



**LEGAL ALERT:**  
**HIGH COURT QUASHES  
THE MORTGAGE  
REGULATIONS UNDER  
THE RETIREMENT  
BENEFITS ACT**

**NOVEMBER, 2022**

## *Introduction*

The High Court of Kenya recently quashed the legislation allowing members of pension schemes to access their contributions to purchase residential houses.

The Tax Laws (Amendment) Act, 2020, introduced amendments to the Retirement Benefits Act (the “**Act**”) to the effect that pension scheme members would utilize their retirement benefits to purchase a home. To give effect to the amendment, the Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020 (the “**Regulations**”) were enacted in September 2020.

The Judicial Review Application (the “**JR Application**”) before the court sought to quash and prohibit the implementation of the amendment and the Regulations, for among other reasons, want of meeting the constitutional threshold for public participation.

Pursuant to the Regulations, members would access 40% of their pension contributions subject to a maximum of KES 7M. The Regulations were meant to foster the affordable housing agenda.

## *The case*

The ex-parte applicant’s case was that the amendments to the Act allowing members to purchase a residential house were sneaked into the amendment Bill after the Bill was passed by the National Assembly but before the President assented to it. This, according to the ex-parte applicant, was an outright denial of the right to public participation particularly owing to the economic and financial ramifications of the impugned legislative amendment.

In their reply, the National Treasury posited that the amendment was aimed at allowing members to access a portion of their pension benefits to purchase a residential house in addition to using the benefits to secure mortgage loans. They also contended that the Regulations had undergone public participation.

## *The court’s determination*

Whilst granting the orders sought in the JR Application, the Court underscored the importance of the constitutional right to public participation in the legislative process. The learned judge found that the amendments required a robust process of stakeholder engagement and public participation owing to its heavy impact on the utilization of pension funds. Introducing the amendments, therefore, at the committee stage denied stakeholders the opportunity to contribute to the contents of the impugned legislation.

## *The impact of the judgment*

When a legislation is quashed, the effect is that it is null and void *ab initio* with no effect in law. It is the case that the amendments and Regulations are a nullity and any action based on these legislations are null and void.

Question would then be: what happens to member applications which were being considered by the pension schemes before the judgment? Principally, non-criminal legislation should not have retrospective application. Since the Learned Judge did not address the transitional implications of the quashing orders by either suspending the effect of the quashing orders or limiting their retrospective effect, our view would be that parties should consider going back to court for an advisory opinion on the transitional provisions. This would be premised on the fact that members who had made applications to the schemes had a legitimate expectation regarding release of funds by the schemes to fulfill their respective contractual obligations and they would be prejudiced if their applications are thrown out pursuant to the judgment. In the alternative, the trustees of pension schemes should discuss the impact of the judgment with the members whose applications are in process to come up with solutions which comply with the Act and the judgment.

Generally, such impugned legislations are tabled afresh in the National Assembly pursuant to the laid down legislative process to correct the procedural flaw during which time stakeholders would have a chance to exercise their right of public participation.

*\*This legal alert is for information purposes only. Legal advice should be sought on the views expressed herein.*

Please do not hesitate to contact us in case of any questions.

**Wamaitha Gichamba & Co. Advocates**

**Cool Breeze Gardens, Office No. F, Muthaiga Along**

**Thika Superhighway**

**P.O. BOX 11622-00400, NAIROBI**

**TEL: +254 731 965 951/ +254 719 311 563**

**Email: [wamaitha@wamaithagichambaadvocates.com](mailto:wamaitha@wamaithagichambaadvocates.com)**

**Website: <https://wamaithagichambaadvocates.com/>**



**Dorcas Wamaitha**  
**Managing Partner**