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A CRITICAL ANALYSIS ON THE ROLE OF THE RETIREMENT BENEFITS ACT AND REGULATIONS IN PREVENTION OF LOSS OF RETIREMENT BENEFITS IN THE OCCUPATIONAL PENSION SCHEMES

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DECLARATION

I, CHRISTINE GATWIRI KIMATHI, declare that this thesis is my own original work and that it has not been submitted for examination for the award of a degree at any other university.

SIGNED: …………………………. ……………………….

CHRISTINE GATWIRI KIMATHI DATE

This thesis has been submitted for examination with my approval as the University Supervisor.

SIGNED: …………………………. ……………………….

NAOMI NJUGUNA DATE

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DEDICATION

I dedicate this thesis to my family. Particularly, I would like to express my utmost gratitude and special thanks to my dear husband Stanley Kibe, my parents and siblings, for offering relentless encouragement, prayers and motivation in my academic pursuit that has made completion of my studies possible. And to my beloved children, Ndungu and Kimathi, who endured my limited family time, in pursuit of my studies. May God bless you all.

LIST OF ABBREVIATIONS AND ACRONYMS

ACECA	Anti-Corruption and Economic Crimes Act (Kenya)
APRA	Australian Prudential Regulation Authority
CEO	Chief Executive Officer
CS	Cabinet Secretary of Finance
Constitution	Constitution of Kenya, 2010
DB	Defined Benefit
DC	Defined Contribution
EAC	East African Community
GDP	Growth Domestic Product
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
KEMRI	Kenya Medical Research Institute
LAPFUND	Local Authorities Provident Fund
LAPTRUST	Local Authorities Pension Trust
NHIF	National Hospital Insurance Fund
NSSF	National Social Security Fund
NSSF Act 2013	National Social Security Fund Act, 2013
OPS	Occupational Pension Schemes
PENCOM	Nigerian National Pension Commission
PPF	Pension Protection Fund
RBA	Retirement Benefits Authority

RBA (1997)	Retirement Benefits Act
SRBS	Staff Retirement Benefits Scheme
SERs	Socio-Economic Rights
TDPK	Trustee Development Program Kenya
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
WEPPA	Wage Earner Protection Program Act (Canada)

TABLE OF CONTENTS

ABSTRACT

Retirement benefits schemes play a fundamental role in an economy as the driving force of savings towards retirement. Specifically, occupational pension schemes are a major source of retirement income for many Kenyans. Retirement benefits therefore have a big impact on the financial well-being of a retiring person, and a 'wrong' decision cannot be undone at a later stage as retirement benefits scheme members may be left without money after retirement. Financial insecurity is one of the main factors that lead to poverty in retirement, which is witnessed in Kenya today.

The Retirement Benefits Act 1997 and Regulations have been amended severally since their enactment which has improved the protection of scheme member's benefits. We are however seeing a few loopholes that need to be sealed in order for benefits held in occupational pension schemes to be completely protected. This study has shown that non-remittance of monthly contributions by employers, misappropriation of scheme assets by the trustees, loss of scheme funds through negligence of trustees and poor investment of the scheme assets, continue to be problems that need to be watched in order to avoid loss of members' benefits under occupational pension schemes.

The purpose of this study was to identify why occupational pension schemes are still encountering the aforementioned problems. Many factors were critically analyzed, including the weaknesses in the Retirement Benefits Act 1997 and it Regulations that have been exploited to an extent that scheme assets and funds have been affected negatively. The findings of the study revealed that the retirement benefits laws are not adequately equipped to avert the

risks that lead to loss of retirement benefits. The study also reviewed certain shortfalls within the role of Retirement Benefits Authority (RBA). It was noted that RBA does not have sufficient powers to implement the current retirement benefits laws as well as protect benefits fully. The study revealed that retirement benefits directly affect the citizens' well-being and life after retirement. When retirement benefits are well taken care of, they have the effect of reducing poverty during retirement as well as increasing the gross domestic product for countries.

CHAPTER ONE

INTRODUCTION

1.1. Introduction and Background

Pension funds are a major source of retirement revenue for many people in the world.[1] They are also vital contributors to the gross domestic product (GDP) of many countries and an important source of capital in financial markets.[2] Statistics have shown that the life expectancy in Kenya is improving on yearly basis and therefore more people are leaving beyond age sixty. For instance, the life expectancy of year 2014 in Kenya for adults was 63.52 years, while that of 2013, 2012 and 2011 was 63.29, 63.07 and 59.48 years respectively[3]. However, in 2015, the life expectancy decreased slightly from that of 2014 to 63.4 years[4]. Even with this slight decrease, the life expectancy in Kenya has improved in the long run. It therefore becomes necessary to safeguard the retirement benefits for members so that they can have adequate benefits at the time of retirement and throughout their life. This thesis therefore seeks to explore solutions that may be put in legislation to provide full protection of these benefits especially under the occupational pension schemes (OPS).

The overarching objective of any pension scheme is to provide beneficiaries with an adequate income stream during the post-employment period.[5] An occupational pension scheme[6] "is a pension scheme established by an employer or employers that provides benefits to or in respect of any or all of the employees of that employer and/or any other employer that may or may not

[1] Amos G Njuguna and Cecil Arnolds, 'Improving the Financial Efficiency of Pension Funds in Kenya' 2 <http://mba.nmmu.ac.za/sites/default/files/C02_Arnolds_C.doc> accessed 2 December 2014.
[2] Ibid 2.
[3] Index Mundi, <http://www.indexmundi.com/g/g.aspx?c=ke&v=30> accessed 4 December 2014.
[4] World Health Rankings, 'World Life Expectancy' <http://www.worldlifeexpectancy.com/kenya-life-expectancy> accessed 5 August 2016.
[5] SrichanderRamaswamy, 'The Sustainability of Pension Schemes' (2012) BIS Working Papers No. 368, 5 <http://www.bis.org/publ/work368.pdf> accessed 18 May 2014.
[6] Hereinafter in this project referred to as Scheme.

also provide benefits to or in respect of any other persons who are not employees of any of the employers concerned".[7] An occupational pension scheme can also be defined "as a contributory or non-contributory, insured or self-administered pension scheme to which an employee may be eligible to join by reason of his or her employment in a firm or membership of a profession or trade".[8]

An OPS is established under irrevocable trust, meaning that it cannot be terminated or altered without the authority of the beneficiaries. A trust has been defined severally with definitions which differ greatly depending on the point of view. However, most of these definitions bring out the core components of a trust.[9] These components include the person who establishes the trust, the persons who benefit from the existence and operation of the trust known as the beneficiary, the assets that are managed in the trust and the persons who manages the trust such as the trustees[10]. The trustees are the legal owners of the trust assets and they have a fiduciary role[11] in the management of these assets. The unique feature of a trust is the separation of legal and beneficial ownership of the assets in the trust. Even though the trustees are the legal owners of the assets, they must at all times place the interest of the beneficiaries above their own.

The social security sector is one of the key players in the pension industry.[12] Social security has been defined severally with definitions influenced by various factors. For this thesis, social

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[7] Kith and Breman, *The Emergence of Occupational Pension Schemes* (first Edition, New York: MC Graw - Hillbook Company 2001), 7.
[8]Business Dictionary, <http://www.businessdictionary.com> accessed 17 May 2014.
[9] Joseph R. Long, 'The Definition of a Trust' (1922) 8(6) Virginia Law Review, 426.
[10] As defined by the Black's Law Dictionary is the person appointed, or required by law, to execute a trust; one in whom an estate, interest, or power is vested, under an express or implied agreement to administer or exercise it for the benefit or to the use of another.
[11] A fiduciary relationship is one where a person or body of persons has power unilaterally to make decisions or take actions which affect the interests of a beneficiary. See College of Insurance Nairobi Kenya, Trustee Development Program Kenya, (published 2011) 51 and 91.
[12]Masinde Victoria and John Olukuru, 'Impacts of Pension Reforms on the Kenyan Pension Industry' (2014) European Scientific Journal, 64 <http://eujournal.org/index.php/esj/article/viewFile/4011/3822> accessed 30 March 2015.

security can be defined as “benefits that the society provides to individuals and households through public and collective measures to guarantee them a minimum standard of living and to protect them against low or declining living standards arising out of a number of basic risks and needs”.[13] Accordingly, OPS are a concept of social security. In many countries, pension is provided by mandatory public or government schemes usually referred to as social security schemes, which are supplemented by OPS.[14] In Kenya, social security is specifically recognized by the constitution of Kenya 2010 (constitution) under Article 43 (1) (a-f)[15] as a socio-economic right. In the same breath, the general rules of international law and any treaty or convention ratified by Kenya on social security automatically forms part of the laws of Kenya in terms of Article 2 (5) and (6) of the Constitution.

The Kenyan social security system is divided into three pillars: a public scheme, occupational schemes and individual schemes. Private retirement benefits are classified under the second and third pillars which are occupational and individual schemes respectively. The mandatory government scheme in Kenya is known as the National Social Security Fund (NSSF). It is regulated by the National Social Security Fund Act 1978 which is to be repealed by the NSSF Act 2013. Although not yet in force, the NSSF Act 2013 was enacted in order to transform the NSSF into a social security fund in line with Article 43 which makes social security a constitutional right for all Kenyans.

[13] Ibid 64.
[14] Srichander Ramaswamy, ‘The Sustainability of Pension Schemes’ (2012) BIS Working Papers No. 368, 5 <http://www.bis.org/publ/work368.pdf> accessed 18 May 2014.
[15] This Article provides for health, adequate food and of acceptable quality, housing, clean and safe water and social security.

The OPS are regulated by the Retirement Benefits Authority (RBA) which was established by the Retirement Benefits Act, chapter 197 (RBA, 1997).[16] Prior to 1997, there was no codified legislation that regulated RB schemes in Kenya. There were however, a diverse number of statutes that controlled trustees in the exercise of their duties but not specifically related to trustees of RB schemes. These are still in force and include Trustee Act 1982, Trustee (Perpetual Succession) Act 1981, Trusts of land Act 1982, Public Trustee Act 1982, Perpetual and Accumulation Act 1984, and Income Tax Act 1974 (Cap 470). Seeing the need of restructuring the pension sector, the government in 1996 requested the World Bank to provide technical advice.[17] Upon assessment, the World Bank was of the view that the lack of a general policy and regulatory framework for the pensions sector was a concern especially because of the level of government unfunded liabilities to the pension schemes and the poverty witnessed among the old age retirees. It recommended the formation of a regulatory framework for the proper growth of a pension system in Kenya. This recommendation was followed by the enactment of the RBA, 1997.

The RBA (1997) established the RBA which is a regulatory and supervisory body charged with the responsibility of regulating, supervising and protecting the interests of members and sponsors of the retirement benefits schemes and developing the retirement benefits sector.[18] The enactment of the RBA (1997) and the establishment of RBA in 2000 marked the beginning of a regulated, organized and more responsible RB sector in Kenya. This made registration of retirement benefits schemes compulsory with RBA.

[16] Commenced on 20th November 1997 and brought into effect by a Legal Notice number 537 of 1997.
[17] World Bank, 'Financial Sector Assessment Program Kenya' (Unpublished Report 1996).
[18] Retirement Benefits Act 1997, s 5

In Kenya, the RB assets have increased over time, both in absolute terms and as a ratio of GDP.[19] The Pension assets grew from Kshs.117.4 billion in 2002 to Kshs.432.8 billion in 2011, translating to an average annual growth rate of 26.9 percent over the period.[20] As a share of GDP, the ratio improved over the period from a ratio of 11.5 percent in 2002 to approximately 14.3 percent in 2011.[21] Further, between December 2012 and December 2013, the total industry assets grew by 26.97 percent.[22] In the review period, the pension subsector accounted for 18.3 percent of GDP.[23] While in 2013, 2014 and 2015 the pension subsector accounted for 14.68, 14.6 and 13.08 percent respectively of GDP.[24] Currently, the pension system contributes to an estimated 68 percent of the total income of retirees.[25] It is therefore notable that the RB industry has a big impact to the Kenyan financial sector and market today. To this extent, a big loss in the RB funds would actually have an impact on the Kenyan economy. Since RB implementation, RBA has reduced the Overall Risk Score from 1.15 in 2011 to 0.854 in 2013.[26] This shows that there is great improvement in terms of controlling risk that members' benefits may be facing, however, the exposure to risk still exist at 0.854. This is the risk that this study endeavors to identify and find a solution for, so that members' benefits are fully protected.

[19] Ben Kipanga, 'Do Retirement Benefits Assets Contribute To Economic Growth In Kenya?' (2012), 4 <http://www.rba.go.ke/research papers> accessed 20 December 2014
[20] Ibid 4.
[21] Ibid 4.
[22] Financial Sector Regulators Forum, 'Kenya Financial Sector Stability Report' (2013) 39 <https://www.centralbank.go.ke/index.php/kenya-financial-sector-stability> accessed 20 December 2014.
[23] Ibid 39.
[24] Financial Sector Regulators Forum, 'Kenya Financial Sector Stability Report' (2015) 23 < https://www.centralbank.go.ke/uploads/financial_sector_stability/2057936782_Financial%20Stability%20Rpt%202015.pdf> accessed 9 November 2016.
[25] Kingori, W. P. & Ngugi, K., 'Determinant of Procurement Performance at Retirement Benefit Authority in Kenya' (2014) 1 (11) European Journal of Business Management 361, 361 <http://www.ku.ac.ke/schools/business/images/stories/research/dr_ngugi/DETERMINANT_OF_PROCUREMENT_PERFORMANCE_AT_RBA.pdf> accessed 1 February 2015.
[26] Ibid 361.

