

**UNIVERSITY OF NAIROBI
SCHOOL OF LAW
MASTER OF LAWS, (LL.M) THESIS**

**THE APPLICATION OF CORPORATE GOVERNANCE PRINCIPLES TO
OCCUPATIONAL RETIREMENT BENEFIT SCHEMES SPONSORED BY PUBLIC
ENTITIES:
WITH REFERENCE TO NATIONAL MUSEUMS OF KENYA STAFF PENSION
SCHEME**

BY

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**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF
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I acknowledge My Lord and God who truly does immeasurably more than what we ask or imagine! The Good Shepherd, who leadeth me to pastures green.

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DEDICATION

I began this Master's program in September 2012. However, the sudden death of my father nearing the end of the first semester threw my life into, what to me felt like, an abyss of utter confusion. I was inconsolable, I can now say that I am not ashamed of this, but I also add that I am humbled to have been able to return and complete the program. It was with the support of my husband that all this was possible. I therefore dedicate this thesis to my husband, Vincent Moseti Nyabiosi, for the wholehearted financial, parenting, social and emotional support during the period of my studies. Indeed, he has always been by my side, encouraging me, ever since we met, 13 years ago. I cannot forget my lovely daughters, Eden Moraa and Elaine Lugusi, to whom this thesis is also dedicated. Together you are my reason for living and I think of you in all things I do.

LIST OF ABBREVIATIONS AND DEFINITION OF KEY TERMS

AGM	Annual General Meeting
	Meeting convened annually by the trustees and attended by scheme members where scheme matters such as audited accounts, investments, remuneration of trustees, statutory compliance and questions from members ¹ are discussed.
DB Scheme	Defined Benefit Scheme
	A retirement benefits scheme in which a member's entitlement is fixed. It is determined as a factor of the employee's last pensionable salary and the years of service to the employer.
DC Scheme	Defined Contribution Scheme
	A retirement benefits scheme in which a member's entitlement is determined by the contributions paid into the scheme by the employer and employee and the investment return earned on the contributions.
ILO	International Labor Organisation
	A tripartite U.N agency that sets labour standards, develops policies and devices programs promoting decent work for all women and men, encourages decent employment opportunities and enhances social protection. ²
Mwongozo	A code of governance for State corporations issued jointly by the Kenyan Public Service Commission and the State Corporations Advisory Committee in January 2015.
NMKSPS	National Museums of Kenya Staff Pension Scheme
NSSF	National Social Security Fund
OECD	Organization for Economic Co-operation and Development

¹ Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000, reg 33 <http://kenyalaw.org/lex/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/R/Retirement%20Benefits%20Act%20Cap.%20197%20-%20No.%203%20of%201997/subsidiary%20legislation/docs/RetirementBenefitsAct3of1997_subsiary.pdf> accessed 13 July 2018.

² International Labour Organisation, About the ILO, <<http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>> accessed 12 July 2018.

ORBS	Occupational Retirement Benefit Schemes
	A category of retirement benefits scheme regulated by the Retirement Benefits Authority, which an employer sets up for the benefit of its employees.
RBA	Retirement Benefits Authority
	A body corporate established under section 3 of the Retirement Benefits Act for the regulation of the retirement benefits industry.
Act	Retirement Benefits Act, Act No.3 of 1997
	An act of Parliament to establish the Retirement Benefits Authority for the regulation, supervision and promotion of retirement benefit schemes and development of the retirement benefits sector.

TABLE OF CASES

Kenya Plantation & Agricultural Workers Union V Board of Trustees, National Social Security Fund & Another HC Petition No. 11 of 2014 [2014] eKLR.

Kenya County Government Workers' Union V National Social Security Fund Board of Trustees and 5 Others ELRC Petition No 35 of 2014 [2015] eKLR.

Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others HC Petition No 377 of 2013 [2013] eKLR.

International Center for Policy and Conflict & 4 Others v The Hon. Uhuru Kenyatta and Others HC Petition No. 552 of 2012 [2013] eKLR.

Clement Ogutu v Kenya Railways Staff Retirement and Benefits Scheme & 2 others HC Petition No.188 of 2015 [2015] eKLR.

TABLE OF LEGISLATION AND CONVENTIONS

Constitution of Kenya, 2010, (Government Printer, Nairobi 2010).

Judicature Act Cap 8, Laws of Kenya (Government Printer, Revised Edition 2016).

National Museums and Heritage Act No 6 of 2006 (Government Printer Revised Edition, 2012)

National Social Securities Fund Act No. 45 of 2013, Laws of Kenya (Government Printer 2013).

Public Service Superannuation Scheme Act No. 8 of 2012, Laws of Kenya (Government Printer 2012).

Pensions Act, Cap 189, Laws of Kenya (Government Printer 2009).

Retirement Benefits Act No. 3 of 1997, Laws of Kenya (Government Printer 2016).

Trustees Act, Cap 167, Laws of Kenya (Government Printer 2012).

Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations, 2000.

Retirement Benefits (Minimum Funding Level and Winding up of Schemes) Regulations 2000.

Retirement Benefits (Administrators) Regulations, 2007.

Pensions Act 2008 (UK).

ILO Convention No. 102 Social Security (Minimum Standards) Convention 1952.

ABSTRACT

This study is on corporate governance and how it has been applied in occupational retirement benefit schemes of public entities. To narrow down the broader issue of corporate governance, the study undertook to ascertain the application of corporate governance principles in occupational retirement benefit schemes sponsored by public entities such as state corporations, with a reference to National Museums of Kenya staff pension scheme.

The study further considers the impact of corporate governance on independence from sponsor influence, performance, professionalism, relationships with service providers and relationships with the members and other key stakeholders as well as maintenance of the statutory scheme funding level.

To achieve its objectives this study provides a background into the need for retirement benefits and its place in the provision of social security. Next the study looks at the challenges that defined contribution scheme sponsored by a public entity are facing including non-remittance of contribution and lack of effective mechanisms to ensure compliance of these schemes. Next, the research methodology is outlined with the use of the National Museums of Kenya staff pension scheme as a case study. The stakeholder theory and agency theory anchor this study with a focus on leadership linked with the duties and responsibility of the trustees to the members of the scheme.

The study discusses the governance structure in retirement benefit schemes in Kenya using the case study and other similar jurisdictions with a view to consider any gaps and new strategies that could be incorporated in this jurisdiction. The study also considers the governance structure of the National Museums of Kenya staff pension scheme and the challenges it has experienced from formation of the trust in 2011 to the date of the study. Ultimately, it will aid in filling the corporate governance gaps that may exist in National Museums of Kenya staff pension scheme in its quest for maintained viability.

The study recognizes that corporate governance challenges prevent the success of retirement benefit schemes and the realization of old age security as a pillar of social security and as provided in the Constitution of Kenya, 2010. Though established to secure an individual's retirement, the retirement benefit schemes of public entities suffer from severe funding

challenges. The study ultimately recommends that the legal and regulatory framework should be complemented by a robust corporate governance framework, which needs to be actualized at the institutional scheme level for the scheme to thrive.

Though the adoption of the principles of corporate governance is important in entrenching a good leadership, they are inadequate in themselves to guarantee delivery of retirement benefits as and when they fall due to members. In retirement benefit schemes of public entities especially, there must be a commitment from the government and the sponsor public entity to fund the schemes and provide pension for its employees. This commitment is even more necessary in schemes sponsored by public entities that solely rely on the national government for funding and are without external sources of revenue such as levies and fees.

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CHAPTER ONE: Introduction

‘Good Corporate Governance is not an end to itself.’³

1.1 Background to the problem

In today’s uncertain economic environment, the provision of old age income is an important subject to Kenyans, especially following the promulgation of the Constitution of Kenya⁴ in 2010. Social protection is a long established international human right and became codified in Chapter Four (4) of the Constitution of Kenya, 2010, particularly Art 43(1) (e). This article provides as follows:

- 43 (1) “Every person has the right—
- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
 - (b) to accessible and adequate housing, and to reasonable standards of sanitation;
 - (c) to be free from hunger, and to have adequate food of acceptable quality;
 - (d) to clean and safe water in adequate quantities;
 - (e) to social security; and
 - (f) to education...⁵

This article of the Constitution emphasizes the individual’s right to social security and the State’s duty to protect such right. For Kenyans, it is more than just possession of the right, but how the state can practically bring to life the protection of this right so as to decrease poverty at an advanced age, and allow citizens access to healthcare, education and other productive activities.

According to the International Labour Organisation (ILO), to be wholesome, social security should cover nine principal branches namely sickness, healthcare, employment injury, unemployment insurance, maternity benefits, invalidity benefits, survivors’ benefits, family and old age.⁶ The ILO Social Security (Minimum Standards) Convention⁷ came into force in 1955

³ G20/OECD, *Corporate Governance Principles* (OECD Publishing Paris 2015) <<https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf>> accessed June 2017. Note by the OECD Secretary General at the G20 Finance Ministers and Central Bank Governors Meeting, 4-5 September 2015, Ankara.

⁴ Constitution of Kenya 2010 (Government Printers, Nairobi) <<http://kenyalaw.org/lex/rest/db/kenyalex/Kenya/The%20Constitution%20of%20Kenya/docs/ConstitutionofKenya%202010.pdf>> accessed 11 July 2018 (Constitution of Kenya).

⁵ *ibid* art 43(1).

⁶ International Labour Organisation (ILO) Website, International Labor Standards on Social Security <<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang-en/index.htm>> accessed 9 June 2017. This article provides a summary on the flexibility ILO conventions offer, and

advocating for the application of the minimum standards of social security. The convention allows a member country to take advantage of Article 3 of the convention, which provides that, any country whose economy and medical facilities are not well developed can apply the convention with some necessary temporary exemptions on the extent of coverage of the benefits. Kenya has however not yet ratified the ILO Social Security (Minimum Standards) Convention. It has further not ratified any of the subsequent conventions touching on social security⁸ and is not fulfilling the targets or minimum levels specified in the ILO Conventions.⁹ However, the country has taken first steps in choosing to provide some but not all social security benefits through the establishment of a framework for retirement benefit schemes (old age benefit), medical care, sickness benefit, employment injury benefit and maternity benefit.

According to a 2010 ILO report on Kenya and its social protection policy, social protection is rather unbalanced with more than 57 percent focused on pensions for former civil servants.¹⁰ This study will focus only on the old age element of social security and particularly defined contribution occupational retirement benefit schemes of public entities. These retirement benefit schemes enlarge the scope of social protection to more than just civil servants to cover employees of public entities. Through the investment of employer and employee contributions in approved asset classes and investment ventures, these schemes play an important financial role in securing a retirement future for the many citizens who participate in retirement benefit schemes.¹¹ Though certain aspects of social security such as unemployment benefit and family benefit are not covered in Kenya, retirement benefit schemes offer some other benefits typically at emigration or upon ill health or disability of the employee as well as last expenses benefit upon death of a member.

highlights selected relevant ILO Instruments that cover the nine principle branches in the Social Security (Minimum Standards) Convention, 1952 (No 102).

⁷ILO Convention, No 102 Social Security (Minimum Standards) Convention 1952, <blue.lim.ilo.org/cariblex/pdfs/ILO_Convention_102.pdf> accessed 10 July 2018.

⁸ International Labour Organisation, 'Ratifications for Kenya' <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103315> accessed 19 July 2017.

⁹ ILO, *Kenya: Developing an Integrated National Social Protection Policy* (International Labour Office, Geneva 2010) 4 <http://www.ilo.org/secsoc/information-resources/publications-and-tools/TCreports/WCMS_SECSOC_19224/lang--en/index.htm> accessed 10 July 2018.

¹⁰ *ibid*, ix.

¹¹ Emmeline Cooper, 'Pension Schemes and Sustainable Investing: The Promise of Deliberative Governance' (PSA Annual Conference, Brighton, 2016) 2.

Statistics from the Retirement Benefits Authority (RBA) provide that, in the half year period from June to December 2015, the assets under management of retirement benefit schemes had grown by Kshs. 6.8 Billion bringing the total assets under management in retirement benefit schemes to Kshs. 814.11 Billion.¹² In the half year to December 2016 the value of assets under management held by retirement benefit schemes hit close to the Kshs. 1 trillion mark.¹³ As at December 2016, retirement funds under management in the industry were confirmed to have grown to Kshs 912.66 Billion.¹⁴ The significant continued growth in the industry from year to year is a key indicator of the economic role that these funds play. So much so, as to attract the attention of the relevant stakeholders, including but not limited to members of schemes, service providers and government ministries, departments and agencies and international investors. Such growth, although not unprecedented, also attracts the hounds of mismanagement and misappropriation akin to what has been witnessed in schemes such as the National Social Security Fund (NSSF).¹⁵ The leadership of retirement benefit schemes thus becomes a key focus area because the greater the fund, the greater the risks of loss, and the greater the need for structures to ensure good governance and guide trustees in the implementation of a schemes vision.

Corporate governance is a key cog in a corporation's machinery, and according to the Organization for Economic, Co-operation and Development (OECD), it improves efficiency and enhances investor confidence. It also provides the structure through which a corporation's objectives are set and met and performance monitored. The International Labour Organisation in its Guide for Board Members in Africa on the governance of social security systems, views good

¹² Retirement Benefits Authority, 'Retirement Benefits Industry Performance Report for the Year 2015' 1 <<http://www.rba.go.ke/index.php/en/statistics/industry-performance-report?download=146:industry-brief-december-2015>> accessed 10 July 2018.

¹³ New rules on early reporting put pressure on retirement schemes' *Business Daily* (Nairobi, 18 January 2017) <<http://www.businessdailyafrica.com/markets/New-rules-reporting-pressure-retirement-schemes/539552-3522480-tnqi9e/index.html>> accessed 5 May 2017.

¹⁴ Retirement Benefits Authority, Retirement Benefits Industry Report for the Year 2016 <http://www.rba.go.ke/index.php/en/?option=com_phocadownload&view=category&id=72> accessed 10 July 2018.

¹⁵ Rawlings Otieno, 'The shocking verdict on Shs 5 Billion NSSF Project' *The Standard Digital* (Nairobi, 18 April 2014) <<https://www.standardmedia.co.ke/article/2000109649/the-shocking-verdict-on-sh5-billion-nssf-project>> accessed 5 May 2017. In a report issued by the Commission for Administrative Justice, the Managing Trustee of the NSSF was alleged to have misused public funds and maladministered the scheme in relation to the Kshs. 5.03 billion Tassia II project in Nairobi's Eastlands.

governance as key to effective and efficient social security schemes critical to the management of risks and resources of a scheme.¹⁶ In Clarks' research into pension fund governance, he admits that it has been difficult to design and implement a single code of conduct of pension funds as funds come in different shapes and sizes.¹⁷ However, attempts by OECD to regulate private pension shows its concern at the impact of the lack of governance on financial performance and stability of both types of institutions.¹⁸ The UK Pensions Regulator,¹⁹ in its code of practice for public service pension schemes has identified governance principles are helpful in governing the scheme, managing scheme risks, ensuring effective scheme administration and resolving scheme conflicts.²⁰

Due to the value which retirement benefits scheme provide, this study therefore seeks to determine whether the issues facing DC retirement benefits schemes of public entities could benefit from the adoption of corporate governance principles to improve the performance of the scheme. The study shall cover aspects of corporate governance such as the board of trustees including its composition and autonomy, transparency and disclosure including ways in which to maintain member confidence and assess risks and stakeholder relationships and managing conflicts. In doing so, the study will refer to the National Museums of Kenya staff pension scheme.

¹⁶ ILO, *Governance of Social Security Systems: A guide for Board Members in Africa*, (International Training Centre of the ILO, Turin 2010) 8

<<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwj-4Go1czcAhVLUhoKHSbvAIAQFjAAegQIAxAC&url=http%3A%2F%2Fwww.social-protection.org%2Fgimi%2Fgess%2FRessourcePDF.action%3Fressource.ressourceId%3D37499&usg=AOvVaw2sPTk2JbopqamOuvIpoQZ2>> accessed 20 July 2018.

¹⁷ Gordon Clark, 'Pension Fund Governance Expertise and Organisational Form' in John Evans, Michael Orszag and John Piggot (eds), *Pension Fund Governance: A Global Perspective on Financial Regulation* (Edward Elgar Publishing, Cheltenham, UK 2008) 14.

¹⁸ *ibid.*

¹⁹ Public body sponsored by the Department for Work and Pensions, which protects workplace pensions in the United Kingdom.

²⁰ The Pensions Regulator, 'Draft code of Practice No 14. Governance and Administration of Public Service Pension Schemes' 17 <<http://www.thepensionsregulator.gov.uk/docs/draft-code-14.pdf>> accessed 5 May 2017.

1.2 Statement of the problem

In defined benefits (DB) schemes, a member's retirement benefits are calculated based on their final pensionable salary, years of service and an accrual rate. On the other hand, in defined contribution (DC) schemes, the amount of retirement benefit received is dependent on a sustained contribution rate and adequate return on the investment of the scheme coupled with good management, fiscal or otherwise of the scheme by its trustees. The Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000, defines a defined contribution scheme as, 'a scheme in which members' and employers' contributions are fixed either as a percentage of pensionable earnings or as a shilling amount, and a members retirement benefits has a value equal to those contributions, net of expenses including premiums paid for insurance of death or disability risks, accumulated in an individual account with investment return and any surpluses or deficits as determined by the trustees of the scheme.'²¹

This study focuses on defined contribution schemes sponsored by public entities. Previously, public entities would make provision for retirement benefits through the defined benefit non-contributory model. This meant that the public entity and by extension the government assumed all responsibility of providing retirement benefits to their employees as a fixed amount determined by an applicable formula. However, the means of provision for retirement benefits for public service retirement benefit schemes was revised and the defined contribution model adopted.²² The employer and employee would from the date of the circular be required to contribute into the scheme. In a defined contribution scheme, the amount of retirement benefits received by a member at retirement or a beneficiary, is wholly dependent on the amount of contributions and investment interest received on account of those contributions. Therefore, DC schemes are extremely dependent on a steady contribution from the employer and employee as well as a high return on investments.

²¹ Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000, reg 3. <http://kenyalaw.org/lex/rest/db/kenyalaw/Kenya/Legislation/English/Acts%20and%20Regulations/R/Retirement%20Benefits%20Act%20Cap.%20197%20-%20No.%203%20of%201997/subsidiary%20legislation/docs/RetirementBenefitsAct3of1997_subsiary.pdf> accessed 13 July 2018 (Occupational Regulations).

²² Office of the Deputy Prime Minister and Ministry of Finance, 'Public Service Retirement Benefit Schemes approval by the Treasury prior to Registration by the Retirement Benefits Authority', Treasury Circular No 18/2010 24 November 2010.

The schemes of public entities are unique because of the impact of the decision to move to a defined contribution model. It would follow that a change in mindset of all stakeholders was required. Trustees of these schemes are required to make sound investment and asset management decisions that would impact the scheme positively. They should ideally collectively possess the requisite knowledge and skills mix to make investment and other decisions for the benefit of the members of the scheme. Members would need to have greater interest in the management of the scheme as the risks in DC schemes are borne by the members themselves. They would need to be updated on scheme issues and have an open and transparent mode of operations. The scheme would need to take up an autonomy from the sponsor, guided by the trustees and monitored by the members. The schemes would need to develop the necessary internal mechanisms to manage these kinds of risks.

Further, the sponsor obligation to pay contributions into the scheme becomes of absolute importance for two reasons. The first is the obligation to contribute as an employee and the second is the obligation to remit contributions deducted from an employee, as it is through a payroll system, fully in control of the employer that employee contributions are made into the scheme. In a nutshell, in DC schemes, there needs to be a sustainable and continuous flow of funds channeled into the scheme. This has an impact on investment income and ultimately retirement benefits earned by the member. The independence of scheme from the sponsor becomes crucial in determining and obtaining compliance with the laws.

