;
5. Mark the examination;
6. Give marks for the examination;
7. Issue Certificates;
8. Choose the Trainers;
9. Determine the fees payable for the training;
10. Determine the remuneration for the training;
11. Share with other organizations the fees paid by the trainees.

It is not attractive to have the above state of affairs.

We have pointed out this matter before to you.

We suggest that: -

1. The Curriculum be revised by the Curriculum Development Assessment and Certification Council together with the stakeholders in the pensions industry;
2. The training be dispatched to the Technical Vocational Education and Training institutions licenced by the Technical Vocational Education and Training Authority;
3. The persons trained and certified to be Trainers of Trainers under the Trustee Development Program Kenya be the only ones permitted to conduct the training of the Trustees Development Program Kenya in any of the Technical Vocational Education and Training institutions licenced by the Technical Vocational Education and Training Authority;
4. The Curriculum Development Assessment and Certification Council does conduct, mark the examination and issue certificates;
5. Subject to licence by the Technical Vocational Education and Training Authority, the College of Insurance does continue alongside the Technical Vocational Education and Training institutions stated above.

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Both Technical Vocational Education and Training Authority and Curriculum Development Assessment and Certification Council are government intuitions. They have licenced the Technical Vocational Education and Training institutions to give training in pension management and administration leading to qualification as a Pensions Manager.

Additionally, Retirement Benefits Authority may require that the right directors of a company desirous of rendering services to a pension scheme are appointed and the internal governance arrangement is suitable for each scheme. Training of directors of the pension company shall be a function of the company within the permitted cost of administration.

The college of Insurance, may, at its own discretion and cost, provide relevant courses for pension governance without any mandatory requirement from the Retirement Benefits Authority on these directors to attend.

We have forestalled by persuasion, litigation meant to challenge this unhealthy state of affairs.

We request that you do look into the matter and give appropriate direction.

7. Purchase of Annuity

This has been interpreted by some pension schemes to mean that when the pension promised falls due, the accrued benefit is calculated and paid to Insurance Company for purchase of an Annuity. This action offends the objects for which the scheme is established, law and changes the character of a pension scheme to a provident fund. It is alleged that the trend is also abused for unfair financial gain.

Nevertheless, it has been alleged to be an international best practice in defined benefit systems. There may be nothing inherently wrong with it. However, if we are to retain the system, there is need to develop a better annuity market disclosure and whether Retirement Benefits Authority can assist annuity purchasers to access market services digitally without moving from one provider to another.

We request that you do consider the matter and give corrective instructions.

8. Income Drawdown

The Income Drawdown Regulations purport registration of an Income Drawdown arrangement to be registered by the Retirement Benefits Authority. An income drawdown is a payout phase in a pension scheme. It is not a retirement benefits scheme.

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Schemes should be allowed to offer Income Drawdown services to their retiring members without any further registration. The regulations may be expanded to provide a framework on how trustees can manage Income Drawdown funds and services. But, in case a stand-alone service provider opts to offer Income Drawdown services, then Retirement Benefits Act needs to be amended to provide for this service provider like others, set minimum requirements and how the Income Drawdown funds and services will be managed.

We recommend that you do reconsider the matter and withdraw the regulations.

9. Retirement Benefits Act

Numerous amendments have been made to the Act and Regulations since 1997 and 2000 respectively. These recurring actions have made the law uncertain. For example, the Regulations are surviving pending decision of the court. It may be reckless to wait for the court decision.

It is recommended that the best option will be to rewrite a new pension law capturing new developments and re-focusing the sector for the 3 decades.

10. Registration and Licencing of Trustees

The industry has lost resources of the persons who have been trained under the Trustees Development Program Kenya. It is ideal that this resource be recovered and facilitated to manage any pension scheme. This is done by compelling appointment of trustee only from the list of those persons trained under the Trustees Development Program Kenya.

We recommend that provision be made for: -

- 1. Registration and licencing by the Retirement Benefits Authority any person who has been trained under the Trustees Development Program Kenya;*
- 2. Choice of trustee of any pension scheme only from the list of those persons trained under the Trustees Development Program Kenya; and*
- 3. A Corporate Trustee to at all times have in its Board of Directors and top Management at least two (2) persons who have been trained under the Trustees Development Program Kenya.*

11. Public Procurement and Disposal of Assets Act

Trustees and Administrators have complained, perhaps with justification, that the provision in this Act that pension schemes are a procurement entity is offensive in many ways. We have previously raised this matter.

The most serious offence is that pension funds, which is personal money of a member of a pension scheme, is being subjected to fulfilment of a public duty. The Public Procurement and Disposal of Assets Act states that a procurement entity should use public money to do procurement.

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We recommend that the classification of a pension scheme as a procurement entity should be removed in its entirety from the statutes.

12. Fair Administrative Action

Again, Administrators and Trustees have complained that Retirement Benefits Authority does not acknowledge receipt or respond to the submissions made to it. Reliance is being made on presentations made in previous years during budget memorandum preparations. This course of action has created mistrust and, in some instances, resulted in litigation which can be avoided. The example is the case you referred to at the convention.

We request that you do consider the matter with a view to improving trust and mutual respect in the pensions industry with both the stakeholders and interested parties.

13. Proximity

There is the continuing uneasy allegation of complicity and capture of the Retirement Benefits Authority. This is related to private business actions of service providers and the involvement of Retirement Benefits Authority.

The example commonly given is where service providers offer workshops and sell the event to the schemes which they are contracted and paid a fee to render services. The alleged connivance by the Retirement Benefits Authority is that it routinely attends, sanitises these functions and acquiesces this conflict of interest.

You may wish to review your conduct in such matters which touch on the independence and reputation of the Authority.

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