1.2. Statement of the Problem

The retirement benefits industry has since the coming into effect of the RBA (1997) and Regulations, experienced better management of OPS which have become more regulated and systematized. Further, several reforms to this industry have enabled more Kenyans to access their full retirement benefits, upon leaving the employer's service. In spite of the above, OPS in Kenya are still exposed to a number of risks that may threaten their ability to eventually pay adequate retirement benefits to their members. These risks include but not limited to non-remittance of monthly contributions, misappropriation of scheme assets by the trustees, loss of scheme funds through negligence of trustees and poor investment of the scheme assets. Enforcement of the RBA (1997) and it Regulations continues to be a challenge which is contributing to the risk.

RB scheme members may be exposed to the above risks as well as to other risks that may compromise their entire retirement benefits and to which they may not be protected against. Other risks may include employer insolvency risk, systemic risk, market risk and actuarial risks.[27] This study intends to focus on mechanisms that can be put in place to enable the RBA (1997) and Regulations provide sufficient protection of members' benefits.

1.3. Justification

There is inadequate mechanism put in place under the RBA (1997) and Regulations to ensure enforcement of the law by the RBA, the mandated body. This refers to both instances where the law is in place and where it is not. For instance, the law provides that schemes are supposed

[27]Nzomo Mutuku, 'Need and viability of a benefit protection fund for retirement benefits schemes in Kenya' (2011) RBA Research paper, 2 <http://www.rba.go.ke/research papers> accessed 1 November 2013.

to pay contributions to the scheme on monthly basis and reports on contributions are supposed to be filed with RBA once in every quarter during the year.[28] RBA is therefore supposed to enforce payment of contributions when they receive reports indicating non-remittance of contributions. However, schemes are being put under interim administration because of non-payment of contributions. It therefore becomes obvious that RBA has not been enforcing the law. On the other hand, where laws that would protect the retirement benefits are not in place, RBA has the duty to ensure that those laws are enacted. For instance, Kenya does not provide preference for the unpaid pension benefits during insolvency proceedings of employers. The unpaid benefits are thus treated as unsecured claims and beneficiaries recover little or nothing from the insolvency process. In order, to protect beneficiaries, RBA can push for the amendment of the Insolvency Act 2015 to allow for preferential treatment of unpaid pension benefits. It is believed that out of this study, solutions that will bring new insight in this area will be generated. Specifically, with regard to solid protection of retirement benefits so that they can serve their purpose in the long run. It is therefore hoped that the findings will help amending RBA (1997), its Regulations and related laws, in order to enable the RBA be in a better position to enforce the law accordingly.

1.4. Theoretical Framework

This research is based on the agency and lifecycle hypothesis theories further discussed below.

1.4.1. Agency Theory

The Agency Theory was developed by Stephen Ross and Barry Mitnick Ross both in 1973. Ross developed the economic aspect of this theory, while Mitnick developed the institutional

[28]Regulation 10(4) and Regulation 15(1) of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000.

aspect.[29] The agency theory examines the contractual relationship that exists between principal and agent. It is founded on the idea that agents have more information than principals. This information asymmetry negatively impacts the principal's capacity to properly monitor whether his interests are being appropriately attended to by the agent, thus creating a problem.[30]

The principal agent problem arises where the agent is motivated to act in his own best interests, which are contrary to those of the principal.[31] Specifically, the delegation of authority to the agent may result in the agent taking actions that are not in the principal's best interests but which are unknown to the principal.[32] The problem is aggravated by the fact that beneficiaries sometimes have no way of knowing whether the activities of the trustees towards the funds of the scheme are destructive. For instance, in an OPS situation, the trustees of the scheme act as the agents and the beneficiaries are the principals. An agency relationship exists between trustees and the beneficiaries. The principal agent problem in OPS arises when the trustees fail to act in the best interests of the beneficiaries. As a result, benefits may be lost or misappropriated. Leaving the beneficiary with no benefits or insufficient benefits that may not be able to cater for their needs during retirement. Therefore, if both the principal and the agent are wealth seekers then the possibility of a conflict arises. In this regard, the agent may exploit the information he has in a bid to maximize his own wealth which will not necessarily be in the best interest of his principal. This occurs in OPS where some trustees misappropriate

[29] Barry M. Mitnick 'Origin of the Theory of Agency: An Account by One of the Theory's Originators' (2006) <http://www.pitt.edu/~mitnick/agencytheory/agencytheoryoriginrev11806r.htm> accessed 15 August 2016.

[30] Hounaida Daly, 'Conflicts of Interest in Agency Theory: A Theoretical Overview' (2015) 15(1) Double Blind Peer Reviewed International Research Journal, 20 <https://globaljournals.org/GJHSS_Volume15/2-Conflicts-of-Interest-in-Agency.pdf> accessed 8 November 2016.

[31] Sanford J. Grossman and Oliver D. Hart, 'An Analysis of the Principal-Agent Problem' (1983) 51 (1) Econometrica 7, 9.

[32] Barry M. Mitnick 'Origin of the Theory of Agency: An Account by One of the Theory's Originators' (2006) <http://www.pitt.edu/~mitnick/agencytheory/agencytheoryoriginrev11806r.htm> accessed 15 August 2016.

scheme funds through attendance of more than the recommended meetings with pay as well as remunerate themselves highly, since the RBA (1997) and it Regulations does not provide a limit. For instance, inspection audit reports by RBA showed that the Kenya Railways SRBS trustees drew sitting allowances of KSh10,000/= and KSh5,000/= for each out of town trips.[33] The audit found the trustees to have held too many meetings over and above the quarterly requirement, in addition to awarding themselves bonuses of KSh50,000/= each in 2010.[34]

The agency theory is criticized because it assumes that the agent is likely not to act in the best interests of the principal.[35] In addition, the theory has been criticized for being too narrow, simple, abstract, and for being non-transferable to public sector and non-profit settings.[36] While some of the criticisms can be excluded, the agency theory has prompted several debates on it use and value as a theory.[37] However, agency theory has contributed to the appreciation of the conflict between the agent and the principal, informational asymmetries, the likely complications that arise as a result of various opportunistic behaviors by agent, and the governance structures that have developed thereafter.[38]

In this project, the agency theory will be used to look at the weaknesses in the retirement benefits laws regarding trustees' actions that have contributed to loss of retirement benefits.

[33]Africa Centre for Open Governance, 'Kenya Governance Report' (2012), 22 <http://www.africog.org/sites/default/files/AGR_Report_2012-FINAL.pdf> accessed 23 May 2015.

[34] Ibid 22.

[35] Kartika Putri Kumalasari & Made Sudarma, 'A Critical Perspective Towards Agency Theory' (2013) 4(2) 269, 283 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&cad=rja&uact=8&ved=0ahUKEwiV_Ly-oqbQAhVCIsAKHUHKCb44ChAWCBkwAA&url=http%3A%2F%2Fjamal.ub.ac.id%2Findex.php%2Fjamal%2Farticle%2Fdownload%2F258%2F242&usg=AFQjCNHyoN7f2nZRnmc8XkM4m4ywN4oBrA&sig2=bqG93etRQc_uL6vqdzSCKw&bvm=bv.138493631,d.d2s> accessed 12 November 2016.

[36] Ibid 284.

[37] Hendry, J., 'Beyond Self-Interest: Agency Theory and the Board in a Satisfying World' (2005) 16 (1) British Journal of Management, 55.

[38] Ibid 55.

The study will provide recommendations that would assist in making the law watertight so that to protect the assets of the OPS.

1.4.2. Lifecycle Hypothesis Theory

The lifecycle hypothesis by Franco Modigliani, Albert Ando and Richard Brumberg in the early 1950s, is an economic theory dealing with economic decisions on retirement saving.[39] This theory suggests that people make their retirement savings based on a life cycle. They save while working so that they can continue enjoying almost a similar lifestyle when they retire. Therefore, people amass wealth during their working life up to their retirement, and de-accumulate wealth thereafter.[40] Modigliani had noted that one of the main reasons for setting money aside was the need to provide for retirement.[41] People will save when they are young so that when they are old and either cannot or do not desire to work; they will have money to expend.[42]

This theory is the underlying idea for social security. The purpose of a pension scheme is to provide retirement income security for the rest of a life of a retiree.[43] Therefore a pension provides people with the resources by which they can sustain an equitable living standard after they retire and so avoid the need to fall back on the state or on other people in their final years.

[39] Albert Ando and Franco Modigliani, 'The "Life Cycle" Hypothesis of Saving: Aggregate Implications and Tests' (1963) 53 (1) The American Economic Review, 55-84 <http://www.jstor.org/stable/1817129> accessed 11 August 2016.
[40] Ibid 78.
[41] Angus Deaton, 'Franco Modigliani and the Life Cycle Theory of Consumption' (2005), 1 <www.princeton.edu/~deaton/downloads/romelecture.pdf> accessed 2 April 2015.
[42] Ibid 1.
[43] Prof. David Blake, 'Annuities in Pensions Plans', (1999) 1 <http://www.pensions-institute.org/commentaries/comm_blake_jun99.pdf> accessed 10 January 2015

Pigou in 1932 noted that “there is a clear perception that changes in economic welfare [the level of real income] indicate changes in social welfare in the same direction, if not in the same degree”.[44] Research has shown that health and well-being in retirement may be related to pension receipt.[45] This is because it allows pensioners a better life with higher food security and with greater capacity to help children in their households who then enjoy higher food security and better schooling. Evidence has shown that pensions buffer financial and emotional impacts of an adult child’s death, and the resulting care work for grandchildren left behind.[46] Further, measures of depression among adult household members are inversely related to the number of pension recipients.[47] This suggests that money provided by the pension reduces stress for all adults.[48] Other evidence suggests improvements in health and wellbeing among adults and children living in households with pensioners.[49]

Social security reduces the percentage of people in poverty, such that those who are retired and are without pension income are more likely to be in poverty.[50] Almost one quarter of retired workers who lack pension income have income levels below the required poverty threshold, compared with retired workers with pension income.[51] Therefore, private pensions can make the financial difference in retirement.[52] A comparative study, argues that pensions in for

[44]Richard A. Easterlin, ‘Building a Better Theory of Well’ (2003), 4 <http://wwwbcf.usc.edu/~easterl/papers/BetterTheory.pdf> Accessed 2 April 2015.
[45] Schatz E1, Gómez-Olivé X, Ralston M, Menken J, Tollman S., ‘The impact of pensions on health and wellbeing in rural South Africa: does gender matter?’, 1 <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3475956/pdf/nihms400906.pdf> accessed 8 January, 2015.
[46] Ibid 1.
[47] Ibid 1.
[48] Ibid 1.
[49] Ibid 1.
[50]Dorothy A. Brown, ‘Pensions, Risk, and Race’, 1522 <http://law.wlu.edu/deptimages/Law%20Review/61-4BrownArticle.pdf> accessed 8 January 2015.
[51] Ibid 1522.
[52] Ibid 1522.

instance South Africa and Brazil have had a significant impact on reducing poverty among older people and their households.[53]

The life cycle theory has critics such as Gardner Ackley who pointed out that the life cycle theory takes the position that each family in making consumption decisions considers a certain, conscious vision of the family's future size and composition.[54] Further, each family must have embraced such a vision with sufficient conviction that it would be sensible to use this vision as a foundation for rational planning of consumption decisions.[55] Ackley notes that these assumptions are not realistic. Another critic noted that the life cycle theory is not cognizance of liquidity constraints, noting that the current markets may not allow borrowing for long term on the basis of a vision.[56] Two other critics Laurence Kotlikoff and Lawrence Summers emphasized that the need to make bequests was the key reason for saving.[57] Franco Modigliani however disputed the evidence noting that data showed only 15 to 20 percent of saving is from bequests. Modigliani noted that life cycle saving provides the bulk of savings in retirement.

The lifecycle hypothesis theory will be used in this study to show the importance of adequate pension to retirees. If the law is amended appropriately, there shall be adequate pension for the retirees. This is because systems will be in place that will ensure that older people are not

[53]Prof. Pius Tanga Tangwe, 'The Impact of the Old Age Grant on Rural Households in Nkonkobe Municipality in the Eastern Cape Province of South Africa' (2013) 4(13), 628 <http://mcser.org/journal/index.php/mjss/article/viewFile/1554/1566> accessed 8 January 2015.

[54] Mauro Baranzini, 'Modigliani's Life-Cycle Theory of Savings Fifty Years Later' (2005) LVIII (233-234) BNL Quarterly Review 109, 112.

[55] Ibid 113.

[56] Deaton, A.S., 'Saving and liquidity constraints' (1991) 59 (5) 1221, 1229.

[57] Denis Kessler and Masson Bequest, 'Wealth Accumulation: Are Some Pieces of the Puzzle Missing?' (1989) 3 (3) Journal of Economic Perspectives 141, 150.

placed at risk of poverty and can enjoy a decent standard of living and enable people to maintain, to a reasonable degree, similar living standards after retirement.