The legal framework that exists to support defined contribution schemes places a high burden on the scheme trustees to ensure compliance within the scheme. Public entities differ from private entities in that compliance with the obligation to contribute into the scheme is linked to funding available and often determined by mainstream government through the relevant ministries. The DC schemes sponsored by these public entities would need to incorporate greater stakeholder management for scheme success.

The guidelines on terms and conditions of service of state corporations classifies them as either financial corporations, commercial and manufacturing corporations, regulatory corporations, public universities, training and research corporations, service corporations, regional

development authorities and tertiary education and training corporations.²³ The National Museums of Kenya is training and research corporation and with a greater reliance on the national government for funding than regulatory corporations and commercial and manufacturing corporations. The study outlines the National Museum as sponsor and scheme further in chapter 2. At the time of writing this study, the trustees and sponsor of the National Museums of Kenya Staff Pension scheme (NMKSPS) together with the regulator, had made significant efforts to revive the scheme. Other schemes of public entities facing similar problems had regulatory action taken against them under the Act, including interim administration and winding up of the scheme. The NMKSPS was one scheme which had avoided such regulatory action, and therefore the application of corporate governance could be discussed. It provided a unique opportunity for the study to consider any gaps that could be glossed over by corporate governance and ultimately impact scheme stability.

This study sets out to investigate the impact that the application of corporate governance principles in the management of DC schemes of public entities. These problems can be summarised as follows: (1) insufficient internal mechanisms that incorporate corporate governance (2) lack of a regulatory and legal framework to support these schemes (3) trustees are not empowered and lack independence from the sponsor (4) sponsor challenges that affect contributions. As good leadership influences good management, this study sets out to consider the benefits of corporate governance to defined contribution schemes of public entities with a reference to the National Museums of Kenya staff pension scheme.

1.3 Research Questions

The study shall be guided by the following research questions:

- a) What is the current regulatory, legal and institutional framework that supports corporate governance in retirement benefit schemes?

²³ The Republic of Kenya, Office of the President, 'Guidelines on Terms and Conditions of Service for State Corporations Chief Executive Officers, Chairmen and Board Members, Management and Unionisable staff' 23 (November 2004, Government Printer, Nairobi <<http://www.scac.go.ke/2015-02-16-09-56-36/scac-guidelines?download=2:scac-guidelines>> accessed 16 July 2018.

- b) Is the governance of the National Museums of Kenya Staff Pension Scheme in accordance with international best practice in the governance of retirement benefit schemes?
- c) If not, what are the necessary regulatory, legal and institutional reforms to bring DC schemes of public entities into international best practice so as to benefit employees who are members of such schemes?

1.4 Hypotheses

The study is based on the following three hypotheses:

- a) That the incorporation of corporate governance principles are key to the success of occupational retirement benefit schemes sponsored by public entities.
- b) That the existing regulatory, legal and institutional framework that governs occupational retirement benefit schemes in Kenya are not sufficient to ensure effective management and compliance of these schemes.
- c) That a failure to incorporate the necessary framework will ultimately lead to loss of retirement benefits and a failure to provide the necessary social security through old age income.

1.5 Objectives of the study

The main objective of the study is to investigate the application of good corporate governance practices in the management DC occupational schemes sponsored by public entities with a focus on National Museums of Kenya Staff Pension Scheme. To demonstrate the argument, the study will consider the regulatory, institutional and legal framework of the identified schemes and will consider the following ancillary objectives:

- a) To outline the regulatory, legal and institutional framework that governs occupational retirement benefit schemes in general;
- b) To consider the adopted corporate governance structures of National Museums of Kenya Staff Pension Scheme and how it compares to international best practice; and
- c) To give views on the reasons for failure of these type of schemes and provide possible solutions to the problem.

1.6 Theoretical framework

The preceding paragraphs of this chapter provided the background and described some challenges facing defined contribution occupational retirement benefit schemes sponsored by public entities. Subsequently, for those problems that lie within the scope of this study, the shareholder theory and agency theory shall underpin the study.

1.6.1 Shareholder theory

The shareholder theory propounded by Milton Friedman²⁴ argues that, “the sole responsibility of business is to increase profits.” It is based on the premise that the leadership of an organisation is employed as the agent of the shareholders to run it for their benefit, and therefore they are legally and morally required to serve their interests. The only qualification to the rule to make as much money as possible is “conformity to the basic rules of the society, both those embodied in law and those embodied in ethical custom.”²⁵ Shareholder theorists argue that organizations which employ governance oriented in this theory enjoy advantages in the market as their corporate governance is more flexible and tend to give room for fast adaption to market changes. They further argue that as the organizations are not burdened with stakeholders’ interest, they can enter into market more aggressively with adapted market requirements but at the same time it is easy for them to get out from inefficient investments more easily.²⁶

Trustees of retirement benefit schemes in Kenya stand as fiduciaries with a duty to act in the best interest of the beneficiaries of the trust and in accordance with the trust deed and rules establishing the scheme. This is a high standard of care bestowed upon a trustee and applies to all decisions on investment, administration and or management of the scheme. The ultimate

²⁴ Milton Friedman (1912-2006) was an American economist who received the 1976 Nobel Memorial Prize in Economic Sciences for his research on consumption analysis, monetary history and theory and the complexity of stabilization policy.

²⁵ Shareholder and Stakeholder Theories of Corporate Governance (*Corplaw Blog* 2013) <www.corplaw.ie/blog/bid/317212/Shareholder-Stakeholder-Theories-Of-Corporate-Governance> accessed 11 June 2017.

²⁶ Primož Dolenc, Igor Stubelj & Suzana Laporšek ‘What is the Objective of a Firm? Overview of Theoretical Perspectives’ in Stefan Bojnec, Josef Brada and Masaaki Kuboniwa (eds), *Overcoming the crisis: Economic and Financial Developments in Asia and Europe* (University of Primorska, 2010) 51 <<http://www.hippocampus.si/ISBN/978-961-6832-32-8/papers/dolenc.pdf>> accessed 17 July 2018.

responsibility for the trustees is to ensure an adequate benefit upon retirement, unemployment, immigration, invalidity or death either to a member or his designated beneficiaries.

In the context of scheme governance, the shareholder theory would focus on shareholders as members of the scheme. In adopting this theory, trustees are expected to manage the trust in a leadership that is largely accountable to the members at the expense of other stakeholders, including the sponsors. The best interest of the beneficiary is the basis against which decisions are to be made focusing on meeting the needs of the members of the scheme and other identified beneficiaries as opposed to those of the sponsor or service providers engaged with the scheme.

The shareholder theory can come out as myopic as it is blind to other competing interests that could play a key role in the overall success of an organization. To impress shareholders with a significant rate of return, leadership has often at times resorted to the manipulation of financial reports to portray a picture of good performance to the detriment of future sustainability. The application of this theory to retirement benefit schemes finds trustees so consumed with meeting the interests of the members that management of its relationships with its stakeholders is forgotten. It has been argued that the governance of pension funds is not without fault simply through the application of statute and trust deed and rules.²⁷ According to Clark, there remains a systemic problem of asymmetrical information that works against the efficacy of fund governance.²⁸ In essence, service providers often possess greater material knowledge than the scheme trustees on issues regarding the scheme. Management of these relationships is therefore crucial to ensuring sustainability and better administration and management. Including other stakeholders, such as the administrators, fund managers (where applicable), custodians and the sponsor, is part of realizing trustees' fiduciary duty.

²⁷ Gordon Clark, 'Expertise and Representation in Financial Institutions: UK Legislation on Pension Fund Governance and US Regulation of the Mutual Fund Industry' [2007] 2 21st Century Society: Journal of the Academy of Social Sciences 1-23.

²⁸ Gordon Clark, 'Pension fund governance, expertise and organisational form', in John Evans, Michael Orzag and John Piggot (eds), *Pension Fund Governance: A Global Perspective on Financial Regulation* (Edward Elgar Publishing, Cheltenham UK 2008) 12.

1.6.2 Agency theory

The agency relationship is defined as a relationship in which one or more persons called principal(s) engage the services of another called the agent to act on their behalf, which may include delegating decision-making powers to this agent.²⁹ The bedrock of the agency theory is the assumption that the interests of the principal and those of the agent will always converge. It is therefore the responsibility of the principal that he put in place incentives that will attract and align the interest of the agent to those of the principal.³⁰ Divergence of interests of the principal and those of the agent will always result in the reduction of the principal's welfare which in most cases is viewed as residual loss. Just like the agency theory operates under corporate law, the same theory can be applied to the structure of management of a retirement benefits scheme, where the board of trustees operates as the agent of the members contributing towards into the scheme fund.

According to Clark, pension schemes are particularly vulnerable to the agent theory problem and thus, proper internal governance is seen as crucial to the welfare of the beneficiaries.³¹ This theory can be conceptualized for the purpose of this study from two angles. The first is the agency-principal relationship between the trustees and the members and sponsor, where they are tasked to manage the scheme and make decisions on their behalf. The second is the agency-principal relationship between the trustees and the service providers. It is argued that because of this principal-agent problem, trustees' motivations are difficult to observe, and the interests of the administrators and service providers are not always apparent³². The ultimate loser is therefore the beneficiary, who bears the risk and ultimate cost of market failures and trustee decision making. Further, as agents of the members, trustees are expected to bring a certain level of expertise that would aid in the decision making of the scheme. It is therefore, not only important for trustees to have the required knowledge and skills, it is also necessary that the service providers who support the trustees are able to bring the required expertise to enable effective decision-making.

²⁹ Charles W. L. Will, Thomas M. Jones, 'Shareholder-Agency Theory' [1992] 29 (2) *Journal of Management Studies* 132 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-6486.1992.tb00657.x>> accessed 11 June 2017.

³⁰ *ibid* 8.

³¹ Clark, *Pension Fund Governance Expertise and Organisational Form* (n28) 12.

³² *ibid* 12.

In general, the composition of the trustees should reflect the current circumstances and needs of the organization. For example, it will be prudent for a board of trustee to have a lawyer as one of the members so that it can be guided appropriately in legal issues. Corporate governance models adopted by different jurisdictions require that boards should have an expert among them in various fields so as to enhance the capacity to arrive at sound decisions. The Mwongozo³³ is the code of governance for state corporations released for compliance in 2015. It provides the framework for the incorporation of good governance within boards of state corporations. This code requires that there be at least one Board member who is a financial expert. The OECD guidelines advocate that a governing body should hire an investment expert if they do not have one amongst themselves. This theory directly applies to the need for a well-blended board of trustees, who should be elected from among persons of diverse educational and knowledge competency. As trustee avail themselves of the necessary support in scheme management, they should stand guided that this support is supplemental to their existing capabilities and serves to increase their effectiveness.

1.7 Justification of the study

Good governance is increasingly recognized as an important aspect of an efficient pension system. At the individual scheme level, the application of corporate governance would ensure that the business environment is fair and transparent and that scheme trustees are held accountable for their actions. Strong corporate governance structures would ensure proper financial governance, independence from the sponsor, well managed relationships between the scheme trustees and relevant stakeholders and enhanced investment performance and benefit security. On the other hand, weak corporate governance is likely to lead to waste of scheme funds, mismanagement, confusion and at worst times corruption.

Corporate governance provides a robust, but at the same time flexible reference for policy makers and market players to come up with their own innovative framework of corporate

³³Public Service Commission and State Corporations Advisory Committee, *Mwongozo, Code of Conduct for State Corporations* (Nairobi, 2015) <<http://www.jkf.co.ke/downloads/MWONGOZO.pdf>> accessed 11 July 2018. This code was developed by the State Corporations Advisory Committee and came into force through Executive Order No 7/2015, Implementation of Mwongozo: The code of governance for state corporations, March 2015, issued by the Executive Office of the President, Nairobi.

accountability that fits with the demands of any scheme. Good governance can aid trustees in better scheme management, increased efficiency and transparency and accountability to its members. For the regulator, good governance shall bring its focus to better scheme performance through the management of risks and soundness of its management structure. When schemes are thriving, they assist the state in ensuring the realization of an important economic and social right.

This study proposes to consider a case for further entrenchment of good corporate governance practices in the management of occupation retirement benefits schemes of government owned entities. To do so, the study shall consider the applicability of corporate governance in the performance of the National Museums of Kenya Staff Pension Scheme (DC) and will consider how the insistence on the practices of good governance could improve the efficiency and effectiveness of its management.

Data from the retirement benefits Authority shows that the challenges of underfunded defined benefit schemes have replicated in the defined contribution schemes. Whereas the move by government to the DC model was heralded as a reduction in risks for the sponsor, it did not take away the obligation of the sponsor to make necessary contributions into the scheme. The current deficits in defined contribution schemes are also a result of the conversion from DB to DC schemes, where members transferred existing liabilities into the new schemes. This coupled with the failure to remit contributions into the newly formed scheme has compounded the problem further. At the time of this study, the National Museums of Kenya staff pension scheme had a total outstanding contribution plus interest of Kshs110 million as at December 2016.

Given this scenario, there is a need to consider a solution to the problem in general and specifically how corporate governance principles could be utilized to impact better scheme performance and management. Further, good governance is a principle enshrined in Article 10 of the Constitution of Kenya, 2010 and elevated to the status of a national value. Article 10 (2) (c) provides that:

- 10 (2) The national values and principles of governance include—
- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development.³⁴

As a constitutional provision, the principles of good governance should be adopted by the leadership of any business-oriented body be it corporations, publicly owned companies, state corporation or any other legal arrangements.³⁵ Retirement benefit schemes are set up under trusts which qualify as a legal arrangement. As mentioned earlier, one method of provision of social security in Kenya is through the set up and contribution and management of retirement benefit schemes. As legal entities, good governance could be crucial in the management of retirement benefit schemes under and by extension, the provision of social security. This study shall consider how the incorporation of good governance principles as enshrined both in the Constitution and relevant retirement benefits law can aid in the improvement of the situation of DC schemes with a focus on National Museums of Kenya staff pension scheme.

1.8 Research Methodology

This study has been undertaken based on secondary research with a dependence on literally materials. Sources include textbooks, journals, newspaper articles and internet sources such as online journals, publications and commentaries on retirement benefit schemes, the sector, and the adequacy of corporate governance structures in defined contribution occupational retirement benefits schemes sponsored by public entities.

There will be some primary data collected by way of targeted respondent interviews with scheme officers, trustees and administrators using questionnaires. The questionnaire focusses largely on the framework and mechanisms in place for scheme institutional corporate governance procedures. The questionnaires and list of respondents is provided in Appendix I of this study.

³⁴ Constitution of Kenya, art 10 (2).

³⁵ The national values and principles of governance in article 10 of the constitution bind all persons who apply the constitution, enacts or interprets any other law, and who make and implement public policy. These values therefore extend to trust regimes in Kenya through article 260 of the Constitution, which state that a person shall include a company, association or other body of persons whether incorporated or unincorporated. The national values and principles in article 10(2) cover governance at paragraph (c).

A case study will be used to consider the extent of application of existing corporate governance principles in defined contribution occupational retirement benefit schemes sponsored by public entities. The use of a case study will allow the study to narrow down on specific governance issues peculiar to such type of schemes. The sponsor of the scheme is categorized as a training and research state corporation and as mentioned above, with a greater reliance on the national government for funding than regulatory corporations and commercial and manufacturing corporations. A case study on this scheme would allow a research into the kind of government response to the crisis.

Other sources of information for the study included principles and codes from various international bodies involved in the retirement benefits sector at a global level. These will provide industry practices in other jurisdictions and allow a comparison between those selected jurisdictions and the Kenyan scenario. The Constitution of Kenya, 2010 and various Acts of Parliament which refer to retirement benefit schemes and provision of social protection in Kenya have also been used in this study. Lastly, the author works for the Retirement Benefits Authority in Kenya and this has provided a unique opportunity to inquire into some practical issues concerning the scheme selected.

1.9 Literature Review

Retirement benefits scheme funds play an important role as both channels for retirement savings and as players in the financial system of the country. This combined role makes them a prime concern of governments and regulators from a variety of perspectives. Section 32 of the Retirement Benefits Act³⁶ defines scheme funds as that into which “all contributions and investment earnings, income and all other moneys payable under the scheme rules and provisions of the Act shall be paid”.³⁷ Scheme funds, however, are by their nature subject to potential conflicts of interest arising between the fund administrators, the trustees and the ultimate beneficiaries of the fund. Scheme funds, therefore, require a set of internal policies and external regulations (such as legislative framework) to ensure that they are managed in the best interest of

³⁶ The Retirement Benefits Act No 3 of 1997 Laws of Kenya (National Council for Law Reporting, Revised Edition 2016 [2013]) < <http://www.kenyalaw.org/lex//actview.xql?actid=No.%203%20of%201997>> accessed 18 July 2018. (Retirement Benefits Act)

³⁷ *ibid* s 32.

beneficiaries. The balance between internal statutes and external regulations is a delicate one and depends largely on a country's social and legal structure.³⁸

Evans, Orszag and Piggot in the introduction to *Pension Fund Governance: A Global Perspective on Financial Regulation*,³⁹ write that good governance of pension funds is crucial, not only in protecting the interests of contributors, but also in advancing good governance at the enterprise level.⁴⁰ They link corporate governance to ensuring contributions into the scheme form a significant fraction of an organization's total obligations. Their understanding of governance is drawn from the need to ensure interests of stakeholders are met and reliance is placed on the leadership of the trustees to adequately oversee and manage the scheme funds. Their commentary acknowledges the work of the OECD in drawing to the regulators' attention the need for better governance in schemes and even in providing an approved set of guidelines.⁴¹ In their opinion however, the guidelines have not been translated into a practical, workable regulatory and supervisory framework.⁴² The relevance of the work by Evans, Orszag and Piggot is found in the fact that they acknowledge that corporate governance is crucial to the success of retirement benefit schemes. Further, it brings out the importance of a seamless framework that requires to be adopted by a regulator in a practical fashion. This study will focus on this general premise looking at the retirement benefits industry in Kenya and the manner in which corporate governance can be adopted. It will consider whether the regulator has adopted a workable framework for corporate governance in the retirement benefits industry in Kenya.

Miles and Zhang in, *Improving Corporate Governance in State-owned Corporations in China: Which Way forward?*⁴³, noted that the purpose of corporate governance is to always align the interest of directors with the shareholders, and that to mitigate the agency problem, priority

³⁸OECD, *Guidelines for Pension Fund Governance* (OECD, 2009) 6 <<http://www.oecd.org/pensions/private-pensions/34799965.pdf>> accessed 10 September 2016.

³⁹ John Evans, Michael Orszag and John Piggot, *Pension Fund Governance: A Global Perspective on Financial Regulation* (Edward Elgar Publishing, Cheltenham UK 2008).

⁴⁰ *ibid* 1.

⁴¹ *ibid* 2.

⁴² *ibid* 3.

⁴³ Lilian Miles and Zhong Zhang, 'Improving Corporate Governance in State-Owned Corporations in China: Which Way Forward?' [2006] 6 (Journal of Corporate Law Studies 213 <<https://www.tandfonline.com/doi/abs/10.1080/14735970.2006.11419951>> accessed 12 June 2017.

should be given to strengthening the rights of shareholders so that they can hold the directors to account.⁴⁴ In their discussion of corporate governance in State Owned corporations in China, they note that in order for there to be good corporate governance, the board must act in a responsible manner and in the best interests of a company.⁴⁵ Within the scheme context, this would call upon scheme trustees to act in the best interest of the beneficiaries and the rights of the beneficiaries should be strengthened so that they are able to monitor their actions. In their study of these companies, they noted that where there is state control over the appointment and employment of the directors there is no need for a regulatory framework as their conduct is ratified by the state.⁴⁶ They further argue that as long as the standards set for corporate governance are ambiguous, their effectiveness will remain a purely academic exercise.⁴⁷ Miles and Zhang give various practical methods as way forward including the strengthening of the rights of shareholders and institutional shareholder activism.⁴⁸ This study is relevant as it recognizes the political aspect of entities in which there is some state control. It is also relevant in bringing to the fore the need for corporate governance to cease its ambiguity and be translated into a practical exercise. While the work by Miles and Zhang is relevant as stated, it focuses on state corporations based in China and not retirement benefit schemes. This study is specific to corporate governance in the retirement benefits sector and more particularly schemes sponsored by public entities in Kenya.