1.5. Literature Review

Nzomo Mutuku has noted that though most of the risks faced by schemes have been mitigated by either the regulatory framework in place, risk based supervision by the RBA changes in scheme design, or existing protection funds, schemes are still exposed to elements of counterparty default and fraud risk.[58] He therefore examines the need and viability of establishing a benefit or guarantee fund. This is with a view to compensate beneficiaries in case a scheme is wound up and provide protection to members of retirement benefits schemes against some key risks that they may be exposed to.[59] Nzomo is therefore coming up with a good solution that can enable beneficiaries recover lost retirement benefits.

Amos Gitau Njuguna studied governance of pensions in a view to improve the management of the same in Kenya.[60] He noted that pension schemes should have governing bodies charged with the duty of managing the pension scheme, ensuring protection of beneficiaries' best interest and being accountable to the members and the regulating authorities.[61] The governing bodies been the trustees have sometimes been involved in activities that have led to loss of assets for the scheme. This problem will persist unless certain loopholes in the retirement benefits laws are sealed. This is one of the clarifications that this particular paper has not given.

[58]Nzomo Mutuku, 'Need and viability of a benefit protection fund for retirement benefits schemes in Kenya' (2011) RBA Research paper, I <http://www.rba.go.ke/research papers>accessed 1 November 2013.
[59]Ibid 2.
[60] Amos Gitau Njuguna, 'Determinants of Pension Governance: a Survey of Pension Plans in Kenya' (2011), 101 <http://dx.doi.org/10.5539/ijbm.v6n11p101> accessed 2 November 2013.
[61] Ibid 101.

Rono, Bitok and Asamoah recommended that the Regulator needs to device measures that would ensure pension funds are insulated from inflationary and other risks.[62] They noted that an effective way is to institute a pension risk insurance fund that will underwrite and compensate such losses and provide for a logical indexation of benefits to inflation.[63] Currently schemes whose investments are done by insurance companies are guaranteed. However, this guarantee is not protected by law. For instance in 2011, CFC Life Assurance Company gave a return of 3% which was reduced from 4% without consultation with their clients. Many pension schemes in 2011 obtained negative returns. This led to the loss of the members' contributions as well as any earlier investment income that had been earned. It is therefore important if the guarantee can be protected by law in order to maintain the initial contributions and also increase members' benefits. In this regard, the writers' idea for a pension risk insurance fund that will underwrite and compensate losses for retirement benefits is a noble idea. However, the writers did not give a recommendation on the implementation of the same and therefore nothing has been done to date.

Lucy Jepchoge Rono recommended that there is need for schemes to have portfolio that will give higher returns.[64] On this note, she was of the view that RBA needs to regularly study the market and adjust the set limits to reflect the prevailing market conditions.[65] There is also need to harmonize all regulations relating to pensions in order to create efficiency and avoid

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[62] Lucy Jepchoge Rono, Julius Kibet Bitok, and Gordon N. Asamoah, ' Impact Of Retirement Benefit Act (RBA) on Investment Returns to Pension Funds in Kenya' (2010), 51 >clute.online.com < accessed 2 November 2013.
[63] Ibid 51.
[64] Lucy Jepchoge Rono, 'An Evaluation of Factors Influencing Pension Managers' Investment Decisions in Kenya' (2009), 97 <journals.cluteline.com/index.php/IBER/article/viewfile/3179/3227> accessed 11 November 2013.
[65] Ibid 97.

confusion.[66] She however does not offer any solutions on how to preserve the high returns for the members until they reach the retirement age.

Shikhule et al, noted that in Kenya, RBA uses compliance based supervision to regulate the pension industry.[67] Despite this effort, there is a growing concern that some schemes still experience serious credibility problems due to poor governance. This study sought to assess the determinants of effective pension schemes governance in Kenya and a survey of KEMRI pension scheme was conducted.[68] The study established that knowledge of the trustee's agreements by the members, information flow to members and participation of members in the governance of pension schemes are the main factors that influence effectiveness of governance of pension schemes.[69] The study recommends that trustees should establish a formal governance policy for decision making; enhancing information flow to members; and undertake an assessment of the skills and knowledge of trustee.[70] This article is important to this study as it gives a clear picture of factors that caused assets of the scheme to be mismanaged. This is because Kenya Medical Research Institute (KEMRI) Pension Scheme is among the schemes in Kenya that have been placed under interim administration after trustees misappropriated the scheme funds.

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[66] Ibid 97.
[67] Shikhule, Andrew Festus, Momanyi, Gideon, Naibei, Kiprotich Isaac, Oginda, Moses N and Nyakweba, Irene, 'Determinants of Pension Schemes Governance Effectiveness: A Case of Kenya Medical Research Institute' (2012) 6(2) African Research Review, 354 <http://dx.doi.org/10.4314/afrrev.v6i2.30> accessed 10 January 2015.
[68] Ibid 354.
[69] Ibid 354.
[70] Ibid 354.

Barbone and Sanchez have tried to capture some of the issues of social security in Sub-Saharan Africa.[71] They have emphasized the urgency of improving governance of formal social security institutions and doing so within the broad framework of a social security strategy.[72] The main tasks involve increasing transparency, curtailing opportunities for corruption, and most importantly protecting beneficiaries' rights.[73] Governments and even social security administrations have contributed to the mismanagement of social security institutions.[74] The aim at the end is to protect the rights of the beneficiaries by providing better services, reducing administrative costs, raising the returns to investment, and contributing to overall development by careful considering the links with the rest of the economy.[75] This paper identifies the actual problems that the RB are facing that may somewhat prevent members from being paid their benefits in full at the time of retirement, and also identifies the reforms that could be applied to the issues raised. However, there is no adequate follow up mechanism put in place to ensure the reforms are adapted. My study will seek to recommend follow up processes that may be put in place to ensure the recommendations given are adequately enforced.

Kakwani et al have noted that protecting the elderly from the risk of poverty is a central challenge in all developing countries.[76] The various elements of the analysis are combined to provide some important insights into the status of the elderly in Kenya and the need for the

[71]Luca Barbone1 & Luis-Alvaro Sanchez B., Pension and Social Security in Sub-Saharan Africa Issues and Options (1999), 1 <http://info.worldbank.org/etools/docs/library/76907/february2003/readings/barbone.pdf> accessed 10 January 2015.
[72] Ibid 1.
[73] Ibid 1.
[74] Ibid 1.
[75]Ibid 2.
[76]Nanak Kakwani, Hyun H. Son and Richard Hinz, 'Poverty, Old Age and Social Pensions in Kenya' (2006), 2 <http://www.globalaging.org/pension/world/social/povkenya.pdf> accessed 13 January 2015.

consideration of enhancements in the pension system.[77] This article is important to my study and it gives the statistics on the poverty levels of the pensioners in Kenya.

OPS are still been placed under interim administration and liquidation as a result of loss of scheme funds. This is to show that they still exists a gap that needs to be filled in order to ensure that RB are completely protected from any kind of loss. In my study therefore, I hope to provide a permanent solution.

1.6. Objective of the Study

1. The purpose of carrying out this study is to propose and come up with recommendations that will ensure that the retirement benefits laws fully protect retirement benefits from any form of loss. In this regard:
    a. the government will use the results to implement the necessary corrective measures to bridge the existing gaps and provide better protection of retirement benefits;
    b. this will in effect result in the growth and safety of pension funds as well as create confidence in the industry and attract potential savers. As a result, long-term savings will be boosted, in addition to eradicating poverty at old age.
2. To propose recommendations that will enable related laws such as the Insolvency Act 2015 been amended to provide for preferential treatment for unremitted pension contributions.

[77] Ibid 45.

1.7. Broad Argument Layout

The existing retirement benefits laws in Kenya have seen several amendments since they were enacted, in a bid to ensure that the retirement benefits sector is more effectively and efficiently managed. However, we are still seeing a gap that is unfilled as schemes continue to be placed under interim administration and liquidation. It is that gap that this study endeavors to close. Specifically that gap that is still enabling under-funding of retirement benefits schemes due to non-remittance by employers of deducted contributions; poor investments of the retirement benefits assets; blatant misappropriation of scheme assets; and poor administration of the schemes by the trustees and service providers who have been delegated to the duty of administration by the members thus loss of benefits.

1.8. Hypotheses

The study is premised on the hypothesis that the existing RBA (1997) and Regulations do not contain adequate mechanism to fully protect the retirement benefits under the OPS. It assumes that a reform in the legislative and institutional framework regulating OPS and related legislation such as the Insolvency Act 2015 regarding unremitted contributions by the employers, will enhance the protection of the retirement benefits.

1.9. Research Question

1. Is the RBA (1997) and Regulations adequately equipped to fully protect the retirement benefits under the OPS from any kind of loss?
    a. How does the OPS fit into the concept of social security?
    b. What are the factors causing loss of retirement benefits in Kenya?

c. What are the weaknesses in the existing retirement laws in Kenya?

d. What are the global best practices for enhancing the safety of OPS through the law?

1.10. Research Methodology

The method selected for this research is internal desk research. This method is most suited to find an answer to the identified gap. It is efficient and would assist in clarifying the research questions. It would also assist in reviewing relevant laws, scholarly work, case law and books. The gap has been identified in the legislation; specifically the RBA (1997) and the Regulations noting that the problem discussed emanates from the inadequacy of the said Act, Regulations and related laws such as the Insolvency Act 2015, to solve that problem. Therefore, the research is directed at improving the said laws. Other sources of data will be secondary, such as observations and internet searches. The secondary material would help in understanding the gap experienced by OPS in Kenya.

1.11. Limitations of the Study

The main challenge in this study was the lack of materials and texts books on this topic. There are very few materials that relate to the subject of study, as my selected field is scarcely covered in Kenya and the materials provided do not entirely cover the problems that arise with OPS. However, this challenge was slightly overcome by articles written by scholars from the rest of the world.

1.12. Chapter Breakdown

1.12.1. Chapter One: Introduction

The chapter identifies the research problem, which is recognized as a statement of the problem. It also lays out the introduction and background to the study which specifically identifies the various factors that have caused or cause loss of funds in OPS. The justification of the study to this problem is also provided, mainly in order to give a recommendation which will enable the retirement benefits laws to be amended. This is in order to have in place measures that will provide solid protection of the RB. This chapter in summary will also contain the theoretical framework; literature review; objectives of the study; broad argument; assumptions or hypotheses; research questions; methodology; and limitations of the study.

1.12.2. Chapter Two: The Development of the Concept of Social Security and Occupational Pension Schemes in Kenya

The chapter analyzes the development of the concept of social security generally and OPS in Kenya particularly what necessitated such development and how the states and later employers embraced the provision of social security. The chapter will also analyze the laws that have contributed to the development of social security and OPS.

1.12.3. Chapter Three: Factors Causing Loss of Funds in Occupational Pension Schemes: Weakness of the Existing Retirement Benefits Law

The chapter will discuss in detail the factors that cause the loss of funds in OPS in the light of the existing RB laws, that is, the RBA (1997) and Regulations among others. Further, this chapter will look at the various sections of the retirement benefits laws that may be weak and thus can be misused and retirement benefits can be lost in the process. In this chapter, the study will endeavor therefore to interpret the relevant provisions of the retirement benefits laws which relate to the problem stated. This chapter will also tackle the factors discussed in the light of making recommendations that should be addressed to strengthen the retirement benefits laws in order to fully protect members' funds.

1.12.4. Chapter Four: Global Best Practices on Enhancing the Safety of Occupational Pension Benefits

The chapter will discuss how other jurisdictions are handling similar problems to those that Kenya is facing with OPS.

1.12.5. Chapter Five: A Summary of the Study, Recommendations and Conclusion

The chapter will contain the summary of the study; propose possible changes to the retirement benefits laws in order to remedy any limitations identified in the research and recommend the actions that need to be undertaken to make the law responsive to the needs of the interested parties and the conclusion.

CHAPTER TWO

THE DEVELOPMENT OF THE CONCEPT OF SOCIAL SECURITY AND OCCUPATIONAL PENSION SCHEMES IN KENYA

2.1.Introduction

This chapter analyzes the development of the concept of social security generally and OPS in Kenya particularly what necessitated such development and how the states and later employers embraced the provision of social security. The chapter will also analyze the laws that have contributed to the development of social security and OPS as well as the development of social security as a human right. Universally social security has been recognized as a human right[78] and there is need to integrate human rights into social development policies as well as provides ways to protect social security systems through nationally defined social protection floors that are based on a set of human rights standards[79]. This chapter will be able to show that Kenya is moving in this direction having enacted the Constitution of 2010.

2.2.The Origin of Social Security

The general concept of social security is very old however the term, the legislations and institutions built around it in order to institutionalize the concept is recent.[80] The notion of caring for the elderly started with older societies, with the active members of an extended family supporting their aging kin.[81] This was in the expectation that they in turn, be supported by the younger members of the family. However, the key reason which encouraged the development of more formal arrangements in this respect was the rapid growth of the labour

[78] Universal Declaration of Human Rights, Article 22.
[79] Social Protection Floors Recommendation, 2012 (No. 202), Article 2.
[80] Benjamin N. Cardozo, 'Social Security: Origin and Its Conceptual Evolution', 40 <http://shodhganga.inflibnet.ac.in/bitstream/10603/6251/6/06_chapter%202.pdf> accessed 3 August 2015
[81]Subramaniam N. IYER, 'Pension reform in developing countries' (1993)132 Int'l Lab. Rev. 187,187.

movement.[82] This was prompted by the need to protect the rights of workers during the industrial revolution, coupled with the urbanisation of society, and its separation from the traditional family setting.[83] In Africa, the current social security systems were introduced by the colonist, prior to the colonist era, the extended family and kinship ties provided support. However, these ties are quickly breaking down due to social and economic changes.

Social security as a term was introduced by Abraham Epstein, of the United States of America, in the 1930's with a view to differentiating it from economic security.[84] This was followed by the signing into law of the Social Security Act in 1935 by President Franklin Roosevelt. However, social security schemes had also been devised in Germany in 1881, in the form of social insurance when Emperor William I urged the Government to adopt such schemes.[85] Accordingly, the Government of Germany under Chancellor Bismarck and being in support of social insurance, enacted several laws in this regard between 1883 and 1889[86].[87] The concept of social security then advanced through the larger concept of Beveridgian social security[88] at

[82]Ibid 187.
[83]Ibid 187.
[84] "Mr. Abraham Epstein is the person generally recognized as introducing the word to the world. He was the national leader in the social welfare movement in the first half of this Century in U. S. In U. S. at the beginning of 1930s the term "economic security was used and the Bill introduced in the Congress was Economic Security Bill. Epstein said "I insisted on the term 'social security' because by that time I had a clear conception of the differences which lay between the concept of social insurance as worked out by Bismarck in Germany and the conception of social protection as elaborated in England. I definitely did not want social insurance because this would give it the German twist of the actuarial insurance conception terms of compulsory savings which do not justify governmental contributions. I did not want 'economic security' because what I hoped for was not only a form of security which would, at the same time, promote the welfare of the society as a whole as I was convinced that no improvement in the conditions of labour can come except as the security of the people as a whole is advanced"." See Social Security Bulletin 'Origin of the Term Social Security' (1992) 55 Soc. Sec. Bull.63, 64.
[85]R. C. Saxena, 'Labour Problems and Social Welfare', (1974) 13th edition, 33.
[86] The law providing sickness insurance in Germany was passed in 1883, for workmen's compensation on a compulsory insurance basis in 1884 and for old age and invalidity insurance in 1889. Ibid.
[87] Such schemes were limited to workers in specified occupations: entitlement depended on past employment and contribution history: and they were required to be self-financing, with little support from the State. See Subramaniam N. IYER, 'Pension reform in developing countries' (1993)132 Int'l Lab. Rev. 187, 187.
[88] The report *Social insurance and allied services* by Sir William Beveridge (London, 1942) noted that the goal of social security was to guarantee a basic level of income for all citizens without stifling their initiative to secure more than a mere subsistence. The report proposed a social security system that would include: social insurance, family allowances, a national health service, social assistance and full employment. This concept aimed at protecting workers in the formal economy in a clear labour-capital relation in capitalist society. See Subramaniam N. IYER, 'Pension reform in developing countries' (1993)132 Int'l Lab. Rev. 187,188.

the middle of the century.[89] The Second World War and the post-war years saw significant developments in social seurity at the national, regional and international levels, with the confirmation of social security as a human right. The Beveridge Report, published in the UK in 1942 and implemented from 1945 onwards, had a considerable influence. The purpose was to extend the right to social security from the pool of insured workers to all nations.The Beveridge Report contained a plan for social security whose main feature was "a scheme of social insurance against interruption and destruction of earning power, and for special expenditure arising at birth, marriage or death".[90] Beveridge Report therefore marked another important development that called for a comprehensive, compulsory, contributory and uniformed social security system.[91]

By the end of 19th century the optional schemes had given way to more formal arrangements.[92] By beginning of the 20th century they increasingly took the form of trusts which became the universal basis for OPS because of the introduction of tax relief. Today most advanced countries have comprehensive systems which cover the whole population and function successfully.[93] However, the pension institutions are relatively recent in the developing countries, having developed only after the Second World War, following the emergence of several independent States at the end of the colonial era.

[89] Subramaniam N. IYER, 'Pension reform in developing countries' (1993)132 Int'l Lab. Rev. 187,188.
[90] Institute of Actuaries, 'The Evolution of State Pension Schemes in Great Britain' (1960) 81 Int'l Lab. Rev. 456, 458.
[91] 'Social Security from an International Perspective', 30 <http://dspace.nwu.ac.za/bitstream/handle/10394/9515/Joseph_DE_Chapter_2.pdf?sequence=3> accessed 12 August 2015.
[92] Presentation by NkiroteMworiaNjiru - RBA, 'The General Role and Responsibilities of Trustees' (2008) <http://www.rba.go.ke/news-and-events/presentations/category/31-presentations-2008?download=80%3Athe-general-role-and-responsibilities-of-trustees-february-2008> accessed 1 May 2015.
[93] Subramaniam N. IYER, 'Pension reform in developing countries'(1993)132 Int'l Lab. Rev. 187,188.

2.3.Definition of Social Security

Determining the ambit of social security is extremely important but international literature does not reveal a clear and consistent definition of the concept.[94] The definition of social security is flexible, reflecting a country-specific content, and is subject to constant alterations and improvement over time.[95] Structural and cultural factors, amongst others, determine the particular content of social security in a country on any given period.[96] The obvious broadness of the definitions and the complexity of the various social security systems make it difficult to find a satisfactory definition.[97] However, international instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Labour Organization (ILO) have attempted to give a working definition for social security. Comments 19 of ICESCR states that "the right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, firstly, from lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; secondly, unaffordable access to health care and finally, insufficient family support, particularly for children and adult dependents". On the other hand, the ILO's definition is based on a contingency approach in that social security has the duty to offer protection against life-cycle contingencies which causes reduction or loss of income.[98] Social security protection systems aim to reduce levels of income inequality among individuals and families.[99] Based on the

[94]M.P. Olivier and N. Smit, E.R. Kalula, 'Social security: A legal analysis' [2003] LexisNexis Butterworths 1, 23.
[95]Ibid 28.
[96]Berghman, J, 'Defining Social Security' (1991) D Pieters (Ed) Social Security in Europe, Brussel: Bruylandt, 1.
[97]Haarmann, C. 'Social assistance in South Africa: Its potential impact on poverty' (2000) University of the Western Cape, 24.
[98] ILO defines social security as: "The protection which society provides for its members through a series of public measures, to offset the absence or substantial reduction of income from work resulting from various contingencies (i.e. sickness, maternity, employment injury, unemployment, invalidity, old age or death of the breadwinner) to provide people with health care and to provide benefits for families with children."
[99]Goudswood, K. & Caminade, K., 'The Redistributive Effect of Public and Private Social Programmes: A cross-country empirical analysis' (2009) International Social Security Review, 63(1), 3.

several definitions and conceptualization of the term social security, it is apparent that there is no definite definition.

2.4.Related Concepts of Social Security

Social security includes formal (government regulated or private) and informal arrangements for workers.[100] Its two features are social insurance and social assistance. The former is financed by contributions from employers and employees, with benefits accruing to worker contributors, just like the OPS.[101] The latter is financed by government revenue and targeted at those mostly in need.[102] Another term that is commonly used interchangeably with social security is social protection. It is often interpreted as been broader than social security, since it includes protection provided between members of families or members of local communities.[103] It is also used in some contexts with a narrower meaning than social security, understood to cover measures addressing the poorest, most vulnerable or excluded members of society. In Africa, social security is often thought of in terms of pension funds, medical insurance, and disability schemes.[104]

The concept of social assistance refers to services which are intended to reduce, remove and prevent individuals from the causes or effects of poverty, child neglect or dependence on public assistance.[105] Social assistance was the main substitute to social insurance at the turn of the century. In 1891, Denmark pioneered this approach, introducing a tax-financed, means-tested

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[100]M.P. Olivier and N. Smit, E.R. Kalula, 'Social security: A legal analysis' [2003] LexisNexis Butterworths 1, 23.
[101]Nsongurua J. Udombanat, 'Social Rights Are Human Rights: Actualizing the Rights to Work and Social Security in Africa' (2006) 39 Cornell Int'l L.J.181, 194.
[102] Ibid 194.
[103]ILO, 'Social Security for Social Justice and a Fair Globalization' (2011), 9 <www.ilo.org/.../wcms_152819.pdf> accessed 12August 2015.
[104]Nsongurua J. Udombana, 'Social Rights are Human Rights: Actualizing the Rights to Work and Social Security in Africa' (2006) 39 Cornell Int'l L.J. 181, 195.
[105]Hakijamii, 'The State of Social Protection in Kenya' (2014), 15 <http://hakijamii.com/images/SocialP/SSP.pdf> accessed 24 August 2015.

benefit intended to offer minimum income protection.[106] Social assistance in Kenya is a key element of the social protection mix regulated under the Social Assistance Act of 2013 and implemented together with other group specific legislation and policies.[107] Some examples include the Children's Act 2001, Persons with Disabilities Act 2003, National Children's Policy 2010, National Policy on Older Persons and Aging 2009, National Policy on Youth 2006 and National Policy for the Sustainable Development of Arid and Semi-Arid Lands 2007. The Acts and policies are established pursuant to Article 43(1)(e) of the Constitution, paying attention to the rights component looking to take care of persons considered vulnerable by offering both financial assistance and social services.[108]

2.5.Development of Social Security as a Human Right

The definition of human rights varies and despite numerous efforts to find a compound definition it has now been accepted that the range of this concept cannot easily be determined.[109] However, any definitions cannot disregard the fact that human rights are inherent, indivisible, interrelated, and universal.[110] They belong to every society regardless of geographical, historical, cultural, ideological, political or economic orientation.[111] For the purpose of this project, human rights may be defined as something of which no one may be deprived without a denial to justice.[112]

[106] Brian J. Kreiswirtht, 'The Role of the Basic Public Pension in a Retirement Income Security System' (1997-1998) 19 Comp. Lab. L. &Pol'y J. 393, 424.
[107]Hakijamii, 'The State of Social Protection in Kenya' (2014), 15 <http://hakijamii.com/images/SocialP/SSP.pdf> accessed 24 August 2015.
[108]Ibid 15.
[109]Morris Mbondenyi, 'International Human Rights and their enforcement in Africa' (2011) LawAfrica 18, 532.
[110] Ibid 532.
[111] Ibid 532.
[112] Ibid 532.

The universal need for social security has been recognized by the world community as a human right.[113] The right to social security is a part of SERs[114] and is recognized as a human right in fundamental human rights instruments, namely the UDHR[115], ICESCR[116] and enshrined as such in other international[117] and regional legal instruments[118]. Kenya has ratified both the UDHR and ICESCR. Additionally, ILO established social security as a basic human right in its Declaration of Philadelphia, 1944 and its Income Security Recommendation, 1944 (number 67). There are several general and specific ILO Conventions dealing with different aspects of the right to social security.[119] However, the ILO social security (Minimum Standards) Convention, 1952 (number 102), provides the main standards on social security worldwide.[120] It covers and sets minimum standards for all nine branches of social security[121]. In 2001, the International Labour Conference affirmed that social security "is a basic human right and a

[113]ILO, 'Social Security for Social Justice and a Fair Globalization' (2011), 24 <www.ilo.org/.../wcms_152819.pdf> accessed 12August 2015.

[114] SERs are those rights that give people access to certain basic needs necessary for human beings to lead a dignified life. Government and, in certain circumstances, private individuals and bodies, can be held accountable if they do not respect, protect, promote and fulfil these rights. SERs are especially relevant for vulnerable and disadvantaged groups in society. They are important tools for these groups, who are often most affected by poverty and who experience a number of barriers that block their access to resources, opportunities and services in society. See Khoza, S. (ed), *Socio-economic rights in South Africa: A resource book* (Community Law Centre, University of the Western Cape 2007). They include rights such as the right to work, the right to just and favourable conditions of work, the right to form and to join trade unions, the right to social security, the right to an adequate standard of living, the right to physical and mental health and the right to education belong to the category of SERs. See ICESCR. The SERs differ from civil and political rights which are contained in the International Covenant on Civil and Political Rights and include the rights to life, liberty, security, due process, participation, among others.

[115]UDHR, Articles 22-25.

[116]ICESCR, Article 9.

[117] Including Articles 11(1)(e) and Article (14)(1)(c) of the Convention on the Elimination of All Forms of Discrimination against Women; Article 26 of the Convention on the Rights of the Child; Article (5)(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination; Article (27)(1) and (61)(3) of the International Convention on the Protection of the Rights of All Migrant Workers and Their Families and Article 28 of the Convention on the Rights of Persons with Disabilities.

[118] Article 22 of the African (Banjul) Charter on Human and Peoples' Rights of 1981, Article 13 of the Protocol to the African Charter on Human and Peoples' Rights On the Rights of Women In Africa, African Charter on the Rights and Welfare of the Child, Article 120 of the Treaty for the establishment of the EAC 1999 and EAC Protocol on the Common Market (2010).