Carmichael and Palacios argue that good corporate governance also extends to good financial reporting expected on the part of scheme trustees.⁴⁹ Shareholders and the trustees need sound and reliable financial information for them to assess the performance outlook of the scheme and evaluate management performance. Effective governance of pension funds should focus on ensuring that the board of directors has the competence to oversee prudent financial reporting

⁴⁴ *ibid* 214.

⁴⁵ *ibid* 247.

⁴⁶ *ibid* 222.

⁴⁷ *ibid* 223.

⁴⁸ *ibid* 233-246.

⁴⁹ Jeffrey Carmichael and Robert Palacios, A Framework for Public Pension Fund Management in Alberto Musalem and Robert Palacios (eds), *Public Pension Fund Management, Governance, Accountability and Investment Policies, Proceedings of the Second Public Pension Fund Management Conference* (World Bank, Washington 2003) <<http://documents.worldbank.org/curated/en/640001468782368218/pdf/302250PAPER0public0pension.pdf>> accessed 17 July 2018.

anchored in good corporate governance principles. Such principles would encourage internal controls based on existing policies and with assurance and verification from outside independent auditors. Diversity in the board room can have an impact on the performance outcome of pension schemes. In addition to traditional diversity elements such as ethnicity, race, gender and minority groups, it is important to have diversity in knowledge, skills and relevant experience in the line of investment that defined contribution schemes have elected to pursue. Their study is very relevant to this study as it focusses on the incorporation of corporate governance at the board of trustees level. This study goes a step further to consider the regulatory and legal framework necessary to support institutional policies and focuses on more than the financial aspects of pension fund governance.

Kowalewski⁵⁰ in his study on the link between pension fund performance and corporate governance found that external and internal governance mechanisms in pension plans in Poland are weak.⁵¹ Just like Evans, Orszag and Piggott, Kowalewski notes the surprising lack of research into the impact of the governance structures in privately managed pension funds.⁵² In his study, he notes that in contrast to DB plans, the governance structure of DC plans has even more importance as the benefits are based on contributions to the fund and investment performance and the beneficiaries do not have complete contracting ability.⁵³ The key focus of his study is the agency problem, and therefore, he focuses on leadership of schemes and the study suggests that board composition plays an important role in the success of a scheme. He concludes that more focus be put on the internal mechanisms taking into account the different interests of key stakeholders.⁵⁴ Kowalewski's study recognizes the importance of internal governance structures in the management of pension plans in Poland. This study intends to fill the gap of outlining the importance of an adequate governance structure in DC plans in Kenya with a focus on the impact of the leadership of retirement benefit schemes.

⁵⁰ Oskar Kowalewski, 'Corporate Governance and Pension Fund Performance' [2012] 6 (1) Contemporary Economics, 14-44 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178363> accessed 18 July 2018.

⁵¹ *ibid* 42.

⁵² *ibid* 14.

⁵³ *ibid* 15.

⁵⁴ *ibid* 42.

The United Nations Conference on Trade and Development Guidance on Good Practices in Corporate Governance Disclosure⁵⁵ provides, *inter alia* that, one of the major responsibilities of the board is to ensure shareholders and other stakeholders are provided with disclosures on financial and other operating costs of any entity that the board of directors have been entrusted with governing.⁵⁶ It is argued that these disclosures enable shareholders to make sense of the kind of business the entity is involved in, its current state of affairs and how it is being guided to the future. The adoption of the International Financial Reporting Standards (IFRSs) to represent the financial position of an organisation, has taken away the element of creative accounting and is a recognized benchmark for financial reporting thus improving the quality of financial disclosures.⁵⁷ The guidance concludes with the suggestion on the use of “comply or explain” mechanisms, which allows investors and other stakeholders greater access to information about the corporation.⁵⁸ This guidance focuses primarily on disclosures, which companies should make an important aspect of their corporate governance mechanisms. However, this study will discuss disclosures in the context of their requirement for retirement benefit schemes and what these disclosures would mean for accountability of trustees to beneficiaries and enhancement of transparency and accountability.

Clark⁵⁹ opines that, “pension governance defines accountabilities, establishes authority levels, specifies mechanisms of enhancing compliance with the law and enables provision of accurate, timely and reliable financial information to the stakeholders.”⁶⁰ Clark predominantly analyses the agency problem brought about by trustee representation in pension funds in the United States and United Kingdom – and even hypothesizes on the issue of ‘representative democracy’.⁶¹ According to Clark, decision-making is often the responsibility of committees, boards and agencies assuming that smaller, specialized units of decision-making best resolve many issues.

⁵⁵ United Nations Conference on Trade and Development (UNCTAD) ‘Guidance on good practices in corporate governance disclosure (United Nations, New York and Geneva 2006) <http://www.unctad.org/en/docs/iteteb20063_en.pdf> accessed 18 July 2018.

⁵⁶ *ibid* 3.

⁵⁷ *ibid* 4.

⁵⁸ *ibid* 31.

⁵⁹ Gordon Clark, ‘Expertise and Representation: UK Legislation on Pension Fund Governance and US Regulation of the Mutual Fund Industry’ [2007] 2 (1) *Journal of the Academy of Sciences* 1 -23.

⁶⁰ *ibid* 3.

⁶¹ *ibid* 3.

As the board of trustees is a product of representative democracy and a pragmatic response to large numbers and complexity, these boards are considered to have efficaciously combined representation with expertise. The study however showed that while representative selection provides legitimacy for expertise, the latter may be compromised by the former in matters requiring sophisticated judgment. Though Clark's article focuses on compliance with the law there is no particular emphasis on the adequacy or lack thereof of the legislative frameworks. This study focusses on the Kenyan aspect of governance of retirement benefits and considers the regulatory and legislative frameworks to the extent that it is crucial to success of retirement benefit schemes sponsored by public entities.

Pension fund governance, according to Stewart and Yermo,⁶² are structured according the requirements of the law available in each country but they tend to have a convergence of commonality in their systems of control. In reviewing governance practices from country to country, they found that the board of trustees may therefore be structured either as single or dual depending on the legal form and rules that the scheme has adopted.⁶³ In their analysis of a pension fund, the governing board is the equivalent of the board of directors of a corporation, having the ultimate responsibility for protecting the shareholders assets.⁶⁴ The trustees would have the fiduciary duty to ensure that the beneficiaries receive a benefit at retirement and that the fund is sustained.

In championing the need for good governance, they find that its incorporation can have such positive side effects as creating trust amongst all stakeholders, reducing the need for prescriptive regulation, and facilitating supervision.⁶⁵ In their opinion, good governance and good performance is linked, and a board that is self-evaluating and clear on its mission with good risk management and performance monitoring system translates to excellent returns on the pension scheme. Before a board decides to venture into an investment, it is best that it links the investment strategy to the governance capacity of the board, so that for instance, it must ask itself

⁶² Fiona Stewart and Juan Yermo, 'Pension Fund Governance: Challenges and Potential Solutions' (2008) OECD Working Papers on Insurance and Private Pensions No.18 < <https://www.oecd.org/finance/private-pensions/41013956.pdf>> accessed 18 July 2018.

⁶³ *ibid* 5.

⁶⁴ *ibid*.

⁶⁵ *ibid*.

whether it will be able to monitor alternative investment before it can include it in the schemes investment strategy. For instance, the two postulate that basic training of trustees on how to oversee fund managers has led to improved performance through advanced money and management.

Stuart and Yermo further point out that a fundamental aim of pension fund governance rules is to minimize the potential agency problems and conflicts of interest that can arise between the fund members and those responsible for the fund's management. This conflict can adversely affect the security of pension savings and promises.⁶⁶ Incorporating good governance is often in an attempt to attain high returns on investment while at the same time maintaining low cost of operations for all stakeholders. Beyond this, it has the effect of creating trust among all stakeholders reducing the need for the adoption of prescriptive rules. They continue to postulate that 'many of the pension fund problems emanate from the weaknesses in the governing body,'⁶⁷ in this case, trustees. Some of the weaknesses determined by the team include lack of trustee knowledge of responsibilities, inadequate mechanisms for trustee selection, a lack of self-assessment by the governing board and a failure to identify and address conflicts of interest.⁶⁸

It is their position that the failure of the scheme trustees to develop a sound plan and strategy leads to lack of direction in the scheme.⁶⁹ This lack of direction ultimately leads to employer employee conflict, poor performance and a lack of appreciation of the role to be played by the board and the external service providers. From their study, best practices from across the globe need to be implemented so that there is a clear definition of duties of parties, establishment of a clear vision and mission, creation of board of trustee committees (subject to availability of resources), and an annual restatement of governance provisions. Their study is relevant as it contains some reflections on Kenya, and the situation is not dire. They point out the efforts of the Retirement Benefits Authority in carrying out research to identify needs and targeting of their education resources effectively at scheme Annual General Meetings (AGMs).

⁶⁶ Stewart and Yermo (n62) 9.

⁶⁷ *ibid* 12.

⁶⁸ *ibid* 12-13.

⁶⁹ *ibid* 14.

Retirement benefit schemes in Kenya are set up under an irrevocable trust, and this model requires trustees to manage the affairs of the scheme. While Stewart and Yermo's study highlights elements of the Kenyan jurisdiction in general together with other jurisdictions, this study focuses on the Kenyan position. While their study discusses the sector generally this study shall emphasize occupational retirement benefit schemes specifically those sponsored by public entities with a reference to National Museums of Kenya staff pension scheme. While their study focuses greatly on the trustees and the need for strategic direction say internal mechanisms, this study shall consider the adequacy of the legal and regulatory framework in Kenya.).⁷⁰

Nyakundi in his thesis, *Problems facing Kenya's Pension system: A case for Reform of Laws Relating to Pensions*,⁷¹ considered the case for reforms in the law relating to pensions by focusing on the various ways in which pension is structured in Kenya citing its fragmented nature. The thesis highlights the deficiencies in the system touching on the civil service pension scheme, the NSSF and private occupational retirement benefit schemes. Nyakundi advocates for the pension for civil servants to be provided for under an act of parliament so as to bring it under the regulatory framework of the Retirement Benefits Authority and the benefit structure be redefined to make the scheme more affordable and sustainable.⁷² With regards to the National Social Security Fund (NSSF) he suggests that governance would be enhanced by enacting new legislation and decentralizing management of the scheme fund in order to enhance transparency.⁷³ In the case of funding of private occupational retirement benefit schemes, better governance would be realised by extending criminal sanctions to employers who fail to remit all contributions and separating the role of fund management and investment.⁷⁴ Regarding DC occupational schemes, his study found that the problem of underfunding thrives because of non-remittance of contributions to the scheme by the sponsor⁷⁵

⁷⁰ *ibid* 24.

⁷¹ David Nyakundi, 'Problems Facing Kenya's Pension System : A Case for Reforms of Laws Relating to Pensions' (LLM Thesis , University of Nairobi 2006).

⁷² *ibid* vii.

⁷³ *ibid*.

⁷⁴ *ibid*.

⁷⁵ *ibid* 46.

His study found that even as far back as 2003 the problem of non-remittance in occupational schemes existed. In his opinion, the pension system in Kenya was then ripe for reforms to address the limited coverage and to reduce old age poverty.⁷⁶ In his study, a proactive approach to supervision is touted which would enable prompt and accurate enforcement of the law against defaulting schemes. In order to be more proactive, the Retirement Benefits Authority rolled out a risk based supervision model in six years ago in June 2010.⁷⁷ The study also advocated for improving asset management of private occupational retirement benefit schemes so that there is no over reliance on an investment advisor who many times are the fund managers, to make decisions.⁷⁸ At the beginning of writing this study in 2016 almost 10 years following Nyakundi's study, the problems in occupational schemes of public entities persist.

While Nyakundi's study is an excellent showcase of the entire retirement benefits sector, it does not pick out the specific challenges that face occupational retirement benefit schemes sponsored by public entities. Further, his study was undertaken in the year 2006, and many of the recommendations highlighted in the previous paragraph have been implemented. At the time of this study, these schemes were still facing challenges despite the implementation of these recommendations. This study is a targeted discussion on schemes sponsored by public entities, and what more can be done on the regulatory and institutional framework to enhance their compliance with the law.

Kyanda in *Corporate Governance as a Strategy to Improve Performance in Pension Funds*,⁷⁹ sought to determine whether good corporate governance practices have improved administrative efficiency, investment returns and improved the Kenya Power Pension Fund's ability to attract and retain employees as key parameters of performance.⁸⁰ The findings, in the affirmative, support one of the bases of this study – that proper and improved governance improves the

⁷⁶ *ibid.*

⁷⁷ RBA, 'Retirement Benefits Authority Supervision Framework' < <http://www.rba.go.ke/index.php/en/regulatory-framework/regulatory-framework-c/supervision-framework>> accessed 13 September 2016.

⁷⁸ Nyakundi (n 71) 104-105.

⁷⁹ Henry K Kyanda, 'Corporate Governance as a Strategy to Improve Performance in Pension Funds' (MBA thesis, United States International University 2014). <<http://erepo.usiu.ac.ke/bitstream/handle/11732/151/Henry%20Kyanda.pdf?sequence=1&isAllowed=y>> accessed 4 September 2016.

⁸⁰ *ibid.*

efficiency of government owned retirement benefit schemes. While the focus on Kyanda's study was on a scheme which little challenges, and the impact on employee retention, this study focuses on schemes sponsored by a non-commercial state corporation, which has a heavier reliance on the national government for funding. Further, the focus of this study is the ultimate failure of the retirement benefit scheme to provide the expected social security in terms of benefit to its members upon retirement.

Masinde and Olukuru⁸¹ analyzed the impact of pension reform in the Kenyan pension industry since the inception of the RBA in 1997 and at the time of enactment of the NSSF Act, 2013. Their study examined the link of the reforms within the NSSF Act to the general economic growth of the country as well as the challenges to that reform. The conclusion of the study is that all employers must now enlist their employees in a retirement benefit scheme or the NSSF.⁸² As at the time of writing this study, The NSSF Act, 2013 was yet to be operationalized, due to an injunction provided by the courts.⁸³ Their study is of relevance in considering the move to a mandatory scheme for all employers while in the current regime, the decision to provide pension for one's employees is voluntary and not mandatory. While the study focuses on the state mandatory scheme, this study considers a voluntary scheme set up for the sake of the employees and does not touch on the impact of the NSSF. This study will consider already existing schemes and the role they play in pension provision.

As gleaned from the literature sampled, few contributions on the subject of governance have not touched directly on corporate governance in the retirement benefits sector. Those studies that have been done have had an international basis. Further, there has been a lot of focus on the application of corporate governance to companies and state owned corporations. None of the studies have touched directly on corporate governance of occupational retirement benefit

⁸¹ Victoria Masinde and John Olukuru, Impacts of Pension Reforms on the Kenyan Pension Industry [2015] ESJ 168-76 <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.886.5998&rep=rep1&type=pdf>> accessed 4 September 2016.

⁸² *ibid* 175.

⁸³ *Kenya Plantation & Agricultural Workers Union V Board of Trustees, National Social Security Fund & Another* High court Petition No. 11 of 2014 [2014] eKLR. Ongoya J issued interim orders staying the implementation of sections 18, 19, 20 and 71 of the NSSF Act 2013 on 25 June 2014.

schemes sponsored by public entities in Kenya. However, the literature is full of relevant points that could be applied to the Kenyan situation and these will inform this study.

The common thread is a call for a framework for corporate governance both external, in the form of laws, regulations and guidance, and internal mechanisms within the entities in order to reap the benefits of good corporate governance such as efficiency and performance and meeting shareholder demands.

1.10 Chapter breakdown

Without inculcating good corporate governance practices in the existing legal and structural framework in the management of occupational retirement benefit schemes of government owned entities, trustees could find it difficult to maximize investment returns for the members and beneficiaries. This study will consider the importance for those entrusted with the scheme management, of embracing good corporate governance principles to deliver a retirement benefit.

There shall be four chapters in this study as outlined below:

1. Chapter One: Introduction

This first chapter has provided a background of corporate governance, and the retirement benefits industry in Kenya and the necessity for saving for retirement. This chapter outlines the statement of the problem and provides a justification for the study. It highlights the objectives of the study and provides the theoretical framework that underpins the study as well as a literature review on the various studies and research conducted in the field of retirement benefits and corporate governance noting the gaps that this study intends to fill.

2. Chapter Two: Review of the Regulatory, Legal and Institutional framework for corporate governance in defined contribution occupational schemes sponsored by public entities.

This chapter shall provide a review of the regulatory, legal and institutional framework for corporate governance in the sector generally and particularly in occupational retirement benefit schemes. In the regulatory framework, the study shall consider the provisions of the

retirement benefits act and specifically the Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations, 2000. The legal framework shall discuss the concept of a trust and the trust deed and rules. The institutional framework shall cover scheme issues such as the interplay between the trustees, service providers and the membership.

3. Chapter Three: Case study for international best practices and National Museums of Kenya Staff Pension Scheme

The study will then consider the governance practices in selected jurisdictions of Canada and the United Kingdom selected as they retain the common law concept of trust within their domestic laws, just like Kenya.⁸⁴ Thereafter this chapter shall outline the challenges faced in the National Museums of Kenya staff pension scheme by outlining the existing governance practices in the scheme in tandem with the existing governance practices expected from the regulator of the industry. The study will then consider specific governance issues of board selection, board skills and competence and, transparency and disclosure. The practices in these jurisdictions together with the consideration of NMK SRBS would lead to the identification of the gaps in governance practices.

4. Chapter Four: Summary of findings: Conclusions and Recommendations

This chapter shall summarize the findings on corporate governance in occupational schemes of retirement benefit schemes sponsored by public entities and make suggestions towards the enhancement of corporate governance in the case study scheme. Thereafter, there shall be a determination of whether the hypothesis put forward was tested and established and whether the study met its objectives. The chapter shall conclude on whether there is a need to entrench good corporate governance in NMKSPS and by extension, other occupational retirement benefits of public entities.

⁸⁴ Masinde and Olukuru (n81) 168.

CHAPTER TWO: Review of the framework for corporate governance in defined contribution occupational schemes sponsored by public entities.

2.1 Introduction

The World Bank report on averting the old age crisis offers a widely used classification of pension into three pillars.⁸⁵ The first pillar is public pensions which are statutory plans administered by the state. The second pillar is the occupational pension schemes which are private supplementary plans linked to an employment relationship but can also be established either in employment contracts and are usually sector or profession-based.⁸⁶ In Kenya, the decision to set up a retirement benefits scheme is voluntary and provides a supplement to the benefits the NSSF can offer. The third and final pillar involves personal pensions, which include individual retirement benefit schemes.

Retirement benefit schemes in Kenya are established either under an act of parliament or under a trust deed with rules establishing an irrevocable trust. In all the methods of pension provision, one thing rings true, that trustees of these schemes are obligated to meet their fiduciary duties while managing the scheme fund for the benefit of the ultimate beneficiaries. A trust is not a legal person, like an individual or company, capable of owning property however, for there to be a trust, property must be subject to a trust, so the property will be owned by trustees.⁸⁷

2.2 Review of the legal framework

In Kenya, the requirement to provide social security and more particularly old age income has manifested through the setting up of retirement benefit schemes, largely linked to employment. The methods of pension provision can be summarized as follows. The first method is a scheme for public service under the Pensions Act⁸⁸ and under the Public Service Superannuation Scheme

⁸⁵ World Bank, *Averting the Old Age Crisis: Policies to Protect the Old and Promote Growth* (OUP, New York 1994) <<http://documents.worldbank.org/curated/en/973571468174557899/pdf/multi-page.pdf>> accessed 23 August 2017.

⁸⁶Ron Davies, *Occupational pensions 'Second pillar' provision in the EU policy context*, (Library of the European Parliament 2013) 2

⁸⁷ D.J. Hayton, *The Law of Trusts* (Sweet & Maxwell, UK 2003) 3.