[119] Employment Inquiry Benefits Convention 1964, Convention 121
Invalidity, Old Age and Survivors' Benefits Convention1967, Convention 128
Employment Promotion and Protection Against Unemployment Convention 1988, Convention 168
Equality of Treatment (Social Security), Convention 118
Maintenance of Social Security Rights Convention 1982, Convention 157.

[120]John – Jean Barya, 'Interrogating the Right to Social Security and Social Protection in Uganda' (2009) HURIPEC Working Paper No. 23, 15 <http://huripec.mak.ac.ug/pdfs/working_paper_23.pdf> accessed 2 May 2015.

[121] medical care; sickness benefit; unemployment benefit; old-age benefit; employment injury benefit; family benefit; maternity benefit; invalidity benefit; and survivors' benefit.

fundamental means for creating social cohesion.[122] However, this convention is yet to be ratified by Kenya.

The right of every person to social security is reflected in the UDHR, in which social human rights have been consolidated.[123] The wording of article 9 of ICESCR indicates that the measures that are to be used to provide social security benefits cannot be defined narrowly, in any event, they must guarantee all people a minimum enjoyment of human rights.[124] While the UDHR constitutes an authoritative recognition of fundamental human rights, the ICESCR is a treaty, open for signature and ratification and therefore very instrumental in endorsing the human rights.[125] The obligation of each state party in the implementation of human rights is one of progressive realization. States undertake, upon ratification, to take steps towards the full realization of the relevant rights to the maximum of their available resources, even though over a period of time.

At the international level, the debate on whether socio-economic rights (SERs) are justiciable or not began during the process of adopting the UDHR.[126] The SERs initially comprised equal elements of the UDHR along with civil and political rights, and were defined as "indivisible and interdependent" in the Vienna Declaration. However, these two categories of rights were categorized and divided into two separate international covenants-the ICESCR and the

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[122] Laura Suntio, 'Do human rights exist without social rights?' 33 <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=2168285&fileOId=2171586> accessed 20 August 2015

[123] S. Prylypko, 0. Yaroshenko, P. Zhygalkin, 'Development of Labor Law and Law of Social Security' (2012) Law Ukr.Legal J. 201, 215.

[124] General Comments number 4 of ICESCR.

[125] ILO, 'Social Security for Social Justice and a Fair Globalization' (2011), 11 <www.ilo.org/.../wcms_152819.pdf> accessed 12 August 2015.

[126] Japhet Biegon & Godfrey M Musila (eds.), *Judicial Enforcement of Socio-Economic Rights under the New Constitution - Challenges and Opportunities for Kenya*, Kenyan Section of the International Commission of Jurists (Vol 10, 2011) 17.

International Covenant on Civil and Political Rights (ICCPR) at the time of the Cold War.[127] This was essentially because of political and ideological differences between the Soviet bloc and the United States. The Covenants sets out their respective rights in different terms, whereas, in the ICCPR, the rights are subjects to immediate onus, while in the ICESCR they are to be attained through progressive realization. The key difference between the elevation of SERs and civil and political rights to a status of enforceability, in terms of potential intrusion into political policy, is alleged to be that of "positive" and "negative" effects.[128] SERs are "positive rights," requiring the state to expend resources to provide a remedy, whereas civil and political rights are "negative rights," which simply require the state to desist from undue interference with individual liberty.[129]

The acceptance of SERs as human rights has being contentious with several arguments being presented. It has been argued that SERs are not human rights because they accrue to classes of people and thus lack the essential characteristics of universality.[130] On the other hand, civil and political rights belong to human beings simply because they are human.[131] Another debate on SERs has been that they require positive action on the part of duty-bearers in the form of allocating resources.[132] Civil and political rights, on the other hand, can be guaranteed without any positive action on the part of the duty bearer.[133] It has also been argued that unlike civil and political rights that are clear, SERs are said to be ambiguous and unknown and as such,

[127]Wiles, Ellen, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' (2006) American University International Law Review 22, no. 1: 35, 38.
[128]Ibid 45.
[129]Ibid 45.
[130] Human rights are said to be universal if they accrue to every individual by virtue of their humanity rather than as a result of their position or role in society. See Christopher Mbazira, 'Litigating Socio-Economic Rights In South Africa' (2009) Pretoria University Law Press, 22.
[131] Ibid 22.
[132]JaphetBiegon& Godfrey M Musila (eds.), *Judicial Enforcement of Socio-Economic Rights under the New Constitution - Challenges and Opportunities for Kenya,* Kenyan Section of the International Commission of Jurists (Vol 10, 2011) 17.
[133] Ibid 17.

cannot be the subject of judicial adjudication.[134] It is due to providing remedies to the problems faced when implementing SERs that they were framed as achievable through progressive realization in the ICESCR.[135] The committee for ICESCR acknowledged that there were constraints owing to the limitation of available resources but still imposed on states parties various obligations which were to be commenced immediately.[136] These obligations included provisions of the right to social security. The State was required to guarantee that the right to social security will be exercised without discrimination of any kind and the obligation to take steps towards the full realization of this right.[137] The committee also noted that the states should give the right to social security appropriate priority in law and policy.[138]

Certainly, it has been contended that the driving force behind the distinction between generations of rights was based 'not on legal or empirical rationality but rather on Cold War politics'.[139] As such, states are now called upon to treat human rights 'globally, in a fair and equal manner, on the same footing and with the same emphasis', including the right to social security.[140]

2.6.Social Security and Employment

The social function of labor law enables the state to realize its social policy, including the social security aspect of the policy.[141] In this regard, the state provides protection of the

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[134] Ibid 17.
[135]Wiles, Ellen, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' (2006) American University International Law Review 22, no. 1: 35, 55.
[136]General Comments 40 of ICESCR.
[137]Ibid.
[138]General Comments 41 of ICESCR.
[139]Japhet Biegon & Godfrey M Musila (eds.), *Judicial Enforcement of Socio-Economic Rights under the New Constitution - Challenges and Opportunities for Kenya*, Kenyan Section of the International Commission of Jurists (Vol 10, 2011) 19.
[140] Ibid 19.
[141]S. Prylypko, 0. Yaroshenko, P. Zhygalkin, 'Development of Labor Law and Law of Social Security' (2012) Law Ukr.Legal J. 201, 207.

workers, supporting them as the weaker party in relations with employers.[142] This is done through the laws that it enacts and the supervision it provides in the implementation of the laws.[143] For instance the RBA was established to ensure, amongst other functions, the protection of the interests of the scheme members. The public element in labor law is evidenced where the state participates in regulating the labor process.[144] In the case of pensions, it is a requirement to submit the trust deed and rules, the document that governs pension schemes, to the RBA, which they normally review and approve. By doing this review, they ensure that the rights of workers are fully protected. Since the state is interested in a stable social situation, it will interfere with the individual and collective contractual agreements between the employer and the workers, in order to protect the workers. Accordingly, the employer payments must be held in trust for the sole and exclusive benefit of employees, their families and dependents.[145]

2.7.Development of Social Security in Kenya

The history of social security in Kenya is closely related to the social, economic and political developments witnessed after the Second World War, towards an industrial society.[146] Some of the factors that enabled the development of social security included the increased life expectancy arising from better medical science. This meant that people lived longer and required economic support in their retirement. Further, due to increased industrialization and consequently urbanization, family support for the aged accordingly weakened. Therefore, the aged could not depend on the younger generations for economic sustenance as it had been and

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142 Ibid 207.
143Subramaniam N. IYER, 'Pension reform in developing countries'(1993)132 Int'l Lab. Rev. 187,205.
144S. Prylypko, 0. Yaroshenko, P. Zhygalkin, 'Development of Labor Law and Law of Social Security' (2012) Law Ukr.Legal J. 201, 207.
145Raymond Goetz, 'Pension Plans and Labor Law'1967 U. Ill. L.F. 738, 756.
146 Justus Tari, Nelson H.W. Wawire, Charles Ombuki, 'Trustee Related Determinants of Scheme Design in Occupational Defined Contribution Schemes in Kenya' (2015) 6(3) Research Journal of Finance and Accounting, 182 <http://www.ku.ac.ke/schools/economics/images/stories/research/Trustee_Related_Determinants_Scheme_Design.pdf> accessed 11 July 2015.

they had to rely on external sources of income. Additionally, some employers saw an opportunity to motivate the employees, thus setting up OPS even though NSSF contributions were compulsory. As a result social security systems developed in Kenya.

The earliest insured pension plans in Kenya were mainly administered from England and were solely for the whites.[147] Such plans were informal and discriminatory.[148] The Civil Service Pension Scheme was created by an Act of Parliament purely for employees working with various arms of the government in 1942[149], while the NSSF was established in 1965[150]. The period after independence saw a steady growth in the number of pension plans owing to the social, economic and industrial growth in the country.[151] In Kenya, existing pension schemes are mostly for formal sector workers.[152]

Social security in Kenya has been identified as a tool to address poverty. Kenya also recognised the premise of social protection as social security.[153] The Kenyan government has made significant strides towards designing an integrated social protection structure over the last few years.[154] Building on Kenya's Poverty Reduction Strategy Paper, the 2003 Economic Recovery

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[147] Ibid 182.
[148] Ibid 182.
[149] Akwimbi Ambaka William, 'The Impact of Pension Sector Reforms on the Financial Viability of Pension Plans in Kenya' (2011), 10 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1784297 accessed 28 April 2015.
[150] ILO, 'Extending Social Security and Fighting Poverty: Two reform proposals to extend social security in Kenya' http://www.ilo.org/public/english/protection/socsec/pol/campagne/files/kenya/2page_info_health_pensions.pdf accessed 11 July 2015.
[151] Justus Tari, Nelson H.W. Wawire, Charles Ombuki, 'Trustee Related Determinants of Scheme Design in Occupational Defined Contribution Schemes in Kenya' (2015) 6(3) Research Journal of Finance and Accounting, 182 <http://www.ku.ac.ke/schools/economics/images/stories/research/Trustee_Related_Determinants_Scheme_Design.pdf> accessed 11 July 2015.
[152] HakiJamii Trust, 'The Right to Social Security in Kenya, the gap between international human rights and domestic law and policy' (2007), 4 <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/hakijamiikenya39.pdf> accessed 18 December 2014.
[153] Hakijamii, 'The State of Social Protection in Kenya' (2014), 7 <http://hakijamii.com/images/SocialP/SSP.pdf> accessed 24 August 2015.
[154] 'Social Protection and Child Malnutrition' http://www.savethechildren.org.uk/sites/default/files/docs/social-protection-Kenya-briefing-BT.pdf accessed 24 August 2015.

Strategy for Wealth and Employment Creation and the 2008 Kenya Vision 2030, measures were taken to develop a National Social Protection Strategy.[155] In 2011, Kenya enacted the National Social Protection Policy, which explicitly defines social protection[156] and thus providing for affordable healthcare, social security, and social assistance.[157] Additionally, the Constitution as well as other laws[158] that are read together with the constitutional provisions, provide for the essential conditions for the enjoyment of social security rights.[159] Social security in Kenya is governed by the National Social Security Fund Act 1978 which is to be repealed by the NSSF Act 2013. This Act is read together with other provisions such as the RBA (1997), Pensions Act 1946, Employment Act 2007 and others. Of particular interest NSSF Act, 2013 commits "*to provide basic social security for its members and their dependants for various contingencies …*".[160]

Additionally, Kenya's social insurance that endeavors to ensure better healthcare is governed by the National Hospital Insurance Fund Act 1998 (NHIF Act). This Act established the National Health Insurance Fund which is a medical insurance. Section 15 of NHIF Act allows contributions to the Fund from people in salaried employment and those in self-employment. The rates are chargeable on a graduating scale of the formal workers' salaries.[161] In relation to

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[155] Ibid 7.
[156] For the purposes of the Kenya National Social Protection Policy, social protection refers to: Policies and actions, including legislative measures, that enhance the capacity of and opportunities for the poor and vulnerable to improve and sustain their lives, livelihoods, and welfare, that enable income-earners and their dependants to maintain a reasonable level of income through decent work, and that ensure access to affordable healthcare, social security, and social assistance.
[157] Hakijamii, 'The State of Social Protection in Kenya' (2014), 9 <http://hakijamii.com/images/SocialP/SSP.pdf> accessed 24 August 2015.
[158] National Social Security Act 2013, National Hospital Insurance Fund Act 1998, Pensions Act 1946, Retirement Benefits Act 1997 and Social Assistance Act.
[159] Hakijamii, 'The State of Social Protection in Kenya' (2014), 10 <http://hakijamii.com/images/SocialP/SSP.pdf> accessed 24 August 2015.
[160] NSSF Act 2013, S 4 (a).
[161] Persons earning Kshs.5,999 and below pay a premium rate of Kshs.150, while those earning Kshs.100,000 and above pay Kshs1,700. Self-employed persons pay Kshs.500. See the NHIF (Standard and Special Contribution) Regulation 2015, Regulation 3.

the benefits offered, NHIF has no provision for exclusions. As such, all medical conditions are covered.[162]

2.8.The Concept of Social Security and its Relationship to OPS

In many countries, pension is provided by mandatory public or government schemes usually referred to as social security schemes, which are supplemented by OPS operated by employers.[163] The provision of RB in Kenya has, in common with many countries, been based on three pillars: state schemes; occupational schemes; and personal pension plans.[164] The state schemes consist of the Civil Servant Pension Scheme and NSSF. Private benefits are classified under the second and third pillars which are occupational and personal schemes respectively.