⁸⁸Pensions Act No 31 of 1950

<<http://kenyalaw.org/lex/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/P/Pensions%20Act%20Cap.%20189%20-%20No.%2031%20of%201950/docs/PensionsAct31of1950.pdf>> accessed 23 August

Act⁸⁹. The former Act provides for the provision of pension, gratuities and allowances for officers since its date of commencement in 1942 and continues in force to date. The latter Act establishes a contributory scheme for public service employees and commenced in the year 2012. Though the scheme legally commenced in 2012, it is yet to roll out due to fears from employees on whether they can bear the financial responsibility to contribute into the scheme. The set contribution rates may appear high in light of their existing salaries. The trustees have not been appointed to the board and this delay has also impacted the roll out of the scheme.⁹⁰ The set-up of the 2012 scheme for public servants was in line the government directive to convert all schemes to defined contribution schemes in order to contain risks, especially of funding, associated with defined benefit schemes.⁹¹

The second method of provision is through the National Social Security Fund (NSSF) established under the National Social Security Fund Act No. 45 of 2013,⁹² which covers employees of persons, public bodies, firms, corporations or companies and the government who have entered into a contract of service. The scheme targets formal sector workers and is a mandatory statutory scheme. Before the enactment of the 2013 Act, the previous fund provided for a contribution of Kshs. 300 per employee. However, the provisions under the new Act require a much higher rate of contribution in an attempt to provide an adequate replacement rate upon retirement. The 2013 Act, sought to meet the scheme objective through a first and second tier of contribution. The first tier provides for a mandatory contribution into the fund at 12% of an

2017. An act of parliament to provide for the grant and regulating f pensions, gratuities and other allowances in respect of the public service of officers under the Government of Kenya.

⁸⁹ Public Service Superannuation Scheme Act No 8 of 2012 <

<<http://kenyalaw.org/lex/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/P/Public%20Service%20Superannuation%20Scheme%20Act%20Cap.%20190A%20-%20No.%208%20of%202012/docs/PublicServiceSuperannuationSchemeAct8of2012.pdf>> accessed 25 August

2017. An act of parliament to establish the Contributory Public Service Superannuation Scheme for providing retirement benefits to persons in the public service and for connected purposes.

⁹⁰ 'Hurdles delay roll out of civil servants pension plan' *Business Daily* (Nairobi, 14 August 2017) <<http://www.businessdailyafrica.com/economy/Hurdles-delay-rollout-civil-servants-pension/3946234-4044448-16xmap/index.html>> accessed 25 August 2017.

⁹¹ Office of the Deputy Prime Minister and Ministry of Finance, *Public Service Retirement Benefits Schemes approval by the Treasury prior to Registration by the Retirement Benefits Authority*, Treasury Circular No 18/2010 24 November 2010.

⁹² National Social Security Fund Act No 45 of 2013

<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/National_Social_Security_Fund_Cap._258_.pdf> accessed 26 August 2017. An act of parliament to establish a National Social Security Fund to provide for contributions to and the payment of benefits out of the Fund; and for matters connected therewith and incidental thereto.

identified lower earnings limit. The employer and employee shall each contribute 6% of their earning. The lower earnings limit is set at Kshs. 6,000 in the first year and gradually increases to Kshs. 9,000 in the fourth year of contribution. Thereafter, the lower earnings limit shall be as per the determined national minimum wage.

The employers may opt to contract out of the second tier of contributions, to a scheme it either establishes as a private occupational scheme, or opt to participate in an individual retirement benefit scheme, provided that the scheme provides benefits in the same manner as the second tier of contributions and meets other requirements provided in the scheme reference test.⁹³ The commencement of certain provisions of the NSSF Act, 2013 have been stayed by the courts due to conflicts in application of the sections which the petitioners have argued is unconstitutional.⁹⁴ As at December 2016, of the total funds under management in the industry, the total assets held by NSSF rose to Kshs 12.16 billion.⁹⁵

The third method of provision of retirement benefit is that of a private occupational retirement benefits scheme set up by an employer to pay out a retirement benefit to its employees. In this set up, the employer covenants to make a certain percentage contribution into the scheme each month. This monthly employer contribution is often at a higher percentage of salary than the employee contribution. These contributions, together with any additional voluntary contribution by the member and investment income shall form the basis from which payments are made in accordance with the scheme design. The National Museums of Kenya Staff Pension Scheme is an occupational scheme set up for the benefit of employees of the National Museums of Kenya.⁹⁶

⁹³ The scheme reference test is provided in the fourth schedule of the National Social Security Fund Act No. 45 of 2013 and identifies the key elements of a defined contribution or defined benefit scheme that may be considered for the purposes of opting out.

⁹⁴ *Kenya County Government Workers' Union V National Social Security Fund Board of Trustees and 5 Others* (2015) eKLR, ELRC Petition No 35 of 2014.

⁹⁵ Retirement Benefits Authority, 'Retirement Benefits Industry Performance Report for the Year 2016' < http://www.rba.go.ke/index.php/en/?option=com_phocadownload&view=category&id=72 > accessed 10 July 2018.

⁹⁶ National Museums of Kenya staff pension scheme Trust Deed and Rules (2011) 5

An individual may also seek to provide for himself a pension through contributions into an individual retirement benefits scheme.⁹⁷ This fourth method of pension provision is established for the benefit of individual beneficiaries for purposes of paying a retirement benefit at the time of retirement or at any time after vesting in the manner provided in the trust rules. In this way, individuals who are not necessarily part of the same employer may make contributions into a scheme to enhance an existing benefit provided by the employer or to provide for benefits where there is no other method employed.

The fifth way in which one can save for a retirement benefit is through an umbrella retirement benefit scheme, which can loosely be described as a hybrid of an occupational and individual retirement benefit scheme. In this kind of scheme, employers come together to form one large scheme for provision of benefits to their employees. These plans may be provided by national legislation such as the NSSF, the Local Authorities Pension Trust (LAPTRUST) and the Local Authorities Pension Fund (LAPFUND).⁹⁸ This manner of provision of retirement benefit has increasingly become the method of choice for employers due to the economies of scale that the same enjoys. In 2017, the Cabinet Secretary, the National Treasury published the Retirement Benefits (Umbrella Retirement Benefit Schemes) Regulations, 2017 for purposes of regulating umbrella retirement benefit schemes.⁹⁹

As mentioned earlier in this chapter, retirement benefit schemes in Kenya are set up under an irrevocable trust. The word '*trust*', is used appropriately and even in its ordinary meaning, to connote the relationships present in a retirement benefits scheme. The relationship builds upon trust between the employer and employee and other stakeholders. Under the leadership of the

⁹⁷ RBA, List of registered individual retirement benefit schemes <<http://www.rba.go.ke/index.php/en/retirement-benefits-schemes/retirement-benefits-schemes-col-280/registered-schemes>> accessed 20 August 2017. Schemes include Alexander Forbes Personal pension plan, Apollo Insurance Co Ltd Individual pension arrangement, Chancery pension plan and CFC Life Individual pension plan. The total number of registered individual retirement benefit schemes is 36.

⁹⁸ The promulgation of the Constitution of Kenya 2010 abolished Local Authorities and introduced county governments. In an effort to provide for retirement benefit for county government and affiliated organisation employees, the government has prepared with the help of relevant stakeholders The County Governments' Retirement Scheme Bill, 2017 which along with provisions for the establishment and management of a scheme, will also repeal the Local Authorities Provident Fund Act, Cap 272.

⁹⁹ An umbrella retirement benefit scheme is defined in regulation 2 of the Retirement Benefits (Umbrella Retirement Benefit Schemes) Regulation, 2017 as a retirement benefit scheme with members employed by several employers, in which employees and employer's contributions are paid into.

trustees, the legal provisions of the Retirement Benefits Act and the scheme trust deed and rules, form the basis of procedures, processes, rights and obligations of the parties involved. Beyond this, the sponsor, responsible with establishment of the scheme, has leeway to craft the trust deed and rules as they deem fit. The trust deed and rules act as a constitutive document and a ‘*grundnorm*’ of sorts that should spur the development of sound governance policies within the scheme.

The sponsor of the scheme has a primary role in the establishment of the scheme and is solely responsible for early decisions related to the scheme, before trustees are put in place. In fact, the sponsor can determine whether to employ a trust corporation to manage the fund as opposed to nomination of members to form a trustee board. For the trust deed and rules to be completed for purposes of registering the scheme, trustees must be in place to execute it. The trust must take a form, which adequately protects the rights and interest of the members of the scheme. This sponsor influence is witnessed not only at the formation of the scheme, but also during the existence of the scheme, sometimes to the schemes detriment.

2.3 Review of the regulatory framework

The Retirement Benefits Act

Retirement benefit schemes in Kenya are regulated and supervised by the Retirement Benefits Authority (RBA), which is established and incorporated under the Retirement Benefits Act, No. 3 of 1997 (The Act).¹⁰⁰ Over and above the incorporation of the RBA, the Act makes provision for the requirements for registration of retirement benefits schemes and service providers. The RBA derives its regulatory powers from the Act and as such is granted powers to consider persons seeking to act as trustees or to provide custody, management, administration services to the scheme. The Act also grants the RBA powers to inspect schemes for compliance with the law and place such schemes under interim administration.

¹⁰⁰ The Retirement Benefits Act No 3 of 1997

<<http://www.kenyalaw.org/lex//actview.xql?actid=No.%203%20of%201997>> accessed 31 July 2018 (Retirement Benefits Act). An Act of Parliament to establish a Retirement Benefits Authority for the regulation, supervision and promotion of retirement benefits schemes, the development of the retirement benefits sector and for connected purposes.

The mandate to regulate and supervise the establishment and management of retirement benefit schemes in Kenya is more set forth in Section 5 of the Retirement Benefits Act, which sets out the object and functions of the Retirement Benefits Authority as follows:

5. The object and functions of the Authority shall be to—
- (a) regulate and supervise the establishment and management of retirement benefits schemes;
 - (b) protect the interests of members and sponsors of retirement benefits sector;
 - (ba) approve trustees' remuneration approved by members during the annual general meeting after every three years;
 - (c) promote the development of the retirement benefits sector;
 - (d) advise the Minister on the national policy to be followed with regard to retirement benefits schemes and to implement all Government policies relating thereto; and
 - (e) perform such other functions as are conferred on it by this Act or by any other written law.¹⁰¹

By virtue of the mandate in section 5, the RBA is the agency responsible for ensuring compliance with the requirements of the Act and development of the sector. The RBA and its work therefore plays an important role in the realization of the rights enshrined in the provisions of Article 43 (1) (e) of the Constitution of Kenya, 2010. More particularly, the RBA is the agency through which the National Government undertakes part of its responsibilities under the 4th Schedule of the Constitution of Kenya, 2010 on consumer protection including standards for social security and professional pension plans.¹⁰²

RBA has as its mission, 'to develop, safeguard and deliver value to the retirement benefits sector through excellence in service delivery'.¹⁰³ A key result area in the RBA's Strategic Plan 2014-2019 is the improvement of regulation and supervision of the sector. Some of the concerns relevant to this study include failure of schemes to comply with legal obligations and unprofessional and inappropriate actions that cause conflict.¹⁰⁴ The RBA will be looked upon to

¹⁰¹ *ibid* s 5.

¹⁰² Constitution of Kenya, 2010 Fourth Schedule No 14, 185 (Government Printers, Nairobi) <<http://kenyalaw.org/lex/rest/db/kenyalex/Kenya/The%20Constitution%20of%20Kenya/docs/ConstitutionofKenya%202010.pdf>> accessed 11 July 2018 (Constitution of Kenya).

¹⁰³ Retirement Benefits Authority, Strategic plan 2014-2019 <http://www.rba.go.ke/index.php/en/about-us/strategic-plan?download=127:rba-strategic-plan-2014-2019> accessed 10 July 2018.

¹⁰⁴ *ibid* 13-14.

provide the necessary guidance and improvements to the existing regulatory framework towards exemplary performance of retirement benefit schemes.

Another key result areas of the RBA is the increase of coverage of retirement benefit schemes from 15% to 20%.¹⁰⁵ In 2014, the coverage of retirement benefit schemes was 14 percent. In RBA's strategic plan, the activities are geared towards growth of coverage to 20%.¹⁰⁶ The number of active schemes stood at 1180 schemes comprising 1122 occupational retirement benefit schemes, 34 individual retirement benefit schemes and 24 umbrella retirement benefit schemes. As at June 2017 the number of umbrella schemes were 28, individual schemes were 32 and occupational schemes were 1,206 in total.

The Retirement Benefits Act provides that no scheme shall be registered unless trustees are in place and they satisfy the requirements relating to trustees.¹⁰⁷ Section 22 of the Retirement Benefits Act states *inter alia* that “no person shall establish a retirement benefit scheme without a certificate issued by the RBA”.¹⁰⁸

Section 24(1) of the Retirement Benefits Act provides that:

24(1) No scheme, other than a scheme established by a written law shall be registered under this Act unless—

- (a) it is proposed to be established under an irrevocable trust; and
- (b) the proposed scheme rules adequately protect the rights and interests of the sponsors and members thereof.¹⁰⁹

Ordinarily, the trustees comprise both sponsor nominees and employee elected trustees and section 22A of the Retirement Benefits Act provides criteria for suitability¹¹⁰ to apply to any person seeking to manage the scheme at this level. The Act provides the minimum requirements for consideration by the RBA as follows:

22A(1) The Authority shall, in determining whether a person is suitable to act as a trustee, manager, custodian or an administrator under this Act, consider the—

¹⁰⁵ RBA Strategic Plan (n 103), Strategic objective 1.1, ix.

¹⁰⁶ *ibid.*

¹⁰⁷ Retirement Benefits Act, s 24 (2).

¹⁰⁸ *ibid* s 22 (1).

¹⁰⁹ *ibid* s 24(1).

¹¹⁰ *ibid* s 22A (1).

- (a) financial status or solvency of the person;
- (b) educational or other qualifications or experience of the person, having regard to the nature of the functions which, if the application is granted, the person shall perform;
- (c) status of any other licence or approval granted to the person by any financial sector regulator;
- (d) ability of the person to carry on the regulated activity competently, honestly and fairly; and
- (e) reputation, character, financial integrity and reliability—
 - (i) in the case of a natural person, of that individual; or
 - (ii) in the case of a company, of the company, its chairperson, directors, chief executive, management and all other personnel including all duly appointed agents, and any substantial shareholder of the company, if the chairperson, director, chief executive, management or the personnel are shareholders of the company.¹¹¹

The RBA also considers whether a person is fit and proper by considering:

- 22(2)...whether a person is fit and proper—
- (a) take into account whether the person—
 - (i) has contravened the provision of any law, in Kenya or elsewhere, designed for the protection of members of the public against financial loss due to dishonesty, incompetence, or malpractice by persons engaged in transacting with marketable securities;
 - (ii) was a director of a licensed person who has been liquidated or is under liquidation or statutory management;
 - (iii) has taken part in any business practice which, in the opinion of the Authority, was fraudulent prejudicial to the market or public interest, or was otherwise improper, which would otherwise discredit the person's methods of conducting business; or
 - (iv) has taken part or has been associated with any business practice which casts doubt on the competence or soundness of judgment of that person; or
 - (v) has acted in such a manner as to cast doubt on the person's competence and soundness of judgment;¹¹²

While the above provisions also relate to any person who wishes to act as a trustee, manager, custodian or an administrator, trustee specific provisions are contained in section 26 which provides:

- 26(1) Every scheme, other than a scheme established by a written law shall be established under an irrevocable trust.
- (2) No person shall be a trustee of any scheme fund if such person—

¹¹¹ *ibid.*

¹¹² *ibid* s 22A (2) (a).

- (a) has been sentenced to imprisonment by a court of competent jurisdiction for a period of six months or more;
 - (b) is adjudged bankrupt;
 - (c) was previously involved in the management or administration of a scheme which was deregistered for any failure on the part of the management or the administration thereof;
 - (d) is disqualified under any other written law, or his holding office as such is deemed by the Authority as being, in any way, detrimental to the scheme.
- (3) Notwithstanding the provisions of subsection (2), the appointment of any person as a trustee shall be subject to approval by the Authority.¹¹³

From the sections cited above, it is clear that even from a regulatory standpoint, the composition of trustees is key to the success of the scheme. The provisions in the law cover diverse aspects and aptitude that trustees should possess. To ensure that trustees possess a sound footing while undertaking their duties, the RBA has introduced the Trustee Development Program, a curriculum developed in conjunction with the College of Insurance and Humber College Canada to ensure that at a minimum, trustees obtain knowledge of the legal, governance, finance and investment requirements in the management of a retirement benefit scheme. The program is mandatory for all scheme trustees.

Section 22 deals with another player in the management of retirement benefit schemes. These are the managers, custodians and administrators, collectively called the service providers. All of the appointed service providers must be corporations or persons who have not been declared insolvent, further they must have necessary education to manage the schemes, and their reputation must be untainted.¹¹⁴ For an entity to be registered as a manager, custodian or an administrator, he must be a limited liability company with minimum paid up share capital of Kshs. 10 million, able to meet the obligations to sponsors and members, have technical capability and competence to manager the scheme, have never held that office in a scheme that has been deregistered or placed under an interim administrator because of any failure on his part to manage the scheme appropriately.¹¹⁵

¹¹³ Retirement Benefits Act, s 26.

¹¹⁴ *ibid* s 22A.

¹¹⁵ *ibid* ss 25, 25A and 25B.

Section 40 of the Retirement Benefits Act requires trustees and service providers to adhere to general obligations. They must ensure that the scheme is managed according to the Act, any regulations and scheme rules and directions issued by the Chief Executive Officer. They must also ensure that the scheme is managed in the best interest of the members and sponsors of the scheme. Finally, the trustees are to report as soon as is practical an unusual occurrence that could jeopardise the rights of members, as well as where contributions into a scheme fund remain due for a period of not more than thirty days.

It is envisaged that there would be disputes arising from the management of the schemes and the relationship of trustees with the service providers and members. The Chief Executive Officer of the RBA under section 46 has the power to review decisions of a manager, administrator, custodian or trustees from any member to ensure that the same has been delivered bearing in mind the relevant law in retirement benefits. The Act establishes an Appeals Tribunal in section 47 for purposes of appealing a decision of the Authority or of the Chief Executive made under section 46. The Appeals Tribunal can also consider disputes arising between any person and the Authority as to the exercise of the powers conferred upon the Authority by the Act.¹¹⁶ This Tribunal provides the mechanism to challenge decisions of the RBA in the discharge of its duties through an appeal mechanism. The Act does not provide for further appeal from the Tribunal and parties aggrieved with the decisions from the appeals tribunal will approach the high court by way of judicial review.

The Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000

The Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 is the key set of regulation for retirement benefit schemes sponsored by public entities, such as the National Museums of Kenya staff pension scheme. These regulations provide the regulatory framework for the incorporation of corporate governance in these schemes, and can be said to be the external mechanisms available to develop internal policies to guide scheme governance.

¹¹⁶ *ibid* s 48.

While the Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations provide extensively for selection qualifications or experience relevant to the nature of the functions the trustees shall perform, they do not provide for the kind of expertise and knowledge needed to undertake the functions and duties. The duties of a trustee are enumerated in Regulation 8(2) of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations. Scheme trustees are expected to undertake the following duties:

- 8(2) (a) Administering the scheme in accordance with the provisions of the Act, these regulations and scheme rules;
- (b) Keeping all proper books and records of account in respect to income, expenditure, liabilities and assets of the scheme fund;
- (c) Computing and preparing statements of payments of benefits to members;
- (d) Liaising with the Authority, sponsors, members, manager, custodian and any other professional engaged by the scheme; collecting, keeping and updating retirement benefits data of each member including maintenance of individual membership records and bank account details of the members for the purpose of payment of benefits;
- (f) Updating the sponsor at least quarterly during the financial year on all matters regarding the scheme;
- (g) Ensuring that contributions based on correct pensionable emoluments have been remitted to the custodian as specified in the Act, these Regulations and the scheme rules;
- (gg) Ensuring that scheme funds are being invested by a manager, duly appointed by the trustees, as specified in the Act, these Regulations and the scheme rules;
- (h) Communicating regularly with the members with respect to the affairs of the scheme and furnishing them with annual membership benefits statements; and
- (i) Ensuring that all documents intended to bind the scheme are professionally prepared;
- (j) Convening an annual meeting of members to enable them to raise any matters that relate to their scheme.
- (k) Ensuring all minutes, statements and resolutions in respect of a scheme are properly kept and maintained.¹¹⁷

Part of the compliance requirements for the trustee includes the submission of annual reports¹¹⁸ and a statement of all investments of the scheme fund.¹¹⁹ The scheme is further required to prepare and utilize a prudent investment policy¹²⁰ on the investment of the funds of the scheme.

¹¹⁷ Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000, reg 8(2)(a) http://kenyalaw.org/lex/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/R/Retirement%20Benefits%20Act%20Cap.%20197%20-%20No.%203%20of%201997/subsidiary%20legislation/docs/RetirementBenefitsAct3of1997_subsiary.pdf accessed 13 July 2018 (Occupational Regulations).

¹¹⁸ Retirement Benefits Act, s 34.

¹¹⁹ *ibid* s 37(3).

¹²⁰ *ibid* s 37(1).

This is important so that at all times, the scheme trustees are able to maintain the funds and only consider investments that are likely to add value to the fund. The trustees with the support of their service providers are better placed to comply with the provisions of the Retirement Benefits Act. Failure to do so could result in regulatory action against them.¹²¹

Retirement Benefits (Administrators) Regulations, 2007

The Retirement Benefits (Administrators) Regulations 2007, govern the provision of administration services. Administration services are defined in the regulations as the, ‘administration of the affairs of the scheme in accordance with the provisions of the Act and regulations, scheme trust deed and rules, any other relevant legislation in force, other legal documents related to the scheme and instrument of appointment of the administrator.’¹²² An administrator is a key service provider where contribution gaps are ongoing in a scheme as part of their duties under Regulation 7 of the Retirement Benefits (Administrators) Regulations, 2007 is to undertake the following:

- 7(a) have all the powers necessary for the performance of its functions under the Act;
- (b) carry out daily administration of the affairs of the scheme in accordance with the provisions of the Act, scheme trust deed and rules and its amendments, any other relevant legislation in force and all other legal documents related to the scheme;
- (c) liaise with the trustees, the Authority, the Department for the time being responsible for collecting domestic taxes and the scheme service providers in the course of administration of the scheme;
- (d) offer advisory and training services to the trustees, members and the Sponsor on their rights and obligations in the scheme;

¹²¹ These include notices and directions from the Chief Executive Officer of the Retirement Benefits Authority to cease from engaging in unsound and unsafe practices. Offences under the Act generally attract a fine or an imprisonment term, with the default penalty being a fine of Kshs. 500,000 or imprisonment for a term not exceeding two years. The RBA can also cause an inspection where it is considered that there is mismanagement of a scheme. Over and above inspection, where the Chief Executive Officer is of the opinion that a more stringent regulatory action would apply to that particular scheme, he may propose to the Board of Directors of RBA, the appointment of an interim administrator to take over the management and affairs of the scheme. This is usually a short-term measure, designed to guide the scheme to a healthy position, before a final decision is made by the RBA in conjunction with the sponsor on whether to wind up the scheme, or salvage it.

¹²² Retirement Benefits (Administrators) Regulations 2007, reg 2

<http://kenyalaw.org/lex/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/R/Retirement%20Benefits%20Act%20Cap.%20197%20-%20No.%203%20of%201997/subsidiary%20legislation/docs/RetirementBenefitsAct3of1997_subsidary.pdf> accessed 13 July 2018 (Administrators Regulations).

- (e) avail the required data of the scheme to the service providers to enable preparation of statutory returns to the Authority;
- (f) submit or cause to be submitted required statutory returns to the Authority;
- (g) compute and pay benefits to the members and their beneficiaries directly as provided for in the law and the scheme rules;
- (h) prepare the scheme budgets, cash flows and liquidity requirements as may from time to time be required;
- (i) where required, offer secretarial services to the board of trustees by organizing meetings, issuing notices for the same and taking minutes during the meetings;¹²³

Mwongozo, the Code of Governance for State Corporations

Corporate governance has a history in the leadership of corporations, particularly through the board of trustees. However, though developed for application by corporations, corporate governance can apply to any legal arrangement including retirement benefit schemes and the trustees who provide leadership to the scheme. Corporate governance is enshrined even within the government itself. In 2015, the government released Mwongozo, the code of governance for state corporations. The code was heralded as a major milestone in addressing the questions of leadership, governance and management of public resources and provides various governance principles for state corporations to adhere to.¹²⁴ This study will highlight the provisions of this code because of the type of scheme, which is being considered. The National Museums of Kenya is a state corporation, which sponsors a scheme for the benefit of its employees. Due to this fact the provisions of this code may prove relevant to its management as trustees of these schemes could benefit from the principles outlined in the Mwongozo.

The Mwongozo covers eight (8) principles of good governance as follows:

1. The Board of Directors: Here, the Mwongozo provides that the board should be competent, diverse and qualified so as to exercise objective and independent judgment over the corporation.
2. Transparency and disclosure: Under this governance arm, the Mwongozo provides that both the leadership and management should create and sustain confidence of its major stakeholders, primarily through financial reporting. The Mwongozo also recognizes that

¹²³ Administrators Regulations, reg 7.

¹²⁴ Public Service Commission and State Corporations Advisory Committee, *Mwongozo, Code of Conduct for State Corporations* (Nairobi, 2015) iii <<http://www.jkf.co.ke/downloads/MWONGOZO.pdf>> accessed 11 July 2018.

there should be a disclosure on board performance as well as compliance with laws and regulations. Disclosures should be made as appropriate to the relevant stakeholders.

3. Accountability, risk management and internal control: The code mandates the board to ensure that an organisation has adequate processes of accountability, risk management and internal controls.
4. Ethical leadership and corporate citizenship: The board in this principle is tasked with the provision of ethical leadership in the management of the organisation. They should develop a code of conduct and ethics as well as have a policy in place to manage conflicts of interest.
5. Shareholder rights and obligations: Shareholders should be treated equitably, and the maximization of their shareholder value should always be a key concern.
6. Stakeholder relationships: The code provides that where these relationships are well managed, there is created an atmosphere of goodwill which enhances the achievement of corporate goals.
7. Sustainability and performance management: The Mwongozo tasks boards of directors to be forward thinking in their strategies to deliver value to their shareholders. While immediate gains are important, the policies which the board adopts should not compromise the organization's ability to sustain future development needs.
8. Compliance with laws and regulations: All boards of state corporations must comply with the applicable laws and regulations, paramount of which is the Constitution of Kenya, 2010.

These eight (8) principles can be important to the establishment of good governance processes by extension in an occupational retirement benefit scheme sponsored by public entities.

2.4 Review of the institutional framework

The obligation of trustees under section 40 (d) of the Retirement Benefits Act is important in that it requires a mechanism to flag and report any unusual occurrences and instances of lack of

remittance of contributions. It follows therefore that the trustees must at all times be aware of what is happening and ensuring that the scheme is compliant to the laws, regulations and the trust deed and rules. Compliance with this and other regulatory obligations is key to trustees, and this means that there must be internal mechanisms to govern their compliance.

For example, Regulation 8(1) of the Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations, 2000 (ORBS) requires that the trust deed and rules contain certain provisions that would govern the management of the retirement benefits schemes. The provisions relating to the manner and appointment/election of trustees and their term in office, their functions, powers and duties, the number, manner of election and grounds for removal. It is on the basis of these regulations that the trustees will put in certain procedures to serve as the internal scheme mechanics for good governance. Trustees are therefore required to have an election policy and remuneration policy to guide these issues.

In *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others*,¹²⁵ where the court considered the matter of the selection of the board of trustees. The petitioner alleged that the scheme had employed discriminatory election rules which excluded, barred and eliminated the participation of members and which extended the terms of the Board of trustees beyond the legally accepted mandate. At the time of the case however, the regulator had not yet placed a cap on the term of the trustee which is now limited to two terms of three years.¹²⁶ The case was not able to adequately canvass the issue as the court was of the view that the Petitioner was making serious allegations of discrimination without any evidence to support the allegations. The court found that the Trust deed and the Retirement Benefits Act and regulations provide clear procedures and avenues in which disputes relating to pension can be adjudicated. Ultimately, this case was decided bearing in mind the fact that the Trust rules must have internal mechanisms for dispute resolution, failing which, the RBA can intervene.

The court judgment in this matter is critical to the discussion on the importance of internal scheme mechanisms in the management of schemes due to the recognition of the need for relevant internal mechanisms. In deliberating on this matter, the judge made reference to the case

¹²⁵ High Court Petition No 377 of 2013 [2013] eKLR.

¹²⁶ Occupational Regulations, reg 7(g).

of, *International Center for Policy and Conflict & 4 Others v The Hon. Uhuru Kenyatta and Others*,¹²⁷ in which the court had observed that the unlimited original jurisdiction of this High Court could not be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances such as the one raised by the Petitioners. From this it is clear that the trust deed and rules must be drafted bearing in mind the rights and obligation of the members and further to this, the scheme should have in place dispute resolution policies to follow as a first method of dealing with conflicts.

Regulation 10 (4) of the ORBS provides that contributions are payable in respect of a member directly to the custodian. This means that the trustees must have internal mechanisms and collaboration with the custodian and sponsor to ensure that the payment of contributions made directly to the custodian are actually done. Under corporate governance, the role of the sponsor and trustees must be checked by the trustees, membership and service providers.

In the case of *Clement Ogutu v Kenya Railways Staff Retirement and Benefits Scheme & 2 others*,¹²⁸ the petitioner was a member of the scheme, and took the respondent scheme to court to challenge the management of certain properties of the trust. The petitioner sought orders that pending the inter parties hearing of the petition, the court issue a conservatory order restraining the management of the respondent from applying the funds of the members to finance the proceedings in the pending appeal. The petitioner argued that he had not participated or been involved in the making of such weighty decisions as the issuance of the temporary ownership licence; that followed the issuance of a temporary ownership licence to two parties over the same properties. This case brings out the need for members to allow trustees to manage the assets of the scheme based on their fiduciary duty. This case brings out the fact that the relationship of trustees as agents of the members needs to be nurtured, and members must feel secure that the scheme is being managed in their best interest.

The case of *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others*,¹²⁹ further illustrates the need for transparency and accountability and disclosures at Annual General

¹²⁷ HC Petition No. 552 of 2012 [2013] (eKLR).

¹²⁸ HC Petition No.188 of 2015 [2015] (eKLR).

¹²⁹ HC Petition No 377 of 2013 [2014] (eKLR).

Meetings (AGMs) and generally. According to the Retirement Benefits (Occupational Retirement Benefit Schemes) Regulations, trustees are required to prepare an agenda for its annual meeting that as a minimum provides for:

8(2)(j) convening an annual meeting of members to enable them to raise any matters that relate to their scheme...¹³⁰

In the case, the petitioner was employed by Telkom (K) Ltd as a Telecommunication Technician in 1988 on permanent and pensionable terms. He was sent on early retirement in 1997 while he was 36 years old. Subsequently, he was entitled to a monthly pension emolument and thereby became a member of the Teleposta pension scheme. The Petitioner claimed that the Respondents implemented a discriminative scheme known as “trivial pension pay out” so as to weed out vulnerable members of the scheme whose monthly take home falls below Kshs. 5000. He claimed that the Respondents have over the years called AGMs, whose resolutions they have failed to implement thus displacing the members’ legal, policy and constitutional position as they are deemed irrelevant in determining the future of the scheme. He claimed that monetary estimates are not given to members during the AGMs thus making members helpless in the management of their financial affairs. The issue of trivial pension is something that could have been adequately discussed in the AGM, through an engaging session on questions from members. Trivial pension is the amount from time to time determined by the Authority which shall not be less than fifty percent of the average of the minimum wage prescribed by the Minister for the time being responsible for matters relating to Labour.¹³¹

The importance of proper internal mechanisms to disseminate information between the members, trustees and the sponsor is highlighted in this above case. It saves the scheme time and money in dealing with litigation risk. It provides that scheme processes move efficiently in the fulfilment of trustee’s duty to the members.

¹³⁰ Occupational Regulations, reg 8(2)(j).

¹³¹ *ibid* regs 25(4) and 25(3).

CHAPTER THREE: International best practices and National Museums of Kenya Staff Pension Scheme

3.1 Introduction

The fundamental goal of scheme fund governance rules is to reduce the occurrence of agency problems and conflicts of interest, which can occur between the fund beneficiaries and persons responsible for the fund's management.¹³² Good governance goes beyond this fundamental goal and objective of delivering high scheme fund performance while keeping costs low for all stakeholders. The application of good governance to any scheme will have positive results including creating trust amongst all stakeholders, minimizing the need for prescriptive legal requirements, and enhancing supervision.¹³³

According to the IOPS, good governance has been a key reform agenda in schemes in the recent years.¹³⁴ Many jurisdictions are embracing internationally recognized principles of good governance and applying them to the industry. With the level of growth experienced in the industry in Kenya, stricter governance oversight and more sophisticated administrative structures are needed to support a safe transition into the trillion-shilling level. Government policy in the years 2004-2007, was focused on the increase of pension coverage and benefit adequacy. The regulator in its mandate to implement government policy¹³⁵ was also keen to open up coverage as much as possible. Public entities were not left behind, with each parastatal setting up its own defined contribution retirement benefit scheme. In Kenya, NSSF is a smaller fund compared to the broader occupational pension sector in which retirement benefit schemes of public entities fall. The retirement benefit sector has long been identified by country policy makers as a key

¹³² Keith Ambachtsheer, Ronald Capelle and Herbert Lum, 'Pension Fund Governance Today: Strengths, Weaknesses, and Opportunities for Improvement' (2006) Financial Analysts Journal <<http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.179.101>> accessed 15 July 2017.

¹³³ Pensions Regulator, Draft guidance: Ensuring good governance and administration in work based pension schemes' (UK 2013) <http://www.thepensionsregulator.gov.uk/docs/regulating-dc-pension-schemes-regulatory-approach-consultation.pdf> accessed 15 July 2017.

¹³⁴ International Organization of Pension Supervisors, 'Good Practices for Governance of Pension Supervisory Authorities' (2013) <http://www.iopsweb.org/principlesguidelines/IOPS%20%20Good%20Practices%20on%20Governance%20of%20Pension%20Supervisory%20Authorities.pdf>> accessed 18 July 2017.

¹³⁵ Retirement Benefits Act, s 5

contributor to the economic wellbeing and development of the Kenyan financial sector and a key strategy in the Economic and Social pillars of its Vision 2030.¹³⁶

Currently, various countries provide guidance on scheme governance, structured in different ways as necessitated by the diverse needs of that particular jurisdiction. This is a further indication of the flexibility involved in crafting governance processes to suit various requirements. However, core to these governance arrangements are the trustees who are the final decision makers and have the overall responsibility for maintaining the strategic direction of the scheme. Further, this body selects service providers (managers, custodians and administrators) and evaluates the schemes performance. As the scheme's governing board, the board of trustees is the equivalent of the board of directors of a corporation, which has the ultimate responsibility for protecting the shareholders' interests.

This study shall now consider the scheme fund governance practices in the United Kingdom (UK) primarily and in Canada too. Both are parliamentary democracies and with schemes set up under the law of trusts. As is with the UK, common law is a crucial component of trust law in Kenya by virtue of its colonial history and the mode of exercise of jurisdiction provided for under the Judicature Act.¹³⁷ Schemes in Canada are also set up under trust law, and there are many similarities in the leadership and management of schemes in Canada and Kenya.

3.1.1 United Kingdom

The Pensions Regulator is the body that regulates occupational pension schemes in the United Kingdom. It has developed a code of practice titled, 'The Governance and Administration of Public Service pension schemes'¹³⁸ (the code). The code is designed to be a guide in the

¹³⁶ Republic of Kenya, 'Investment Programme for the Economic Recovery Strategy for Wealth and Employment Creation 2003 – 2007'(Revised 2004) <<https://www.imf.org/external/pubs/ft/scr/2005/cr0511.pdf> > accessed 10 March 2017. The report finds that national savings as a portion of Gross Domestic Product have increased and increased retirement benefit savings are believed to be one of the main contributors to the increase.

¹³⁷ Judicature Act Cap 8 Laws of Kenya (National Council for Law Reporting, Revised Edition 2016[2012]). <<http://kenyalaw.org/lex/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/J/Judicature%20Act%20Cap.%208%20-%20No.%2016%20of%201967/docs/JudicatureAct16of1967.pdf>> accessed 10 March 2017

¹³⁸ The Pensions Regulator, 'Draft code of Practice No 14. Governance and Administration of Public Service Pension Schemes' <<http://www.thepensionsregulator.gov.uk/docs/draft-code-14.pdf>> accessed 5 May 2017.

fulfillment of the regulatory duties imposed on both the board of trustees and service providers as the case may be. They may be adopted flexibly, as per the existing situation with the ultimate aim of providing trustees a clearer grasp on how to comply with the various legal demands of the sector. The code is fairly detailed and is a great attempt to cover all situations that may arise in the course of trusteeship. The code applies to UK public service schemes both DB and DC in nature.

Regarding the board of trustees, the code provides that the composition of the board of trustees must include a member who is conversant with the rules of the scheme and any other policy documents adopted by the scheme. This provision is key to succession planning as at any point in time, there is a member who has the historical institutional memory that guides the scheme. The code further provides that there must be a member who has the knowledge and understanding of the law relating to pensions. The guidance provides that the board of trustees should develop and *maintain policies for acquiring and retaining knowledge*.¹³⁹ According to the code, the trustee should be able to critically access any information and or advice given to them on any issue.

The UK regulator considers transparency and disclosure as a method of maintaining member confidence and assessing risk and advises that trustees keep track of any conflict of interest, financial or otherwise, which is likely to prejudice a person's exercise of functions as a member of the board of trustees. The practical guidance provides scenarios in which a conflict of interest may arise and suggests a three-stage approach to managing the potential conflicts of interest. Part of this approach is through the documentation of a conflicts policy and procedure that enables schemes to identify, monitor and manage and potential conflicts.

This position *ab initio* is an identified potential cause of conflicts in the UK code which illustrates it as follows:

...a member representative, who is also an employee of a participating employer, is aware that system X would help to improve standards of record-keeping in the scheme, but it would mean outsourcing an activity that is currently being undertaken in-house by

¹³⁹ *ibid* 12.

their employer. The member representative could be conflicted if they were likely to be prejudiced in the exercise of their functions by virtue of their employment.¹⁴⁰

The presence of internal controls is a key determinant in smooth stakeholder relationships. Internal controls are systems, arrangement and procedures that are put in place to ensure that pension schemes are run in accordance with the established rules and regulations.¹⁴¹ Internal controls are so important as to elicit a further code of practice from the UK Pensions Regulator. Essentially, good corporate governance should ensure that there exist a continuous assessment of risk and that any service providers should demonstrate the presence of adequate internal controls as associated with the services they are providing.

Under section 70A of the Pension Act,¹⁴² where there is a case of unremitted contributions, the scheme must provide a written report of the matter to the UK Regulator, as soon as is reasonably practicable. The UK code makes further directions to trustees that overdue contributions should be managed, and that materially significant payment failures should be immediately reported. The schemes should have contributions monitoring record as well as adequate internal controls to monitor the sharing of payment information between the employer, pension scheme and members.

The UK code, takes time to converse on the problem of unremitted contributions by listing steps the trustees can take to manage the situation as follows:

- “a. Investigate any apparent employer failure to pay contributions in accordance with the contributions monitoring record or legal requirements.
- b. Contact the employer promptly to alert them to the payment failure and to seek to resolve the overdue payment.
- c. Discuss it further with the employer as soon as practicable to find out the cause and circumstances of the payment failure.
- d. Ask the employer to resolve the payment failure and take steps to avoid a recurrence in the future.”¹⁴³

Schemes should maintain a record of their investigation and communication between themselves and the employer. The code provides a period of 90 days within which contributions should be

¹⁴⁰ *ibid* 19.