2.8.1. The Nature of OPS

Occupational pension schemes are established by the employers for their employees. They have been defined as "schemes established by an or on behalf of a group of employers, to provide pensions and/or other benefits for or in respect of one or more employees on leaving pensionable service or on death or retirement".[165] The employer may voluntarily establish the OPS for motivational benefits, competitive reasons and/or to augment state benefits, and depending on willingness to contribute to the OPS.[166] OPS can be conceptualised as systems that transform financial inputs[167] into outputs[168] for members. These schemes can either be

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[162]Kefa Chesire Chepkwony, 'Challenges of Provision of Social Welfare Services in Subsaharan Africa: The Kenyan State of Affairs' (2008), 13 <http://www.phasi.org/public/socialsecurity_and__welfare_in_kenya.pdf> accessed 2 March 2015.

[163]Srichander Ramaswamy, 'The Sustainability of Pension Schemes' (2012) BIS Working Papers No. 368, 5 <http://www.bis.org/publ/work368.pdf> accessed 18 May 2014.

[164]Akwimbi Ambaka William, 'The Impact of Pension Sector Reforms on the Financial Viability of Pension Plans in Kenya' (2011), 10 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1784297 accessed 28 April 2015.

[165] Kith and Breman, *The Emergence of Occupational Pension Schemes* (first Edition, New York: MC Graw - Hillbook Company 2001), 7.

[166]Juan Yermo, 'Revised Taxonomy for Pension Plans, Pension Funds and Pension Entities' (2002), 3 <http://www.oecd.org/finance/private-pensions/2488707.pdf> accessed 2 May 2015.

[167] Asset values at the beginning of a financial year, contributions and payments for inputs (see Kith and Breman, ibid 19.).

[168] Retirement benefits and asset values at the end of the financial year (see Kith and Breman, ibid 19.).

defined benefits (DB)[169] or defined contributions (DC)[170] schemes. As of 6th of May 2014, there were approximately 1232 registered OPS in Kenya.[171] This compares to April 2011 where there were 1308 pension schemes with an estimated membership of 2 million[172].

OPS are linked to the employment contract between employer and employee. The employer contributes to the scheme but the employees may or may not contribute depending on the contract.[173] OPS take the form of trusts. In the trust, OPS members have beneficial ownership rights over the pension funds or some other contractual claim against the pension entity.[174] However, the legal title (and often control) is vested on the trustees, who are expected to manage the funds in the best interest of the scheme members. The assets of the OPS are kept separate from those of the employer.

2.8.2. The Importance of OPS

Social security is important for the well-being of workers, their families, and the community as a whole.[175] Through its redistributive character, it plays an important role in poverty

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[169] DB schemes offer a pension, guaranteed by the employer, usually defined in terms of some proportion of final year earning, and are related to the number of years of employment.

[170] In the DC schemes, an employee's contribution (together with any from the employer) are invested and the amount the employee gets when he/she retirees depends mainly on the total amount of money the employee and the employer have paid into the scheme over the years and how the investment has grown.

[171] RBA website, <http://www.rba.go.ke/registeredschemes>accessed 17 December 2014.

[172] Amos GitauNjuguna, 'Predictors of Pension Finance Literacy: A Survey of Members of Occupational Pension Schemes in Kenya' (2011), 103 <http://www.researchgate.net/profile/John_Otsola/publication/215794530_Predictors_of_Pension_Finance_Literacy_A_Survey_of_Members_of_Occupational_Pension_Schemes_in_Kenya/links/02bfe50ffbf26e023b000000.pdf> Accessed 1 February 2015.

[173] Juan Yermo, 'Revised Taxonomy for Pension Plans, Pension Funds and Pension Entities' (2002), 3 <http://www.oecd.org/finance/private-pensions/2488707.pdf> accessed 2 May 2015.

[174] Ibid 15.

[175] Brian J. Kreiswirtht, 'The Role of the Basic Public Pension in a Retirement Income Security System' (1997-1998) 19 Comp. Lab. L. &Pol'y J. 393, 424.

reduction and alleviation, thus promoting social inclusion.[176] If well managed, social security boosts national productivity and supports economic development.[177]

2.8.3. Transfer of Benefits in OPS

The RBA (1997) allows for transfer of retirement benefits [178] from one registered scheme to another within the country.[179]Transfer of benefits from Kenya to any other country is not possible. At the point a worker is migrating, the law allows for withdrawal of 100% of the workers' retirement benefits.[180] A member may however choose to retain benefits in the OPS. There is no mechanism in place to allow workers moving across Eastern African countries (EAC)[181] to continue contributing to the former employer's OPS. Further, the EAC Treaty does not provide for transfer of benefits where workers are moving from one Eastern African country to another. However the EAC Protocol on the Common Market (2010) under article 10 allows workers to enjoy the rights and benefits of social security as accorded to the workers of the host partner state. Unlike Eastern Africa, EU law currently offers legal protection of workers' social security rights through Article 48 Treaty on the Functioning of the European Union and the Coordination Regulations when migrating within the EU. However, as is the

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[176] General Comments number 3 of ICESCR.

[177]Nsongurua J. Udombana, 'Social Rights are Human Rights: Actualizing the Rights to Work and Social Security in Africa' (2006) 39 Cornell Int'l L.J. 181, 195.

[178] Portability of assets allows a worker to withdraw the accumulated pension benefits or transfer them to another retirement arrangement or both. Portability of credited service allows years of service with a previous employer to be included when determining. It allows a worker to keep years of service credited to one plan when changing jobs even if he has not met the vesting requirements of the scheme. See Isaiah Munguti, 'Social security in Kenya and its salient issues' https://www.academia.edu/6636946/Social_security_in_kenya_by_munguti_isaiah accessed 9 May 2015.

[179] The Retirement Benefits occupational retirement benefits schemes regulations 2000, Regulation 19(5).

[180] The Retirement Benefits (occupational retirement benefits schemes regulations) 2000, Regulation 19(5)(b)(ii) provides that if the member has emigrated from Kenya to another country without the intention of returning to reside in Kenya and the trustees have approved the payment of the retirement benefits and submitted, fourteen days prior to payment of the benefits, the approval to the Authority.

[181] The EAC was revived in the year 2000 after it collapse in 1977. Kenya became a member. Currently, EAC has six member countries. See Meredith A. McIntyre, 'Trade Integration in the East African Community: An Assessment for Kenya' (2005) IMF Working Paper WP/05/143, 3 <https://www.imf.org/external/pubs/ft/wp/2005/wp05143.pdf> accessed 13 November 2016.

case with other EAC partner states, Kenya has not harmonized its social security policies, laws and systems with other EAC countries.[182]

2.9.The Kenyan Regulatory Framework

Social security in Kenya is regulated and provided for under a number of laws.[183] These include, the RBA (1997), the Retirement Benefits (Amendment) Act 1998, the NSSF Act 1978, the National Health Insurance Fund Act 1998, the Pensions Act 1946 and the Pensions (Increase) Act 1971.[184]

The OPS are regulated by the RBA which was established by an Act of parliament, the RBA (1997).[185] Prior to 1997, there was no codified legislation that regulated retirement benefits schemes in Kenya but there existed various statutes that controlled trustees in the exercise of their duties but not specifically related to trustees of retirement benefits schemes.[186] These are still in force and include Trustee Act 1982, Trustee (Perpetual Succession) Act 1981, Trusts of land Act 1982, Public Trustee Act 1982, Perpetual and Accumulation Act 1984, and Income Tax Act 1974 (Cap 470).

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[182]Conference Report, 'The East African Community Common Market Protocol for Movement of Labour' 11 <http://www.fes-kenya.org/media/activities/EAC%20Common%20Market%20Protocol%20and%20Free%20Labour%20Mobility%20Workshop/CMP%20Conference%20Report%20November%202012%20Nairobi.pdf> accessed 15 May 2015.

[183]HakiJamii Trust, 'The Right to Social Security in Kenya,The gap between international human rights and domestic law and policy' (2007), 10 <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/hakijamiikenya39.pdf> accessed 18 December 2014.

[184] Ibid 10.

[185] Commenced on 20th November 1997 and brought into effect by a Legal Notice number 537 of 1997.

[186]Kefa Chesire Chepkwony, 'Challenges of Provision of Social Welfare Services in Subsaharan Africa: The Kenyan State of Affairs' (2008), 13 <http://www.phasi.org/public/socialsecurity_and__welfare_in_kenya.pdf> accessed 2 March 2015.

The need for better and more specific measures to protect the interests of employees in pension schemes had become apparent in Kenya by about 1991.[187] Employers before then had unlimited access to the pension funds and would use them to improve their cash flows in the company.[188] Further, trustees were the top managers of the employer and others were political appointees and thus easily manipulated. This resulted in cases of poor pension investments, delays and denials in payments of dues to members, misuse and outright embezzlement of the scheme funds by the same trustees who were entrusted to guard the funds to the ultimate loss to the beneficiaries.[189]

Seeing the need of restructuring the pension sector, the government in 1996 invited the World Bank to provide technical advice.[190] Upon assessment, the World Bank opined that the absence of an overall policy and regulatory framework for the pensions sector posed a concern.[191] It recommended the establishment of a regulatory framework for the proper development of a pension system in Kenya.[192] This recommendation was followed by the enactment of the RBA, (1997). The RB Regulations were enacted thereafter and gazetted in the year 2000. The Regulations sought to put in place further and more precise provisions aimed at achieving the core objectives of protecting the benefits of members of RB schemes and developing the RB industry.

[187] Lucy Jepchoge Rono, Julius Kibet Bitok, and Gordon N. Asamoah, ' Impact of Retirement Benefit Act (RBA) on Investment Returns to Pension Funds in Kenya' (2010), 41 <clute.online.com> accessed 2 November 2013.
[188] Ibid 41.
[189] Ibid 41.
[190] World Bank, 'Financial Sector Assessment Program' Kenya (Unpublished Report 1996).
[191] Ibid.
[192] Ibid.

The enactment of the RBA (1997) and the establishment of RBA in 2000 marked the beginning of a regulated, organized and more responsible retirement benefits sector in Kenya.[193] This made registration of retirement benefits schemes with RBA compulsory. RBA was therefore established in order to address some of the problems that arise in the RB sector. However, OPS are still encountering various problems that cause loss of scheme funds and assets. As a result, a number of schemes have been placed under interim administration or liquidation[194].

2.10. The Approach by the Constitution on the Importance of the Right to Social Security

The constitutional entrenchment of social security rights has significantly strengthened the mandate of the State to provide comprehensive social protection.[195] One of the mechanisms in the Constitution aimed at achieving egalitarian transformation is the entrenchment of justiciable SERs, where the social security right falls.[196] The chapter of the Bill of Rights in the Constitution provides for enjoyment of SERs under Article 43(1)(a-f). This Article provides for health, adequate food and of acceptable quality, housing, clean and safe water and social security. This chapter introduces a constitutional command whereby the government is

[193] Sundeep K Raichura, 'Analytical Review of the Pension System in Kenya' (2008) <http://www.oecd.org/finance/private-pensions/41564693.pdf> accessed 26 August 2014.
[194] As at June 2011, 14 schemes were in the process of being wound up.
[195] Article 43(1)(e). This article 43 is a product of the International Covenant on Economic, Social and Cultural Rights requirement of states legislation of the economic, social and cultural rights. Several legislations have been enacted in response to the Covenant's requirements. See International Covenant on Economic, Social and Cultural Rights article 2.
[196] The entrenched SERs require the State to put in place a legislative, policy and programmatic framework to enhance the realisation of its constitutional obligations to respect, protect and fulfill these rights for all Kenyans. These SER obligations, just like any other fundamental human rights obligations, are, however, not absolute and are subject to legitimate limitation by the state. Two approaches have been used in international and comparative national law jurisprudence to limit SERs: the proportionality approach, using a general limitation clause that has found application in international and regional jurisprudence on the one hand; and the reasonableness approach, using internal limitations contained in the standard of progressive realisation, an approach that has found application in the SER jurisprudence of the South African Courts, on the other hand. The SERs have a substantive positive impact on the lives of the Kenyan people; any measure by the government aimed at their limitation must be subjected to strict scrutiny by the courts. See NW Orago, 'Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights Disputes' (2013) 16(5) PER/PELJ, 184 <http://dx.doi.org/10.4314/pelj.v16i5.4> accessed 8 May 2015.

compelled to ensure the "progressive realisation" of the right to access to social security. Article 21(2) only requires the State to take legislative and other measures for the progressive realisation of SERs in article 43 of the Constitution.[197] The Constitution recognises that resources for the realization of SERs are scarce, and thus allows the government leeway in its adoption of measures and the distribution of resources in the realisation of SERs.[198] However, the Kenyan government is required to move expeditiously towards their realisation by taking immediate, comprehensive and targeted steps capable of SERs realisation.[199] This obligation was affirmed by the High Court of Kenya in Mitu-Bell Welfare Society v Attorney General[200] and further reiterated in the case of Okwanda v The Minister of Health and Medical Services[201]. This is because when human rights, and in particular SERs, are recognized as a legal right they become claimable and operational.[202]

In view of Article 43(1)(e) of the Constitution, the government facilitated the enactment of NSSF Act 2013 which will repeal the NSSF Act 1978. The NSSF Act 2013 is not yet operational because it has been contested by various trade unions filing petitions in Court

[197]NW Orago, 'Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights Disputes' (2013) 16(5) PER/PELJ, 184 <http://dx.doi.org/10.4314/pelj.v16i5.4> accessed 8 May 2015.