¹⁴¹ *ibid* 27.

¹⁴² Pensions Act 2008 s70A.

¹⁴³ *ibid* 40.

recovered by the scheme trustees. This kind of practical guidance cannot be contained in a statute or even subsidiary legislation but is nevertheless necessary to guide trustees in the discharge of their duties.

The relationship between the trustees and the member is one that requires to be maintained. It is important to keep the member informed of the on goings of a scheme. The code describes a relevant member for the purposes of entitlement to information to include among others, deferred members, pensioners, active members etc. Trustees must provide benefit statement and notice of the availability of other information. Whatever the communication design, the trustees should take into account the kind of membership it has, and the ways in which they can access information and use this to their benefit. Key to the settlement of many issues is a strong and robust dispute resolution mechanism. The code provides guidance on applications that may be entertained and from whom. It also encourages the scheme to specify time limits within which issues should be resolved and decision given.

A good system of governance within a pension supervisory authority, supported by effective internal or in-house risk management and controls and independent outside or internal audit, should lead to good management, accountability and performance results, the better use of resources, and positive engagement with relevant stakeholders and the public. Eventually such a system should assist the pension supervisory authorities to efficiently fulfill their supervisory mandate and achieve their main objectives.¹⁴⁴ The governance position in the UK is that for there to be said to be good governance, there must be effective internal controls in the scheme.

Following the introduction of “auto-enrolment” in the UK in 2012,¹⁴⁵ the Office of Fair Trading commissioned a review of the pension sector market.¹⁴⁶ The review brought out several areas

¹⁴⁴In EU countries, the good practices may not apply to those pension funds and pension plans that fall outside the scope of the EU Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, for example pensions funded via book reserves. Though the objective of the present document is to develop good governance criteria for supervisory authorities responsible of the oversight for private pension plans and funds, it may also be considered, under certain circumstances, appropriate to apply these criteria to the supervisory authorities responsible for public pension plans.

¹⁴⁵ This is similar to the Australian ‘default fund’s system

¹⁴⁶ Office of Fair Trading, ‘Defined Contribution Workplace Pension Market Study’ (OFT 2013). <http://webarchive.nationalarchives.gov.uk/20131101164215/http://www.offt.gov.uk/shared_offt/market-studies/oft1505> accessed March 2017.

where standards need to be raised, particularly in a climate where millions of people are without choice, enrolled into workplace pension arrangements. In summary, several main problems relating to pension fund governance were identified. First, trustees and fiduciaries generally lack suitable knowledge, experience or training, which traditionally hinder them from being able to understand and challenge advice they receive from outside experts. Second, conflicts of interest still are prevalent, both within boards and in relation to independent, commercial trustees.¹⁴⁷ Governance requirements for defined contribution workplace schemes were strengthened as a consequence of this review. Part of the changes included the introduction of independence requirements, which came into effect in April 2016.

It is worth noting that even in the UK, pension liabilities may be assumed directly by the sponsoring company or contributions may be invested in private funds or insurance contracts.¹⁴⁸ Even with all the governance mechanisms in place, in any pension arrangement, there must be a party willing to subsume the risks of failure to meet the pension liabilities and the governance mechanisms should therefore be geared towards a mitigation of this risk to as large an extent as possible.

3.1.2 Canada

The Canadian Association of Pension Supervisory Authorities (CAPSA) is a national inter jurisdictional association of pension regulators in Canada. It is set up to facilitate an efficient and effective pension regulatory system in Canada.¹⁴⁹ One of the successful initiatives of the association is the development of a flexible guideline on pension plan governance covering 11 principles of governance for which pension plan administrators could consider to aid them achieve their governance objectives.¹⁵⁰ The principles include fiduciary responsibility, governance objectives, roles and responsibilities of trustees and key players, performance measures, knowledge and skills, access to information, risk management, oversight and

¹⁴⁷ *ibid.*

¹⁴⁸ See generally John Broadbent, Michael Palumbo and Elizabeth Woodman ‘The shift from Defined Benefit to Defined Contribution pension plans- Implications for Asset Allocation and Risk Management’ December 2006.

¹⁴⁹ CAPSA Website < <https://www.capsa-acor.org> > accessed March 2017.

¹⁵⁰ ‘CAPSA Pension Plan Governance Guideline No. 4’ (Canadian Association of Pension Fund Supervisors 2004) <<http://events.snwebcastcenter.com/manulife/GBRS/Prod/PensionLegislation/docs/Pension%20Plan%20Governance%20Guideline.pdf>> accessed March 2017 (CAPSA guideline).

compliance, transparency and accountability, code of conduct and conflict of interest and governance review.

According to CAPSA, an effective pension governance system establishes a framework for defining duties and responsibilities of all participants in the sector. Governance also covers all other facets of pension plan management including communication, funding, investments and benefit administration all while providing careful oversight while enhancing protection for plan members and beneficiaries. Pension plan governance is about ensuring its incorporation into the management of schemes to ensure that the pension promise is consistent with the pension plan documents and legislation. This study shall outline the provisions covering the board of trustees, transparency disclosures, maintaining confidence & assessing risks and stakeholder relationships & managing conflicts.

The basis of the second principle of governance is that the trustees need to establish a governance objective for the management of the scheme.¹⁵¹ The trustees need to have well and clearly documented objectives, and these objectives should ideally build upon the sponsors objectives at the time of setting up the scheme. Having the objectives would also necessarily mean having a well-established vision and mission communicated to all parties who deal with the scheme. This oneness of thought and vision would translate into the relationship of scheme trustees with the relevant service providers.

The fifth principle of governance considers the knowledge and skills of the trustees.¹⁵² This principle is formulated on the basis that the trustees must directly or through delegation apply their knowledge and skills to meet the objectives of the fund.

The ninth principle is focused on transparency and accountability and invites beneficiaries and other stakeholders to take advantage of communication avenues the scheme has put in place to facilitate transparency and accountability.¹⁵³ The guidelines also bring in a new concept of delinquency control, relevant to schemes of public entities plagued with issues stemming from

¹⁵¹ *ibid* 7.

¹⁵² *ibid* 8.

¹⁵³ *ibid* 9.

unremitted contributions. The trustees are called upon to put in place procedures for collecting unpaid contributions and data and come up with solutions for non-compliance. This principle of transparency and accountability involves effective communication and dealing with member concerns. This means that trustees need to have in place a “governance-focused” communication policy for the scheme. Communication should be appropriate, timely, accurate, complete, consistent, cost-effective, and accessible to promote members’ and beneficiaries’ confidence in the governance process.¹⁵⁴ Under communication, the kind of information and the manner of disclosure must appeal to both the kind of membership in the scheme and the communication needs. Further, the guideline provides that the members of the scheme have a right to voice their concerns and not only that, but to have them addressed quickly. The trustees have the added responsibility to create the right environment for communication and creating conflict resolution procedures that can effectively handle disagreements. Those individuals key to the management of the scheme should be readily on hand to handle any queries and deal with scheme members concerns.

3.2 National Museums of Kenya Staff Pension Scheme

3.2.1 Background

The National Museums of Kenya (NMK) is a public entity, established pursuant to section 3 of the National Museums and Heritage Act.¹⁵⁵ The NMK and is under the Ministry of Labour, Sports and Culture. Section 3 of the National Museums and Heritage Act provides as follows:

‘3. There is established a body corporate to be known as the National Museums of Kenya with perpetual succession and a common seal and which shall be capable in its corporate name of—

- (a) suing and being sued;
- (b) purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property;
- (c) borrowing money;
- (d) entering into contracts;

¹⁵⁴ Capsa guideline, 8.

¹⁵⁵National Museums and Heritage Act No 6 of 2006 (Government Printer Revised Edition, 2012)

<http://kenyalaw.org/lex/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/N/National%20Museums%20and%20Heritage%20Act%20Cap.%20216%20-%20No.%206%20of%202006/docs/NationalMuseumsandHeritageAct6of2006.pdf> accessed 21 July 2018.

(e) doing or performing all other things or acts necessary for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.¹⁵⁶

In 1992, the National Museums of Kenya Staff Retirement Benefits Defined Benefit (DB) Scheme was set up by the National Museums of Kenya with the promise that at the end of employment, a member would be entitled to a benefit fixed and determined as a factor of his last pensionable salary and the years of service. However, in 2011, a government directive¹⁵⁷ that all schemes should convert to Defined Contribution (DC) schemes, caused the Board of the National Museum of Kenya to commence the process of conversion of its existing scheme. At that time, nearly two decades after its establishment, the DB scheme was already a struggling scheme, steeped in actuarial deficit. The instability of the DB scheme meant that the amount of accrued benefits capable of being transferred to a newly set up DC scheme would be reduced. The scheme sponsor, NMK, was unable to obtain the necessary finances to bring the DB scheme back to a fully funded status.¹⁵⁸

Despite all this, the NMK Board proceeded with the process of conversion and after compliance delays, an actuarial valuation was done, and deed of amendment filed at the RBA in September 2013. This was necessary to complete the conversion process as outlined in the prudential guidelines issued by RBA to aid schemes in the conversion process.¹⁵⁹ With effect from 30th June 2011, the DB Scheme was closed to new entrants with members aged above 55 years retained in the scheme thus continuing to accrue benefits there. Members aged 55 years and below would accrue future benefits in the DC scheme to be called the National Museums of Kenya staff pension scheme (NMKSPS).

¹⁵⁶ *ibid* s 3.

¹⁵⁷ Office of the Deputy Prime Minister and Ministry of Finance, 'Public Service Retirement Benefit Schemes approval by the Treasury prior to Registration by the Retirement Benefits Authority', Treasury Circular No 18/2010.

¹⁵⁸ Interview with John Muli, Supervision Officer, Retirement Benefits Authority (Nairobi 25 May 2017).

¹⁵⁹ RBA, 'Prudential guideline No 1 for the implementation of Regulation 16 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 on conversion of schemes from defined benefit to defined contribution designs' (RBA 2012) <http://www.rba.go.ke/index.php/en/?option=com_phocadownload&view=category&id=53> accessed 21 July 2017.

To effect the establishment and transition into the new DC scheme, a trust deed and rules was prepared to set the parameters of the trust outlining the duties and responsibilities of the employer, trustees and the rights and entitlements of the members and beneficiaries. The scheme was set up under an irrevocable trust, which cannot be altered or revoked by the settlor at will and is the legal form of the scheme with its own internal governing board in the form of a board of trustees. The NMKSPS was established not only to provide pension and other associated benefits upon their retirement but also to relieve dependants of deceased employees with the offering of some financial support.

Already at a disadvantage, the problems in the DC scheme were enhanced by a failure to remit contributions of members who were to accrue benefits into the scheme and additionally, the employer was not meeting its contribution obligation to the members. Among other requirements, the NMK made a covenant to collect all sums contributed by it and the members in accordance with the rules of the scheme. The trustees covenant generally to manage and supervise and administer the scheme for the benefit of the members and in line with the law.¹⁶⁰

The sponsor over the course of the existence of the scheme demonstrated its willingness to remedy the situation through transfer of lump sum into the scheme fund, however, the overall scenario has resulted in a continuous deterioration in the scheme funding level. As at December 2016, the RBA estimated that since the DC scheme commenced, in July 2011, the total unremitted contributions plus interest was approximately Kshs 110 Million, a debt that continued to increase.

The RBA made persistent and concerted efforts to pursue the trustees of the scheme and the sponsor with a view to regularizing the position and returning the scheme to its full funding level. According to the Retirement Benefits (Minimum Funding Level and Winding up of Schemes) Regulations, 2000, an occupational scheme is considered to be below the minimum funding level when the assets of the scheme are less than one hundred per centum of the value of the accrued liabilities of the scheme and the scheme is unable to meet its liabilities as and when

¹⁶⁰ National Museums of Kenya Staff Pension Scheme Trust Deed and Rules, Clauses 7 and 9 (NMKSPS Trust Deed and Rules).

they fall due.¹⁶¹ Regulatory interventions fell into play once the scheme was below this minimum funding level. These interventions included writing to the trustees and sponsors of the scheme, negotiation of a remedial plan for the scheme,¹⁶² giving notice of intention to appoint an interim administrator¹⁶³ and requests for meetings, with the Ministry of Labour Sports and Culture and the National Treasury, to explore and formalize consistent funding for the scheme as required by law.

3.2.2 *Challenges*

Lack of leadership and direction

Though provided for in its constitutive document, the NMKSPS was without a functioning board of trustees for a number of years. This greatly affected decision making within the scheme. Further, the NMKSPS did not have a policy to guide board composition despite established best practice. The trust rules for the NMKSPS do not explicitly outline the criteria for selection of trustees. The NMKSPS does not have a tangible election or nomination policy that would ensure the right expertise mix within the board of trustees. This could impact the ability of trustees to consider expert advice accordingly, especially advice on complex financial information. In the NMKSPS, election of a trustee is through popular majority vote and there is often a division between trustees who are in either upper or lower cadres of staff where the latter are not treated at par with the fellow trustees. Further, while some trustees are employees of the organisation, others are nominated by the sponsor, and are usually part of senior management or the board of directors of the sponsor. This scenario may also have led to biased decision making in favor of sponsor wellbeing and at the expense of the scheme. Such arrangements interfere with the objectivity of the trustees. A greater focus should therefore be placed on member elected trustees, as research has shown that these trustees can improve fund governance as long as they

¹⁶¹ Retirement Benefits (Minimum Funding Level and Winding up of Schemes) Regulations 2000, reg 4 (1) (a) <http://kenyalaw.org/lex/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/R/Retirement%20Benefits%20Act%20Cap.%20197%20-%20No.%203%20of%201997/subsidiary%20legislation/docs/RetirementBenefitsAct3of1997_subsiary.pdf> accessed 21 July 2018.

¹⁶² *ibid* reg 5.

¹⁶³ Retirement Benefits Act, s 45.

do not dominate the board and they may reduce political interference such as when a sponsoring government uses pension assets as a safety valve against other budget shortfalls.¹⁶⁴

Clause 11 and 12 of the NMKSPS trust deed provides for the composition of trustees. The number of trustees shall always be not less than four and not more than nine in total with the number of trustees nominated by members of the scheme being at least half but not less than half.¹⁶⁵ The scheme has six trustees, three of whom are appointed by the sponsor and three member nominated. By managing the scheme pool of assets, the trustees have legal ownership and control of the fund. The trustees also administer the scheme assets for the sole benefit of the members of the scheme.¹⁶⁶ At the time of formation of the scheme, the trustees were in place, however as at September 2015, there were no trustees with no witnessed deeds of appointment of trustees. This was however remedied in 2016 when 5 members were nominated and appointed to the board of trustees.

Aspects of good board composition such as gender mix, age mix and skills mix are not adequately catered for within the provisions of Clause 11 and 12 of the trust deed. They are also not present within the Retirement Benefits Act. A board of trustees would benefit from professionals with legal, actuarial, financial investment and benefits administration knowledge and capabilities that would enable them to collectively act in the best interest of the beneficiaries. In the NMKSPS, there is no evidence that this criterion forms the consideration for the selection of trustees. Further, there is no policy to ensure that a gender balance is achieved within the trustees. At present, of the five (5) trustees in place, four are male contrary to the over-arching spirit of the Constitution of Kenya.

The NMKSPS did not have a documented formal training program. The guideline issued by the RBA meant that all trustees would have to comply as per the terms. As at the time of the study, it was established the NMKSPS has realized the importance of a proper balance of requisite

¹⁶⁴David Hess, 'Protecting and Politicizing Public Pension Fund Assets: Empirical Evidence on the Effects of Governance Structures and Practices' (2005) U.C. Davis Law Review 187, 205 <https://lawreview.law.ucdavis.edu/issues/39/1/articles/DavisVol39No1_HESS.pdf > accessed 12 July 2017.

¹⁶⁵ NMKSPS Trust Deed and Rules, clause 11.

¹⁶⁶ *ibid* clause 9.

knowledge and skills as well as compliance with the RBA as the existing 5 trustees had all been trained and certified under the Trustees Certification Program. To supplement the program, the trustees of NMKSPS should develop a formal training program for use during a member's term. The NMKSPS did not have a mission, vision or a set of strategic objectives by 30th August 2017. A lack of documentation of governance processes such as scheme charter and code of conduct in no way affects the risk score of the scheme.¹⁶⁷

Poor internal mechanisms and weak regulatory framework

According to the OECD, a good corporate governance framework should ensure that timely and accurate disclosure is made on all material matters including the organization's financial situation, performance and governance.¹⁶⁸ In relation to retirement benefit schemes, the *trust rules* make provision for administering the scheme in accordance with applicable laws, keeping all proper books and records of account in respect of the scheme, ensuring a general meeting is planned, ensuring that contributions based on correct pensionable emoluments are remitted, considering proper investment and maintaining regular communication with the membership.

The trustees are expected to communicate regularly with their members, updating them on the scheme, furnishing them with annual member statements and convening an annual general meeting to enable members to raise matters relating to the scheme. The Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations provide that it is the duty of trustees to convene an annual general meeting.¹⁶⁹ Since the establishment of the NMKSPS, there had been no AGMs and the membership did not have a means of determining the status of the scheme. The trustees of the NMKSPS failed to disclose to the membership, the challenges facing the scheme. The failure of the board of NMKSPS to hold an AGM, contrary to the provisions of the Retirement Benefits Act and Regulations was a key failure in the agency role of the trustee in the relationship.

¹⁶⁷ Email from John Muli to author (27 September 2016).

¹⁶⁸ G20/OECD, *Corporate Governance Principles* (OECD Publishing, Paris 2015) 37
<<https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf>> accessed 8 June 2017.

¹⁶⁹ Occupational Regulations, reg 8(2)(j).

Regular oversight of the trustees was undertaken by the RBA through statutory periodic reporting. However, at no other time were the members actively monitoring the activities of trustees. This created an environment of lack of continuous accountability, checks and balances all leading to prolonged exposure through non-remittance of contributions. The Act bestows upon the scheme trustees a duty to act in the best interests of the members in allowing them to institute proceedings for the recovery of deductions for a member if an employer fails to remit them. The NMKSPS trustees have not instituted any proceedings against the sponsor to recover the deductions of member's benefits despite the clear failure to do so. Additional legislation should be considered beyond simple disclosures to insist on further information on what is actually ongoing in the scheme.¹⁷⁰

In December 2014, the RBA resolved to appoint an interim administrator to provide leadership over the affairs of NMKSPS in lieu of the trustees. This decision moved the sponsor to act with speed by releasing Kshs 81 Million into the scheme. This action was taken as a testament of the sponsor's commitment towards reviving the scheme and allowed the interested parties to reenter into engagement with the regulator to reach a solution to the scheme underfunding. The RBA resolved yet again to appoint an interim administrator in August 2015 when these discussions did not bear fruit. As at April 2016, the Authority was considering the option of winding up the National Museums of Kenya Staff Pension Fund.

Stakeholder relationships

In NMKSPS, though the sponsor made numerous commitments to remit the deductions and contribute into the scheme, the total amounts were never fully realized. At the start of this study, the NMKSPS had been marked by RBA as a scheme deserving of winding up, however, the board of directors of RBA reconsidered its decision when the sponsor showed renewed efforts to inject the funds into the scheme. This commitment was as a result of extensive stakeholder talks between the trustees, the sponsor, RBA the Ministry of Labour, Sports and Culture, the National

¹⁷⁰ David Hess, 'Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development' (2007) 2 (2) Virginia Law and Business Review 221, 263 <http://webuser.bus.umich.edu/dwhess/Hess_2007_Virginia%20Law%20&%20Bus%20Rev.pdf> accessed 12 July 2017.

Treasury and the RBA. Though not done nearly early enough to cater for the enormous deficit, the engagement of stakeholders was a key step to scheme revival.