[198]Ibid 184, the Constitution under Article 20(5)(c) requires that the court, tribunal or other authority may not interfere with a decision by a state organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion. In the case of Trusted Society of Human Rights Alliance v Attorney General High Court of Kenya at Nairobi, Petition No 229 of 2012 (the Mumo Matemu case) paras 77, 98 the Court held that despite the doctrine of the separation of powers the courts still retained authority to review decisions by the executive to ensure that they were rationally/reasonably made and that they were compliant with both procedural and substantive constitutional requirements.

[199]Ibid 184.

[200]*Mitu-Bell Welfare Society v Attorney General & 2 others* (2013) eKLR. This petition arose after the applicants were evicted and their houses were demolished from the Mitumba Village they had been living. The court ruled in the favour of the petitioner and the respondents were ordered to find a solution to the petitioner's grievances.

[201] *Mathew Okwanda v Minister of Health and Medical Services & 3 others* (2013) eKLR. Okwanda was 68 years old and had been diagnosed with diabetes mellitus in 1996. In 2012 he was also diagnosed with Benign Hypertrophy that required specialized treatment. He contended that he was highly in need of medical attention, amongst other claims. The court denied his requests as he was unable to prove that the State had denied him his right to good health.

[202]Wouter van Ginneken, 'Social Protection and the Millennium Development Goals: Towards a Human Rights-based Approach' (2011) Institute of Development Studies, 2<https://www.ids.ac.uk/files/dmfile/VanGinneken2011HumanrightsbasedapproachtoMDGsCSPconferencedraft.pdf> accessed 9 July 2015.

challenging the constitutionality of this Act and asserting that some sections[203] of NSSF Act 2013 will infringe on certain fundamental rights enshrined in the Constitution.[204] The Articles alleged to be infringed include Articles 24, 27 and 36 of the Constitution.[205] The outcome of the petitions is still pending in court.

However, the NSSF Act 2013 was enacted in order to transform the NSSF into a social security fund in line with Article 43. The statutory framework in the NSSF Act 2013 encompasses various rules to effectively regulate the fund. The act objective is to provide "basic social security for its members and their dependants for various contingencies, increase membership coverage of the social security scheme, improve adequacy of benefits paid out of the scheme by the fund, to involve unemployed persons so as to secure their social security and to operate and manage a scheme valuable to its members by among other things, ensuring that the fund and social security is sustainable and dealing with the old provident fund separately so that its shortcomings are not brought along to this new act". Under the NSSF Act 2013, the employers will be required to make both Tier 1[206] and Tier 11[207] contributions into NSSF for each employee.[208] The first tier must be contributed into the NSSF while the second tier may be contributed to a private pension plans if certain requirements are met.[209] The NSSF Act 2013

[203] NSSF Act 2013, S 18 (on the Old Provident Fund and Other Funds), S 19 (Registration of Employer and Employee), S 20 (Mandatory contributions to the Fund) and S 71 (Provisions of Retirement Benefits Act to apply to the Fund).

[204]HHMOraro Newsletter (November 2014) 10 <http://hhm.co.ke/wp-content/uploads/2014/12/HHM-ORARO-Newsletter.pdf> accessed 29 August 2015.

[205] Article 24 of the Constitution deals with the limitation of rights and fundamental freedoms; Article 27 provides for equality and freedom from discrimination, while Article 36 provides for the freedom of association.

[206] Tier I contributions are payable in respect of pensionable earnings below the Lower Earnings Limit which is defined as the average minimum monthly basic wage for the top urban, second tier urban and rural centres.

[207] Tier II contributions are payable in respect of pensionable earnings above the Lower Earnings Limit but capped to a maximum of the Upper Earnings Limit.

[208]HHMOraro Newsletter (November 2014) 10 <http://hhm.co.ke/wp-content/uploads/2014/12/HHM-ORARO-Newsletter.pdf> accessed 29 August 2015.

[209] Ibid 10.

will therefore enable the growth of the OPS as well as ensure that the social security right is implemented for the benefit of Kenyans.

2.11. Conclusion

Having analyzed the development of social security and OPS in Kenya in this Chapter, Chapter three will focus on the factors that are still causing the loss of OPS assets. These factors include but not limited to non-remittance of monthly contributions, misappropriation of scheme assets by the trustees, loss of scheme funds through negligence of trustees and poor investment of the scheme assets.

CHAPTER THREE

FACTORS CAUSING LOSS OF FUNDS IN OCCUPATIONAL PENSION SCHEMES: WEAKNESS OF THE EXISTING RETIREMENT BENEFITS LAW

3.1. Introduction

The *Vision 2030*, under its priorities on human resource acknowledges the need for a broad and effective social security system while also 'harnessing retired high cadre talent' recognizing that 'retirees are capable of making a contribution to a country's development'.[210] *Sessional Paper No.1 of 2000 on National Population Policy for Sustainable Development* observed that older persons, whose population is rapidly growing, present a potential problem regarding their care. This is in light of the breakdown of family support structures and the lack of social security measures. The Sessional Paper recommended formulation of long-term policies and programmes towards preparing people for old age. This was by ensuring provision of social security measures and other forms of socio-economic support to Kenyans in their old age.

This chapter discusses the factors that cause loss of funds in OPS. It also extrapolates on the nexus between the continued loss of funds in OPS in Kenya and the lack of or the provisions of RBA (1997) which may lead to the loss.

3.2. History of Loss of Benefits

The challenge in many African countries continues to be developing reliable and sustainable social security institutions, which set out clear concepts of equity and support rules that assure

[210] Kenya National Commission on Human Rights, 'Growing Old in Kenya: Making it a PositiveExperience' (2009), 10 <http://www.knchr.org/Portals/0/StateOfHumanRightsReports/2nd%20SHRR%20-%20Growing%20Old.pdf> accessed 2 March 2015.

adequate governance.[211] The need for improved and more specific measures to protect the interests of employees in pension schemes had become obvious in Kenya by about 1991.[212] Employers before then had unlimited access to the pension funds and would use them to improve their cash flows in the company.[213] Some of the cases include Railway Corporation, NSSF, Postal Corporation and the University of Nairobi. It is alleged that trustees of University of Nairobi pension fund mismanaged the scheme funds in the tune of KSh1.2 billion out of which the University had borrowed KSh350 million from the pension scheme.[214] Further, trustees were the top managers of the employer and others were political appointees who misused and mismanaged employer contributions.[215] This resulted in cases of poor pension investments, delays and denial of payments of dues to members, misuse and outright misappropriation of the scheme funds by the same trustees who were entrusted to safeguard the funds, to the eventual loss to the beneficiaries.[216]

RBA was therefore established in order to address some of the problems that arise in the RB sector. However, OPS are still encountering various problems that cause loss of scheme funds and assets. In the course of its duties, RBA has acknowledged the existence of some operational challenges to the growth of the social security sector in Kenya.[217] "These include under-funding of social security schemes especially in the public sector, poor investment of scheme

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[211]Luca Barbone & Luis-Alvaro Sanchez B., 'Pension and Social Security in Sub-Saharan Africa Issues and Options' (1999), 20 <http://info.worldbank.org/etools/docs/library/76907/february2003/readings/barbone.pdf> accessed 10 January 2015.

[212] Lucy Jepchoge Rono, Julius KibetBitok, and Gordon N. Asamoah, 'Impact Of Retirement Benefits Act (RBA) on Investment Returns to Pension Funds in Kenya' (2010), 41 <clute.online.com> accessed 2 November 2013.

[213] Ibid 41.

[214]Times Higher Education dated 8 February 1999, <www.timeshighereducation.co.uk/news/pension-scandal-stops-lecturers-retiring/144906.article> accessed 22 February 2015.

[215] Lucy Jepchoge Rono, Julius Kibet Bitok, and Gordon N. Asamoah, ' Impact Of RB Act (RBA) on Investment Returns to Pension Funds in Kenya' (2010), 41 <clute.online.com> accessed 2 November 2013.

[216] Ibid 41.

[217]HakiJamii Trust, 'The Right to Social Security in Kenya, The gap between international human rights and domestic law and policy' (2007), 5 <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/hakijamiikenya39.pdf> accessed 18 December 2014.

funds leading to poor returns for members, misappropriation of scheme funds due to member's lack of adequate awareness, poor administration and record keeping leading to long delays in payment of benefits to members, excessive interference by employers in scheme affairs, denial of benefits to certain staff members on spurious grounds etc".[218] As a result, a number of schemes have been placed under interim administration or liquidated.[219] OPS problems are derived from the fact that the benefits they provide are accumulated from contributions and returns. Therefore, all risks are shifted to the beneficiaries. Thus the mismanagement of reserves, administration costs, and poor administrative performances have led to meager pensions, in most cases.[220]

The primary focus of the RBA (1997), its Regulations and regulatory drive of the RBA was to improve the governance and management of OPS.[221] "By any rational measure, this regulatory framework can be assessed as having accomplished some success in reforming the occupational pensions sector and introducing transparency, accountability and professionalism in the management of these schemes".[222] The question this study endeavors to answer is whether the RBA (1997), its Regulations and RBA's governance are adequate to protect members' retirement benefits in entirety as well as ensure that OPS comply with the law. The

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[218]Ibid 5.

[219] As at June 2011, 14 schemes were in the process of being wound up and 6 schemes had been placed under interim administration. They included Kenya Medical Research Institute (KEMRI) Pension Fund for noncompliance, fraud and loss of assets; the Modern Business Communications Limited Retirement Benefits Scheme for failure to recover unremitted contributions from the sponsor; Stallion Insurance Management Staff Retirement Benefits Scheme Trustees' failure to pay members' benefits; Blue Shield Insurance Co. Staff Retirement Benefit Scheme for failure by the trustees to recover unremitted contributions from the sponsor; Mbuni Drycleaners Staff Retirement Benefits Scheme - No trustees in the scheme; Sponsor unwilling to reconstitute board of trustees; failure to pay members' benefits; and KCC Junior Staff Pension Scheme for failure to pay benefits as directed by Retirement Benefits Appeal Tribunal. See Nzomo Mutuku, 'Need and Viability of a Benefit Protection Fund for Retirement Benefits Schemes in Kenya' (2011) RBA Research paper, 24 <http://www.rba.go.ke/research papers> accessed 1 November 2013.

[220] Luca Barbone & Luis-Alvaro Sanchez B., 'Pension and Social Security in Sub-Saharan Africa Issues and Options' (1999), 20 <http://info.worldbank.org/etools/docs/library/76907/february2003/readings/barbone.pdf> accessed 10 January 2015.

[221]Sundeep K Raichura, 'Analytical Review of the Pension System in Kenya' (2008), 21 <http://www.oecd.org/finance/private-pensions/41564693.pdf> accessed 26 August 2014.

[222] Ibid 21.

specific issues selected for discussion in this study include non-remittance of monthly contributions, misappropriation of scheme assets by the trustees, loss of scheme funds through negligence of trustees and poor investment of the scheme assets.

3.3. Non-Remittance of Monthly Contributions

3.3.1. History of Non-remittance of Contribution by OPS

According to RBA's supervision department, out of the over 1,250 OPS, over 90 had non-remittance issues in the quarter ending June 2013. This situation is worsened by the unwillingness of fund administrators, custodians and managers to name schemes not remitting funds for fear of losing business.[223]

Schemes such as Blue Shield Insurance Company Staff Retirement Benefits Scheme (SRBS) and the Modern Business Communications SRBS were placed under interim administration for failure by the trustees to recover unremitted contributions from the employer.[224] Further, as of June 2002, schemes established by parastatals were underfunded and carrying an actuarial deficit of KSh30 million.[225] RBA may have difficulties in enforcing funding requirements where the schemes that are underfunded are state corporation schemes.[226] This is because these are OPS established by government, if RBA has to prosecute trustees of the said schemes then the government is forced to allocate funds, which it probably does not have. Although these schemes have continued to operate, they have remained financially weak, compromising the

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[223] Ibid 21.

[224] Nzomo Mutuku, 'Need and Viability of a Benefit Protection Fund for Retirement Benefits Schemes in Kenya' (2011) RBA Research paper, 24 <http://www.rba.go.ke/research papers> accessed 1 November 2013.

[225] Ibid 24.