In occupational retirement benefit schemes of public entities, it is important to include an aspect of management of stakeholder relationships. The regulations are silent on the issue of stakeholder relationship and managing conflicts. However, given the nature of these schemes, it is crucial to relate with the government ministry responsible for the public entity, as well as the other stakeholders such as members and the service providers (managers, custodians and administrators).

It is clear from the above that scheme challenges are legal, regulatory and institutional. They include (1) Failure to submit audited accounts; (2) Non-remittance of deducted employee contributions; (3) Non-remittance of sponsor's contributions; (4) Failure by the trustees to appraise membership; (5) Lack of an acceptable remedial action plan; and (6) Lack of commitment by the sponsor to fund the scheme and (7) weak internal mechanisms.

CHAPTER FOUR: Summary of Findings, Recommendations and Conclusion

4.1 Introduction

This study in the previous chapter has established that the NMKSPS is properly constituted under the Retirement Benefits Act, Cap 197. This means that the NMKSPS already had within it certain minimum corporate governance structures as required by the existing legal and regulatory framework. In determining whether these were effective in the management of the scheme, the study found that despite the legal safeguards, the scheme has faced challenges, which have contributed to its present situation. The study established that corporate governance is lacking within the scheme due to the absence of the necessary internal mechanisms to guide the trustees and the sponsor appropriately to meet the needs of the members. Further, the regulatory approach to the management of the schemes is not sufficient to deal with the particular issues, NMKSPS and schemes similar to it, have faced.

Gillan, et. al posit that external and internal governance mechanisms are substitutes to each other, where external governance is exerted by the government agencies, such as the regulator, and internal governance structures are shaped by the trustees themselves.¹⁷¹ International best practices in the sampled jurisdictions of Canada and the United Kingdom¹⁷² provide for governance procedures, the answer to whether incorporation of these enhanced procedures could have led the schemes to better fund performance lies in the concerted efforts by relevant parties to make this happen. This chapter will summarize the findings of the targeted interviews, provide recommendations and draw conclusions on the application of corporate governance in schemes sponsored by public entities.

4.2 Summary of findings

The targeted interviews revealed that the trustees and scheme administrators have a good understanding of what corporate governance is. Majority linked corporate governance to a

¹⁷¹ Stuart L. Gillan, 'Recent Developments in Corporate Governance: An Overview' (2006) 12 *Journal of Corporate Finance* 381 <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.538.3754&rep=rep1&type=pdf>> accessed 24 July 2017.

¹⁷² *ibid* 382-385.

framework through which decisions are made and answers touched on the use of globally accepted ethics in the running of the affairs of an organisation. From the scheme perspective, governance translated into ensuring that the scheme is compliant with the law and that benefits are paid out in a correct and timely fashion.

The benefits of corporate governance were also acknowledged. The benefits identified included improved communication with members, increased investment returns and better compliance with regulatory and legal requirements. The respondents also felt that corporate governance would reduce mismanagement, corruption and render the scheme more efficient. An interesting advantage of inclusion of corporate governance was that it would render the actions of trustees more legitimate and transparency would benefit member trustee interactions.

All of the respondents identified with and had attended, the Trustee Development program endorsed by the Retirement Benefits Authority as a key training for trustees. Some respondents also identified other courses on the fundamentals running a scheme as offered by other service providers. Only a quarter of the respondent trustee boards had undertaken a self-evaluation exercise. All the respondents recognized the need to associate with key stakeholders and the common methods for communication with members were member AGMs and member education forums. Communication with sponsors was through sponsor quarterly reports and management meetings. The interviews revealed that communication on scheme issues with the government is limited to internal discussions with the organisation and the chairpersons of the board of trustees. These interviews revealed that there could be little to no direct interaction between the government and trustees in budgeting for scheme requirements.

The targeted interviews also revealed that the specific challenges faced by the trustees of schemes sponsored by government owned entities and which could ensure better governance was the selection of trustees. Respondents felt that senior managers should not be nominated by the sponsor to sit as trustees as they often intimidate other trustees and members.

From a regulatory perspective, the targeted interviews revealed that the risk assessment of a scheme focusses on certain aspects of scheme administration and management such as the presence of investment policy statements, remedial plans and up to date service level agreements with service providers. Other aspects of management of risk such as the presence of insurance

policies and conflict resolution mechanisms are also considered. However, a scheme risk score is not affected by lack of a trustee charter, conflict of interest policy and other key governance documents such as trustee charter. Rather, the regulators focus in the use of the risk-based supervision has been on the financial position of the scheme, which affects roughly 30% percent of the overall score.

4.3 Recommendations

Legal framework

In the legal framework that governs the setup of occupational retirement benefit schemes, the sponsor plays a primarily role from inception. Without the sponsor resolution to set up the scheme for the benefit of the employees, it would not exist. The sponsor is further responsible for appointing part of the trustees or in the alternative, a corporate trustee, for making decisions about the contribution rate in the scheme and determining other key parameters for the scheme. This legal framework goes further to place on the sponsor, the onus to remit the employee's contributions on his behalf. Corporate governance is in place for the very reason that this lack of balance in the legal framework must be checked.

NMKSPS problems largely revolve around a failure of the sponsor to remit employee deductions into the scheme, and contribute into the scheme. Corporate governance as the UK scenario has shown, could see an enhancement in its internal mechanisms, but ultimately the remedy for a healthy NMKSPS would be for the sponsor to undertake its legal obligation under the trust deed and rules. An injection of funds by the sponsor to remedy the deficit in the scheme is the most useful strategy. The nature of retirement benefits is a voluntary trust arrangement, therefore perhaps a consideration of a mandatory trust with subsequent legal repercussions would be the first step in better performance of these schemes.

Regulatory framework

The governance practices championed within these jurisdictions already appear within the framework of the management of retirement benefit schemes in Kenya collectively through the

Retirement Benefits Act and its Regulations.¹⁷³ This means that the law is generally robust with key issues of corporate governance captured within the existing regulatory framework. Despite this however, the regulatory framework does not seem adequate to deal with issues facing retirement benefit schemes sponsored by public entities. If it did, the problems would not persist.

According to Clark and Urwin, the challenges faced by defined contribution plans especially with regards to heavy losses have placed a premium on plan governance, given its link to fund performance.¹⁷⁴ In their study, Clark and Urwin found that most funds are constrained by the limits of expertise, be it of the trustees or those who support them in the management of the funds. They find that trustees have struggled to make effective judgments, leading them to be bystanders to the passage of events. These are important aspects towards effective scheme governance which would otherwise ensure that the individuals chosen as scheme trustees satisfy the criteria in sections 22A and 26 of the Retirement Benefits Act and regulation 8 of the ORBS Regulations. The regulator has been concerned about the need for trustees to possess the proper reasoning and understanding to run the scheme successfully. Under the prudent person principle,¹⁷⁵ trustees ought to be selected from persons that have financial understanding to ascertain the relevance of expert opinions and advice to them. In 2013, the Retirement Benefits Authority issued a prudential guideline for capacity building of trustees of retirement benefit schemes.¹⁷⁶ This was done pursuant to section 26(3) of the Retirement Benefits Act, which provides that:

26(3) Notwithstanding the provisions of subsection (2), the appointment of any person as a trustee shall be subject to the approval by the Authority.¹⁷⁷

¹⁷³ There are several regulations governing the regulation of Retirement Benefit Schemes in Kenya including i) Individual Retirement Benefit Schemes Regulations ii) Occupational Retirement Benefit Schemes Regulations iii) Minimum Funding Level and Winding up of Scheme iv) Tribunal Rules v) Transitional Regulations vi) Managers and Custodians vii) Forms and fees viii) Administrators and ix) Mortgage Loans.

¹⁷⁴ Gordon L Clark and Roger Urwin, 'Innovative models of pension fund governance in the context of the global financial crisis' (2010) 15 (1) Pensions: An International Journal 62 <<https://link.springer.com/article/10.1057/pm.2009.25>> accessed 15 August 2017.

¹⁷⁵ A legal maxim that would restrict the trustees in their dealings with scheme funds, so that the investments made would be similar to those the trustee would make in his own portfolio when seeking a reasonable return on the investment.

¹⁷⁶ RBA, 'Prudential guideline No 1/2003 'Capacity Building of Trustees of Retirement Benefit Schemes' (RBA 2013) <http://www.rba.go.ke/index.php/en/?option=com_phocadownload&view=category&id=53> accessed 21 July 2017.

¹⁷⁷ The Retirement Benefits Act No 3 of 1997 Laws of Kenya (Government Printer 2016) s 26 (3) <<http://www.kenyalaw.org/lex/actview.xql?actid=No.%203%20of%201997>> accessed 18 July 2018. (Retirement Benefits Act).

The prudential guideline introduced to the industry the Trustee Development Program- Kenya.¹⁷⁸ The program focuses on the skills that trustees would need in the administration of retirement benefit schemes. The guideline required all trustees to undergo the training in order to be certified as trustees by the RBA. The RBA subsequently issued two addendums to the prudential guideline. These addendums extended the time for compliance with the guideline, due to difficulties in complying first to 31st December 2015¹⁷⁹ and thereafter to 31st December 2016.¹⁸⁰ Prior to this guideline, training in the industry was undertaken in a haphazard manner with no formal documented training program. The NMKSPS scheme trustees have obtained necessary training through the program and have engaged the necessary service providers for the scheme. Yet, the scheme still suffers from significant contribution challenges with failures to remit contribution. This can be seen as an indictment on the ability of good governance to solve every problem that could arise in a scheme but is a crucial first step in the acknowledgment of challenges. Further, the regulator should consider targeted sponsor and trustee training in light of the move to defined contribution and the change in the mindset required to make these schemes successful.

From a regulatory perspective, at the time of this study, the RBA did not have a code of governance to guide retirement benefit schemes. Therefore, schemes of this nature did not have a flexible reference from which to model their governance structure. Further, the risk based supervision toolkit does not factor in the risk that a scheme with a lack of adequate corporate governance structures is exposed to. Schemes with poor internal corporate governance mechanisms would receive greater attention if this were the case.

¹⁷⁸ The trustee development program, Kenya (TDPK) developed by the joint efforts of the Regulator, the Retirement benefits Authority in conjunction with the College of Insurance and Humber College, Canada. It provides a holistic training for the new trustee to enable him to have a basic understanding of governance issues, legal issues, regulatory requirements and investment methodologies and terms necessary to the management of a retirement benefit scheme.

¹⁷⁹ RBA, 'Capacity Building of Trustees of Retirement Benefits Schemes, First Addendum (19 February 2015) <http://www.rba.go.ke/index.php/en/?option=com_phocadownload&view=category&id=53> accessed 21 July 2017.

¹⁸⁰ RBA, 'Capacity Building of Trustees of Retirement Benefits Schemes, Second Addendum (18 January 2016) <http://www.rba.go.ke/index.php/en/?option=com_phocadownload&view=category&id=53> accessed 21 July 2017. Trustees argued that the cost of the training was restrictive, and that budget needed to be sufficiently allocated from either the sponsor or the fund.

In the process of supervising the industry, the regulator therefore remains distant, removed from the day-to-day activities and challenges of the schemes. Due to this, it remains largely reactive to issues and is often unaware of the extent of the challenges facing scheme until it is too late. This problem is compounded by the fact that the regulator is dependent on information from the scheme trustees and its administrators as well as other service providers in order to know whether a scheme is facing challenges. Independence is a key issue in the schemes sponsored by public entities and is highlighted by the UK Pensions Regulator in its code of practice for internal controls.¹⁸¹ In developing the code, the UK regulator found that when examining the abilities to solve problems that are relevant to their tasks, trustees were more concerned with safeguarding the sponsor's funds compared to dealing with the management of scheme finances.¹⁸² This was indeed the scenario in NMKSPS where the struggle for the sponsor to remain afloat, determined its decision to not contribute into the scheme for an extended period leading to severe scheme underfunding. The regulator could consider development of a code for internal controls.

As a self-regulatory mechanism, service providers are required by law to report to the regulator any unusual occurrence that could jeopardise the rights of the members or sponsors of the scheme.¹⁸³ Further, there are offences under the Act, such as failure to submit audited accounts under section 34 (4B) of the Retirement Benefits Act, however, these offences are only applicable upon conviction are hardly utilized by the regulator. The current regulatory framework is not robust enough to allow the Authority to follow the culprits and obtain the funds in a swift manner, that is devoid of legal constraints and the regulator could be conflicted between growth of the industry and holding of sponsors and trustees and service providers to account for their role in scheme failures.

The regulator should also consider a reform of the law to put the duty to remit contributions into the scheme back into the hands of the employee or trustees themselves for a time and to follow

¹⁸¹ The Pensions Regulator, Regulatory Code of practice No 9: Internal Controls Paper' <<http://www.thepensionsregulator.gov.uk/docs/code-09-internal-controls.pdf>> accessed 5 May 2017 (Code of Practice No 9).

¹⁸² *ibid* 81.

¹⁸³ Retirement Benefits Act, s 40(c).

those responsible for scheme failures. Additionally, the regulator can seek to enhance the regulators powers such as powers to invoke a moratorium on the scheme, without impacting on the sponsors obligation to make his contributions into the scheme. The regulator can consider collaboration with custodians and other stakeholders to curb the widespread failure to remit into the scheme and amendment to the regulations to allow for institutional arrangements for contributions into the scheme.

Institutional framework

At the institutional level, the trust deed and more particularly the rules do not resolve the numerous governance gaps that have been discussed in the previous chapter. According to the OECD, pension funds require a set of internal statues and external regulations that would establish the framework for corporate governance and effective management towards achievement of its goal. It is imperative that schemes are supplemented by internal corporate governance tools that prove beneficial to the scheme by serving as an internal self-regulatory mechanism for the scheme.

Whenever a new trustee joins the NMKSPS, or any other scheme for that matter, their role and responsibilities ought to be defined in a clear way. The trustees must be inducted alongside a clear mission statement for the scheme so that there is no failure to ascertain one's duties and responsibilities. There needs to be an established induction policy which guides the process. The law governing occupational schemes outlines the various duties of the trustees in specific terms, stemming from these duties and together with the scheme objectives, these must be cascaded into measurable and specific objectives for trustees to achieve collectively. The trustees need to provide adequate guidance on matters such as performance of investments, contributions, strategic plan monitoring, monitoring of the fund's success from year to year and the current application of recommended structures of governance which aim at implementation of the scheme's objectives. A thorough induction will inform trustees of these obligations and expectations so that they can prepare accordingly.

The NMKSPS trustees should put in place a strategic plan with a recognizable vision and mission and strategic objectives which guide its activities for the future. They should also

develop a board charter which forms part of the necessary documents in trustee induction over and above the trust deed and rules, investment policy and past statement of accounts. This guides the expectations of the members also. The scheme should ensure that the objectives are specific, measurable, attainable, realistic and timely.

The preparation of policies to guide board selection, based on skills necessary, gender consideration and other elements¹⁸⁴ should be considered and adhered to according to the existing circumstance of the scheme at the time of election. Practical guidance should be given which focuses on improving leadership practices. Instances of a lack of board of trustees would be quickly recognized as a severe deficiency in corporate governance, and unique ideas could be formulated to bridge the gap. For example, in the case, the sponsor could provide a corporate trustee for the scheme to bridge the gap until trustees are appointed as per the trust deed and rules, and within a mutually agreeable timeline. In some instances, member sensitization on the risks associated with a lack of board of trustees would be helpful. All in all, the NMKSPS trustees should have a diverse mix of knowledge, skills and competencies to effectively make decisions that ensure scheme viability. This study recommends that the NMKSPS develop a board charter and supporting policies as minimum governance documents to aid trustee composition, selection, induction and evaluation of trustees.

Further, internal mechanisms that deal with managing conflict are of importance in schemes sponsored by public entities such as the NMKSPS, where members of the board of trustees are also employees of the sponsor who set up the scheme. As earlier mentioned there has been an attempt to remedy this by putting in place laws to protect the trustees from any victimization in their exercise of their duties as trustee.¹⁸⁵ Following from guideline number ten of CAPSA, the trustees of NMKSPS would need to establish a code of conduct that governs not only themselves but also the service providers who offer business services to the scheme during which other

¹⁸⁴Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000, reg 8 <http://kenyalaw.org/lex/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/R/Retirement%20Benefits%20Act%20Cap.%20197%20-%20No.%203%20of%201997/subsidiary%20legislation/docs/RetirementBenefitsAct3of1997_subsiary.pdf> accessed 13 July 2018 (Occupational Regulations). The trustee must be fit and proper showing his ability to carry out the work of a trustee. Regulation 8 of the Occupational Regulations should be followed, and the trust rules should provide the correct position even going so far as to reference a policy document for the scheme.

¹⁸⁵ Occupational Regulations, reg 8 (4).

conflicts of interest could arise. To address this, the scheme trustees should establish a control procedure and a policy to address conflict of interest both real and future conflicts.

Further, to strengthen its internal mechanisms, and in reference to the agency role they play, trustees of schemes such as NMKSPS, ought to have procedures to effectively communicate regarding scheme deficits, lack of contribution and other regulatory measures taken against the scheme. This will allow members to voice their concerns and may ultimately lead to a quicker resolution of issues. For this to be done, the trustees must create the right environment.

The change in government policy dictating a move from defined benefit to defined contribution schemes had implications for future management of DC Schemes.¹⁸⁶ The NMKSPS trustees in realizing that the risk is now borne by the members, should adopt an appropriate governance structure which allows the beneficiaries of the scheme to monitor their activities. Hess¹⁸⁷ in his critique of scheme governance structure of both defined benefit and defined contribution schemes, found that the structures revolve around creating consistency on matters such as management of scheme assets, investment opportunities and models and also the levels of planning for the fund.¹⁸⁸ His analysis considered that in the defined benefit model, performance of asset investment did not determine future benefits hence the sponsor of the fund suffers the risk of loss resulting from poor investment choices.¹⁸⁹ The conflicts that would potentially arise between the trustees and beneficiaries or sponsors are reduced. This follows that the defined contributions schemes, the potential for conflict is increased. The risk of loss is higher and shouldered by the members, and as we have seen with NMKSPS the issue of unremitted contributions has led to underfunding. It is recommended that there should be institutional arrangements to ensure that contributions can at any point be made directly to the custodian on behalf of the trustees by the member themselves. The trustees must have internal mechanisms with the custodian and sponsor to ensure that the payment of contributions made through the sponsor are actually done.

¹⁸⁶ Office of the Deputy Prime Minister and Ministry of Finance, 'Public Service Retirement Benefit Schemes approval by the Treasury prior to Registration by the Retirement Benefits Authority', Treasury Circular No 18/2010 24 November 2010.

¹⁸⁷ Hess (n170).

¹⁸⁸ *ibid* 227.

¹⁸⁹ *ibid* 261.

In a scheme such as the NMKSPS, it is the contributions and interest into the fund that informs the final pension due. Therefore, there is a greater incentive for members to monitor the effectiveness of trustees in the scheme. Though not required by law, trustees should ensure that members maintain regular oversight over their activities and are able to question trustees and bring to the regulators' attention any unsafe or unsound practice before a point of no return is reached. The trustees of NMKSPS can consider an oversight body such as a committee for oversight over the trustees as posited by Miles and Zhang.¹⁹⁰ It is important however that the independence of such a committee be virtually guaranteed.¹⁹¹ The NMKSPS trustees when faced with non-remittance should have maintained a record of any communication previously had with the employer, and its internal mechanisms should have provided the period within which the matter would be escalated to the regulator. This study recommends that the NMKSPS develop an effective communications strategies key to maintaining transparency and accountability of the trustees to members. Over and above the statutory annual general meetings (AGMs), trustees should organize member education forums to adequately keep members informed on sustainability of the scheme, governance measures and board performance as provided for in the Mwongozo.

An essential internal mechanism would be one that assists trustees in managing stakeholder relationships due to the number of players involved. In the case of NMKSPS the players include Ministry of Labour, Social Security and Services, the National Treasury, the NMK Board, the Regulator, membership of the scheme, scheme trustees and service providers. These stakeholders are important due to the schemes' specific problem of unremitted contributions of both the employer and the employee. The application of the shareholder theory in the management of these schemes is necessary as different players have different obligations towards the ultimate beneficiary in the scheme. Striking a balance of needs is a difficult task. In NMKSPS, the funds generated by the sponsor were simply not enough to meet all its obligations to various parties. Where additional funding was sought, decisions were made based on the available national

¹⁹⁰ Lilian Miles and Zhong Zhang, 'Improving Corporate Governance in State-Owned Corporations in China: Which Way Forward?' [2006] 6 (1) *Journal of Corporate Law Studies* 213

<<https://www.tandfonline.com/doi/abs/10.1080/14735970.2006.11419951>> accessed 12 June 2017.

¹⁹¹ *ibid* 213-214.

revenues and the pressing issues at the time. It is therefore imperative for trustees of occupational retirement benefit schemes of public entities such as the National Museums of Kenya to ensure that they have the relevant structures in place to work with major stakeholders such as the government ministries to directly fund their schemes. As shown in the study, political actors invariably play a significant role in allocation of funds.

4.4 Conclusion

Effective and efficient pension fund governance involves the processes and decision-making arrangements that ensure appropriateness of objectives and information management procedures that support the objectives of the scheme, compliance with applicable laws.¹⁹² Corporate governance is a combination of corporate policies and best practices adopted by corporate bodies to achieve their objectives in relation to their stakeholders while guided by a robust legal and regulatory framework.

The hypothesis put forth at the start of this study was that incorporation of corporate governance practices in the management of contributory occupational retirement benefit schemes of public entities in Kenya is necessary to ensure efficiency and better performance. The study has referenced the National Museums of Kenya staff pension scheme as a case study. The study sought to determine whether the entrenchment of corporate governance principles toward scheme management is sufficient in and of itself to ensure a well-managed and well performing retirement benefits scheme and considered the legal, regulatory and institutional framework that could allow for the entrenching of corporate governance in retirement benefit schemes.

The study found that the scheme had been well established under the Retirement Benefits Act, Cap 197 and accordingly registered with an approved trust deed and rules signed off by elected and appointed trustees. Under the legal framework, the duties of trustees and service providers are well espoused and the fiduciary duty that the trust system provides, gave trustees a focus on the shareholder, the member. Though the external framework existed by virtue of the law, the internal structures were not robust enough to support their implementation. The study found that

¹⁹² Code of Practice No 9.

the internal structures in NMKSPS were weak, with instances where there were no trustees in place, unreported non-remittance of contribution, obvious gaps in accounting statements and lack of proper support from service providers. Further the selection of trustees was not well outlined in a practical internal policy thereby undermining board composition. The scheme objectives and vision had not been set out in a charter and the earlier set of trustees had not received the requisite training or induction into the scheme, which was only another example of the lack of effective internal mechanisms to guide them.

With the recommendations to develop a strong internal governance structure and to take up a responsive and proactive rather than reactive regulation of schemes of public entities, the problem of prolonged non-remittance of contributions and subsequent underfunding could improve significantly. The incorporation of corporate governance can ensure that at a legal, regulatory and institutional level, the scheme is well managed to ensure that deficiencies of this nature do not persist. Indeed, mechanisms could be put in place to call trustees to action when faced with non-remittance. Further, as evidenced in the manner in which the stakeholders in NMKSPS came together, a key strategy in dealing with the problem is to have an acceptable remedial plan, with the buy in of all parties, which would ensure a large and steady injection of funds into the scheme. The particular underfunding that the NMKSPS suffered was not as a result of poor investment decisions, or the trustees' inability to follow the scheme investment policy but rather the inability of the sponsor to meet his obligation to the scheme and the condoning of the situation by trustees and other stakeholders including service providers and the regulator.

On the part of the regulatory framework, the regulator is mandated to regulate and supervise. However, there appears to be a disconnect between information received by the sponsor and what is occurring in the schemes. Where there is no disconnect, there needs to be a proper mechanism in place administratively to actively engage stakeholders and ensure that compliance in submissions by schemes is not compliance in form only, but also in substance. For example, with the NMKSPS, the scheme had met its statutory obligation to file accounts, although the accounts show nil balances for many of the members of the scheme. The regulator needs to further provide appropriate guidance on the internal mechanisms required by successful schemes.

From the study it is clear, that the incorporation of corporate governance can greatly contribute to the success of retirement benefit schemes like NMKSPS to ensure better performance. The institutional, regulatory and legal framework for the management of schemes such as NMKSPS can only be enhanced by the self-regulatory protection that corporate governance offers. Where the law has provided for a regulatory framework which is overarching, scheme trustees and sponsors must incorporate further mechanisms within internal scheme structures. A concerted effort to incorporate corporate governance principles can provide the much-needed strategy to check sponsor power, elevate the regulator response and create necessary internal mechanisms to ensure effective management of occupational retirement benefit schemes of public entities. Corporate governance is therefore key to ensuring that all the cogs in the wheel move together to provide the promised old age benefit to members of retirement benefit schemes sponsored by public entities.

APPENDIX I: LETTER TO RESPONDENT

Dear Respondent,

I am a Master's student at the University Nairobi School of Law. In partial fulfillment of the degree (LLM) requirements, I am conducting a study on **“A CASE FOR CORPORATE GOVERNANCE IN CONTRIBUTORY OCCUPATIONAL RETIREMENT BENEFIT SCHEMES SPONSORED BY PUBLIC ENTITIES**; I would appreciate if you could spare a few minutes of your time to fill in the blanks in the attached list of questions to the best of your knowledge.

The information in this questionnaire will be strictly confidential. The information will not be used for any other purpose other than for this research. Your assistance in facilitating the same will be highly appreciated.

Thank you in advance. _____

Abuodha Clare Asiko

APPENDIX II: QUESTIONNAIRE

The questionnaire is meant to collect information on the impact of corporate governance on occupational retirement benefit schemes in Kenya with a focus on schemes sponsored by government owned entities. Kindly answer the questions by writing a brief statement or ticking in the boxes provided as will be applicable.

Date 27 / 9 / 2016

SECTION 1: BACKGROUND INFORMATION

1. Are you a permanent Employee?

a. Yes

b. No

2. What is your Gender?

i. Male

ii. Female

3. Age Category

a. Below 25 years

b. 26 – 35 years

c. 36 – 45 years

d. Above 45 years

4. What is your highest level of education

a. Secondary

b. Tertiary College

c. University Graduate

d. University Postgraduate

e. Other (please specify) _____

5. What kind of work do you do at your department

a. Formal

b. Informal

Specify (Accountant, manager, etc) _____ Payroll

Processing _____

6. How long have you been in employment? _____ years

SECTION 2: INFORMATION ON CORPORATE GOVERNANCE

7. What do you understand by the term corporate governance?

8. How long have you been a trustee of the scheme?

9. Have you attended any trainings with regard to scheme management in the last 2 years?

Please list them.

10. Has the board of trustees conducted a self-evaluation? What were the results?

11. Does the scheme have the following internal documentation? Yes/No

- a. Trustee charter
- b. Election policy
- c. Conflict of interest policy
- d. Code of conduct
- e. Vision and Mission and Strategic objectives
- f. Procurement policy

12. In your opinion, what are some of the advantages of good governance particularly in management of schemes?

13. How do you associate with/cooperate with your key stakeholders?

14. As a trustee of a scheme sponsored by a government entity, what issues do you think should be addressed differently to ensure better scheme governance?

THANK YOU FOR YOUR RESPONSE

List of Interviewees

1. John Muli- Actuarial Officer, Retirement Benefits Authority
2. Timothy Chege- Senior Actuarial Officer, Retirement Benefits Authority
3. Samuel Wambui – Administrator, UAP
4. Stephen Ngomo – Administrator, Octagon

BIBLIOGRAPHY

- — ‘Hurdles delay roll out of civil servants pension plan’ *Business Daily* (Nairobi, 14 August 2017) <<http://www.businessdailyafrica.com/economy/Hurdles-delay-rollout-civil-servants-pension/3946234-4044448-16xmap/index.html>> accessed 25 August 2017.
 - — National Museums of Kenya staff pension scheme Trust Deed and Rules (2011).
 - — New rules on early reporting put pressure on retirement schemes’ *Business Daily* (Nairobi, 18 January 2017) <<http://www.businessdailyafrica.com/markets/New-rules-reporting-pressure-retirement-schemes/539552-3522480-tnqi9e/index.html>> accessed 5 May 2017.
 - — Shareholder and Stakeholder Theories of Corporate Governance (*Corplaw Blog* 2013) <www.corplaw.ie/blog/bid/317212/Shareholder-Stakeholder-Theories-Of-Corporate-Governance> accessed 11 June 2017.
- Ambachtsheer K, Capelle R and Lum H, ‘Pension Fund Governance Today: Strengths, Weaknesses, and Opportunities for Improvement’ (2006) *Financial Analysts Journal* <<http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.179.101>> accessed 15 July 2017.
- ‘CAPSA Pension Plan Governance Guideline No. 4’ (Canadian Association of Pension Fund Supervisors 2004) <<http://events.snwebcastcenter.com/manulife/GBRS/Prod/PensionLegislation/docs/Pension%20Plan%20Governance%20Guideline.pdf>> accessed March 2017 (CAPSA guideline).
- — Website <<https://www.capsa-acor.org>> accessed March 2017.
- Carmichael J and Palacios R, A Framework for Public Pension Fund Management in Alberto Musalem A and Palacios R (eds), *Public Pension Fund Management, Governance, Accountability and Investment Policies, Proceedings of the Second Public Pension Fund Management Conference* (World Bank, Washington 2003) <<http://documents.worldbank.org/curated/en/640001468782368218/pdf/302250PAPER0public0pension.pdf>> accessed 17 July 2018.

Clark G, 'Expertise and Representation in Financial Institutions: UK Legislation on Pension Fund Governance and US Regulation of the Mutual Fund Industry' [2007] 21st Century Society: Journal of the Academy of Social Sciences 1-23.

— —'Pension fund governance, expertise and organisational form', in Evans J, Orzag M and Piggot J (eds), *Pension Fund Governance: A Global Perspective on Financial Regulation* (Edward Elgar Publishing, Cheltenham UK 2008).

— —and Urwin R, 'Innovative models of pension fund governance in the context of the global financial crisis' (2010) 15 (1) *Pensions: An International Journal* 62 <<https://link.springer.com/article/10.1057/pm.2009.25>> accessed 15 August 2017.

Cooper E, 'Pension Schemes and Sustainable Investing: The Promise of Deliberative Governance' (PSA Annual Conference, Brighton, 2016).

Davies R, *Occupational pensions 'Second pillar' provision in the EU policy context*, (Library of the European Parliament 2013) .

Dolenc P, Stubelj I and Laporšek S, 'What is the Objective of a Firm? Overview of Theoretical Perspectives' in Bojnec S, Brada J and Kuboniwa M (eds), *Overcoming the crisis: Economic and Financial Developments in Asia and Europe* (University of Primorska, 2010) 51 <<http://www.hippocampus.si/ISBN/978-961-6832-32-8/papers/dolenc.pdf>> accessed 17 July 2018.

G20/OECD, *Corporate Governance Principles* (OECD Publishing, Paris 2015) 37 <<https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf>> accessed 8 June 2017.

Gillan L S, 'Recent Developments in Corporate Governance: An Overview' (2006) 12 *Journal of Corporate Finance* 381 <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.538.3754&rep=rep1&type=pdf>> accessed 24 July 2017.

Hayton D. J, *The Law of Trusts* (Sweet & Maxwell, UK 2003).

Hess D, 'Protecting and Politicizing Public Pension Fund Assets: Empirical Evidence on the Effects of Governance Structures and Practices' (2005) U.C. Davis Law Review 187, 205 <https://lawreview.law.ucdavis.edu/issues/39/1/articles/DavisVol39No1_HESS.pdf> accessed 12 July 2017.

— —Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development' (2007) 2 (2) Virginia Law and Business Review 221, 263 <http://webuser.bus.umich.edu/dwhess/Hess_2007_Virginia%20Law%20&%20Bus%20Rev.pdf> accessed 12 July 2017.

ILO, *Governance of Social Security Systems: A guide for Board Members in Africa*, (International Training Centre of the ILO, Turin 2010)

<<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUK Ewj-4Go1czcAhVLUhoKHSbvAIAQFjAAegQIAxAC&url=http%3A%2F%2Fwww.social-protection.org%2Fgimi%2Fgess%2FRessourcePDF.action%3Fressource.ressourceId%3D37499&usg=AOvVaw2sPTk2JbopqamOuVlpoQZ2>> accessed 20 July 2018.

— —*Kenya: Developing an Integrated National Social Protection Policy* (International Labour Office, Geneva 2010) 4 <http://www.ilo.org/secsoc/information-resources/publications-and-tools/TCreports/WCMS_SECSOC_19224/lang--en/index.htm> accessed 10 July 2018.

— —Website, International Labor Standards on Social Security <<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm>> accessed 9 June 2017.

International Organization of Pension Supervisors, 'Good Practices for Governance of Pension Supervisory Authorities (2013)

<<http://www.iopsweb.org/principlesguidelines/IOPS%20%20Good%20Practices%20on%20Governance%20of%20Pension%20Supervisory%20Authorities.pdf>> accessed 18 July 2017.

- Kowalewski O, 'Corporate Governance and Pension Fund Performance' [2012] 6 (1) Contemporary Economics, 14-44
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178363> accessed 18 July 2018.
- Kyanda K H, 'Corporate Governance as a Strategy to Improve Performance in Pension Funds' (MBA thesis, United States International University 2014).
<<http://erepo.usiu.ac.ke/bitstream/handle/11732/151/Henry%20Kyanda.pdf?sequence=1&isAllowed=y>> accessed 4 September 2016.
- Masinde V and Olukuru J, Impacts of Pension Reforms on the Kenyan Pension Industry [2015] ESJ 168-76
<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.886.5998&rep=rep1&type=pdf>> accessed 4 September 2016.
- Miles L and Zhang Z, 'Improving Corporate Governance in State-Owned Corporations in China: Which Way Forward?' [2006] 6 (Journal of Corporate Law Studies 213
<<https://www.tandfonline.com/doi/abs/10.1080/14735970.2006.11419951> > accessed 12 June 2017.
- Nyakundi D, 'Problems Facing Kenya's Pension System : A Case for Reforms of Laws Relating to Pensions' (LLM Thesis, University of Nairobi 2006).
- OECD, *Guidelines for Pension Fund Governance* (OECD, 2009)
<<http://www.oecd.org/pensions/private-pensions/34799965.pdf>> accessed 10 September 2016.
- Office of the Deputy Prime Minister and Ministry of Finance, 'Public Service Retirement Benefit Schemes approval by the Treasury prior to Registration by the Retirement Benefits Authority', Treasury Circular No 18/2010 24 November 2010.
- Office of Fair Trading, 'Defined Contribution Workplace Pension Market Study' (OFT 2013).
<http://webarchive.nationalarchives.gov.uk/20131101164215/http://www.offt.gov.uk/share_d_offt/market-studies/oft1505> accessed March 2017.

Otieno R, 'The shocking verdict on Shs 5 Billion NSSF Project' *The Standard Digital* (Nairobi, 18 April 2014) <<https://www.standardmedia.co.ke/article/2000109649/the-shocking-verdict-on-sh5-billion-nssf-project>> accessed 5 May 2017.

Public Service Commission and State Corporations Advisory Committee, *Mwongozo, Code of Conduct for State Corporations* (Nairobi 2015)
<<http://www.jkf.co.ke/downloads/MWONGOZO.pdf>> accessed 11 July 2018.

Retirement Benefits Authority, 'Retirement Benefits Industry Performance Report for the Year 2015' <<http://www.rba.go.ke/index.php/en/statistics/industry-performance-report?download=146:industry-brief-december-2015>> accessed 10 July 2018.

— —Retirement Benefits Authority Supervision Framework' <

<http://www.rba.go.ke/index.php/en/regulatory-framework/regulatory-framework-c/supervision-framework>> accessed 13 September 2016.

— —Prudential guideline No 1 for the implementation of Regulation 16 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 on conversion of schemes from defined benefit to defined contribution designs' (RBA 2012)

<http://www.rba.go.ke/index.php/en/?option=com_phocadownload&view=category&id=53> accessed 21 July 2017.

— —'Prudential guideline No 1/2003 'Capacity Building of Trustees of Retirement Benefit Schemes' (RBA 2013)

<http://www.rba.go.ke/index.php/en/?option=com_phocadownload&view=category&id=53> accessed 21 July 2017.

— — Strategic plan 2014-2019 <http://www.rba.go.ke/index.php/en/about-us/strategic-plan?download=127:rba-strategic-plan-2014-2019> accessed 10 July 2018.

— — Capacity Building of Trustees of Retirement Benefits Schemes, First Addendum (19 Feb 2015)

<http://www.rba.go.ke/index.php/en/?option=com_phocadownload&view=category&id=53> accessed 21 July 2017.

— — Capacity Building of Trustees of Retirement Benefits Schemes, Second Addendum (18 Jan 2016)

- <http://www.rba.go.ke/index.php/en/?option=com_phocadownload&view=category&id=53> accessed 21 July 2017.
- —List of registered individual retirement benefit schemes
<<http://www.rba.go.ke/index.php/en/retirement-benefits-schemes/retirement-benefits-schemes-col-280/registered-schemes>> accessed 20 August 2017.
 - —Retirement Benefits Industry Report for the Year 2016
<http://www.rba.go.ke/index.php/en/?option=com_phocadownload&view=category&id=72> accessed 10 July 2018.
- Stewart F and Yermo J, ‘Pension Fund Governance: Challenges and Potential Solutions’ (2008) OECD Working Papers on Insurance and Private Pensions No.18 <<https://www.oecd.org/finance/private-pensions/41013956.pdf>> accessed 18 July 2018.
- The Pensions Regulator, ‘Draft guidance: Ensuring good governance and administration in work based pension schemes’ (UK 2013)
<http://www.thepensionsregulator.gov.uk/docs/regulating-dc-pension-schemes-regulatory-approach-consultation.pdf> accessed 15 July 2017.
- —‘Draft code of Practice No 14. Governance and Administration of Public Service Pension Schemes’ <<http://www.thepensionsregulator.gov.uk/docs/draft-code-14.pdf>> accessed 5 May 2017.
 - —‘Regulatory Code of practice No 9: Internal Controls Paper’
<<http://www.thepensionsregulator.gov.uk/docs/code-09-internal-controls.pdf>> accessed 5 May 2017 (Code of Practice No 9).
- The Republic of Kenya, Office of the President, ‘Guidelines on Terms and Conditions of Service for State Corporations Chief Executive Officers, Chairmen and Board Members, Management and Unionisable staff’ 23 (November 2004, Government Printer, Nairobi
<<http://www.scac.go.ke/2015-02-16-09-56-36/scac-guidelines?download=2:scac-guidelines>> accessed 16 July 2018.
- —Investment Programme for the Economic Recovery Strategy for Wealth and Employment Creation 2003 – 2007’ (Revised 2004)
<<https://www.imf.org/external/pubs/ft/scr/2005/cr0511.pdf> > accessed 10 March 2017.

United Nations Conference on Trade and Development (UNCTAD), *Guidance on good practices in corporate governance disclosure* (United Nations, New York and Geneva 2006)

<http://www.unctad.org/en/docs/iteteb20063_en.pdf> accessed 18 July 2018.

Will W. L. C and Jones M. T, 'Shareholder-Agency Theory' [1992] 29 (2) *Journal of*

Management Studies 132 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-6486.1992.tb00657.x>> accessed 11 June 2017.

World Bank, *Averting the Old Age Crisis: Policies to Protect the Old and Promote Growth* (OUP, New York 1994)

<<http://documents.worldbank.org/curated/en/973571468174557899/pdf/multi-page.pdf>>

accessed 23 August 2017.