[226] Nyakundi Bonyi David 'Problems Facing Kenyan Pension System: A Case for Reforms of Laws Relating to Pensions' 82 (Masters of Laws Thesis, University of Nairobi 2006).

pension promise to their members, besides breaching of the law.[227]

3.3.2. Contributions under the RBA (1997) and it Regulations

Contributions are one of the sources of OPS assets besides investment earnings, income and all other moneys payable under the scheme rules or the provisions of the RBA (1997) into the scheme.[228] The law requires pre-funding of the promised benefits. For instance, Regulation 10(4) of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 require contributions to be payable by the tenth day of every calendar month and Regulation 15(1) require schemes to submit a quarterly record of contributions to RBA. The law further requires that the assets required to be used for pre-funding the promised benefits are legally separated from those of the employer. This is by having the asset held in trust.[229] The latter requirement protects the OPS's funds from the claims of the employer's creditors in the case of an employer's insolvency.

The legislative and regulatory requirements have considerably lessened the insolvency risk for OPS' members and noncompliance attracts penalty. According to Section 53 of the RBA (1997) any person who contravenes any provision of RBA (1997) is liable to a fine not exceeding KSh100,000 or to imprisonment for a term not exceeding one year, or to both.

[227] Ibid 82.
[228] The RBA (1997), S 32.
[229] The RBA (1997), S 26 (1).

3.3.3. Action Taken to Recover Non-Remitted Contributions

In the event of non-remittance of contributions, RBA instruct the trustees to give a remedial plan of how the unremitted contributions will be paid. However, considering that the employer is at fault and the trustees are just employees, they may not be able to force the employer to adhere to the remedial plan for fear of losing their jobs. Even where RBA appoints an interim administrator or liquidator to pursue the unpaid contributions, the employer may delay the payments by pursuing the court process. This is for example in the case of Blue Shield Insurance Company SRBS[230]. The employer may also be wound up and the assets are not adequate to cater for the unremitted contributions. This shows that RBA (1997) needs to completely cover such instances to avoid loss of members' benefits.

Section 53A of RBA (1997) allows a scheme to commence proceedings for the recovery of unremitted contributions. Specifically, where an employer makes a deduction from the employee's emoluments for remittance to the scheme, but fails to remit the deducted amount to the scheme within fifteen days of making the deduction. While Regulations 7(I)[231] require schemes to provide the mode of recovery of unremitted contributions in their governing documents, including civil debt recovery. For instance, in the case against the statutory managers of Muhoroni Sugar Company (in receivership),[232] the default judgment was set aside for various reasons among them was that the claim was not a liquidated demand. Therefore, the Judge decided that evidence needed to be called during hearing to prove each prayer. This

[230] The interim administrator has not been able to recover the unremitted contributions to the scheme following a series of moratoriums that have been awarded to the statutory manager by the court.

[231] of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000.

[232] Roberts Insurance Brokers Limited v Kipng'etich K. Bett & another (2013) eKLR <http://kenyalaw.org/caselaw/cases/view/84207> accessed 11 February 2015.

matter is still in court. This could be the position for many cases filed to collect unremitted contributions thus defeating the purpose of Section 53A and Regulations 7(I).

3.3.4. Lacuna in the Retirement Benefits Laws That Would Result in Loss of Contributions

The trust provided for in the RBA (1997) is not equipped to separate the amount of contributions owed by the employer from its other assets in insolvency proceedings. These unremitted contributions are therefore treated as unsecured claims in the distribution of the employer's assets among its creditors, with the result that the OPS will recover nothing or a small fraction of the contributions owing.[233] This risk affects both DB and DC schemes. The second risk, unique to DB schemes, is that the funds set aside to pay for the promised benefits may not be sufficient to pay the full amount required to provide the accrued benefits if the scheme is terminated as a result of the employer's insolvency.[234] This would be the case where the employer has failed to remit contributions to the OPS regularly. Specifically, the minimum funding level of OPS is provided as when the assets of the scheme are less than one hundred per centum of the value of the accrued liabilities of the scheme.[235] Further, when the scheme is unable to meet liabilities as and when they fall due.[236]

The law requires DB schemes to undergo an actuarial valuation every three years.[237] "Actuarial practice involves projecting numerous future events in order to determine how much must be

[233] Ibid 2.
[234] Ibid 2.
[235] The Retirement Benefits (Minimum Funding Level and Winding Up of Schemes) Regulations 2000, Regulation 4(1).
[236] Ibid, Regulation 4(1).
[237] The Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000, Regulation 31(1)(a).

contributed today to fund benefits payable years, possibly decades, in the future".[238] Any deviation from that forecast may lead to the assets in the fund being less than the liabilities accrued at a particular point in time.[239] If that point in time coincides with the employer's insolvency, then the OPS will not be fully funded and members will lose a portion of their benefits.

Where RBA is of the opinion that a scheme fund is below the minimum funding level[240], RBA may direct such a scheme to submit an actuarial valuation report together with a remedial plan.[241] This is done within thirty days from the date of such direction, setting out the arrangements intended to eliminate the deficiency in the scheme fund. Consequently, OPS would implement the terms of the remedial plan duly approved by RBA, within a period of three years for a scheme on discontinuous basis, and within a period of six years for a scheme on ongoing basis from the date of the approval.[242] However, this remedial plan can expose the scheme members to a shortfall risk in the event of the employer's insolvency during the period of the plan.

RBA (1997) does not prescribe the actuarial assumptions to be used by external actuaries in valuing the funding level of DB schemes.[243] RBA is not in a position to legally challenge the

[238] Dr. Janis P. Sarra & Dr. Ronald B. Davis, 'Analysis of Factors Leading to Insolvency and Restructuring and their Effects on Pension Plan Wind-Ups and Closures' (2007), 2 <http://s3.amazonaws.com/zanran_storage/www.blakes.com/ContentPages/52448509.pdf> accessed 7 February 2015.
[239] Ibid 2.
[240] The Retirement Benefits (Minimum Funding Level and Winding Up of Schemes) Regulations 2000, Regulation 4(1) provides that the minimum funding level of an occupational retirement benefits scheme shall be when the assets of the scheme are less than one hundred per centum of the value of the accrued liabilities of the scheme as well as when the scheme is unable to meet liabilities as and when they fall due.
[241] Regulation 4(2) of the Retirement Benefits (Minimum Funding Level and Winding Up of Schemes) Regulations, 2000.
[242] Ibid Regulation 5.
[243] Nyakundi Bonyi David 'Problems Facing Kenyan Pension System: A Case for Reforms of Laws Relating to Pensions' 82 (Masters of Laws Thesis, University of Nairobi 2006).

assumptions adopted by actuaries in carrying out valuations.[244] The effect of this lacuna in the law is that employers and trustees together with the contracted actuary can agree to use assumptions that are not appropriate.[245] This could create a surplus in the scheme with a view of enabling the employers enjoy a contribution holiday.[246] In this case, by the time a proper actuarial valuation is conducted then the employer may be insolvent thus leading to loss of benefits for members. This is because members' unpaid pension benefits do not form part of priority creditors in the Kenyan insolvency law.

The problem of the current retirement benefits laws where unremitted contributions are concerned is therefore the failure to protect the members' benefits in full. This is because the members' claims for the balance of any deficit in the scheme's assets and any unremitted contributions will be treated as unsecured claims in a liquidation and distribution of the employer's assets in an insolvency proceeding. The unremitted contributions during insolvency do not currently qualify for a preference treatment. Insolvency therefore, can place the retirement income of OPS beneficiaries at the risk of reducing.

3.3.5. Kenyan Courts' Decisions on Non-Remitted Contributions

The Kenyan courts have decided on a few cases concerning employees' unremitted contributions by the employer. In the following case, Gideon Ngao Fondo the Claimant filed a suit against the Municipal Council of Malindi, the Respondent.[247] Gideon claimed that he was appointed by the Respondent on permanent and pensionable terms. Further that he was

[244] Ibid 82.
[245] Ibid 82.
[246] Ibid 82.
[247] Gideon Ngao Fondo v Municipal Council of Malindi [2014] eKLR <http://kenyalaw.org/caselaw/cases/view/98936/> accessed 10 February 2015.

given and filled admission forms to the Kenya Local Government Officers' Superannuation Fund but the Respondent failed to pay his pension benefits amongst other benefits on retirement. On conclusion, the Court found that the Respondent was negligent and in breach of the law in failing to process or register the Claimant as a member or contributor to any pension scheme between years 1983 to 2002. Further that it was liable to the Claimant and it ordered the Respondent to pay the Claimant unremitted contributions to Superannuation Fund between years 1983 to 2002.

In another case the Claimant was employed by the Respondent as a Managing Director.[248] After his resignation, he learnt that the Respondent had defaulted in remitting some contributions to the Claimant's pension's account in the sum of KSh.399,617. As a result, he was not paid his pension arising from the non-remitted contributions. The Claimant thus filed this suit against the Respondent seeking payment of the terminal dues and the unremitted pension contributions. The court found that since the Claimant was no longer a member of the scheme, he was entitled to be paid the unremitted pension funds by the Respondent directly.

Another case currently in court is one against Muhoroni Sugar Company (in receivership). In this matter, the Defendant sought to set aside a default judgment that had been entered against the second defendant on 29/5/12.[249] The plaintiff was appointed on 6/4/05 as the interim administrator and subsequently appointed as the liquidator of Muhoroni Sugar Company SRBS

[248] Samuel Kamau Muhindi v Invesco Assurance Co. Ltd [2014] eKLR<http://kenyalaw.org/caselaw/cases/view/98688/> accessed 10 February 2015.
[249] Roberts Insurance Brokers Limited v Kipng'etich K. Bett & another [2013] eKLR <http://kenyalaw.org/caselaw/cases/view/84207> accessed 11 February 2015.

by RBA.[250] The defendants were the joint receivers and managers of Muhoroni Sugar Company (in receivership). The default judgment was of KSh.29,716,079/63 whereby the employer and member contributions receivable were KSh.18,115,250/=, excess of accrued liabilities over scheme assets was KSh.3,003,413/= and the interest at 5% of KSh.8,597,416/63. This judge however was of the view that this was not a liquidated demand and that the claim required formal proof. Therefore this matter is currently still in court. The contention however was how the amounts were arrived at and not what was receivable from Muhoroni Sugar Company as letters from their end admitted the unremitted amount while actuarial valuations showed the extent of accrued liability over scheme assets.

3.4. Misappropriation of Scheme Assets by the Trustees

3.4.1. Trustees Responsibility to the OPS under the RBA (1997) and its Regulations

Trustees have a mandatory obligation to take reasonable care to ensure that the management of the scheme is carried out in the best interest of the scheme members and the employer.[251] Of importance, this duty requires trustees to protect members' retirement benefits from unreasonable losses, including losses from fraud. The RBA (1997) allows trustees to delegate certain duties to external service providers. However, the responsibility for detecting and averting fraud rests solely with trustees. The judge noted in the case between Kenya Anti-Corruption Commission v Davy Kiprotich Koech & another, that if trustees abuse their position as trustees and unlawfully benefit from the trust, one of the remedies available to beneficiaries would be to seek for compensation for losses or restitution of profits.[252]

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[250] The appointment was under the provisions of the Retirement Benefits (Minimum Funding Level and Winding up of Schemes) Regulations 2000 and in particular Regulation 7 thereof.
[251] RBA (1997), Section 40.
[252] Kenya Anti-Corruption Commission v Davy Kiprotich Koech& another [2014] eKLR<http://kenyalaw.org/caselaw/cases/view/104389/> accessed 12 February 2015.

In this case, the plaintiff filed this suit alleging that the defendants as trustees of the KEMRI Pension Scheme misappropriated and embezzled funds amounting to KSh.509,002,643.80. It was not in dispute that the defendants were employees of KEMRI, trustees of the trust and signatory to its bank accounts. Further, being a trust the defendants were mandated to comply with the provisions of the RBA (1997) and specifically section 38 which provides that no scheme funds shall be paid to a trustee. It was clear that the amount that was paid out was made to both defendants and various individuals who were not beneficiaries or had no link to the KEMRI pension scheme and this was illegal. The court noted that KEMRI as the sponsor of the scheme had an interest in the funds of the scheme. Therefore, the plaintiff through Section 7 (1) (h) (i) of Anti-Corruption and Economic Crime Act (ACECA) had locus standi to institute these proceedings for recovery of the funds misappropriated by the defendants. In fraudulently disposing the scheme funds, the defendants as trustees acted ultra vires to the instructions of KEMRI and against its interest as a sponsor of the scheme thus contravening the provisions of Section 45 (3) of ACECA.

The trustees may be to blame however, the looming question would be why RBA was not able to cub such misappropriation before it happened. It can therefore be said that RBA failed in one of their duties to protect the interests of members and sponsors of this scheme.

3.4.2. Trustees Remuneration in Terms of the RBA (1997) and its Regulations

Historically, it was uncommon for schemes to pay any of their lay trustees.[253] It was the Myners

[253]Liberty Pension Services Limited, 'Liberty Pension News line Issue 15' 3<http://libertypensions.co.ke/?wpdmact=process&did=MTMuaG90bGluaw==> accessed 7 March 2015.

Report in 2001 (UK)[254] that recommended it was good practice to pay trustees to nurture expertise and business like fund management.[255] The RBA (1997) regulations, 2000 allow for the scheme Rules to provide for remuneration of trustees. The RBA (1997) significantly increased OPS trustees' responsibilities. It introduced the legal requirement to have knowledge and understanding of the highly technical areas of scheme activity such as investment, scheme funding, employer covenant and the impact of corporate activity on the scheme.[256] The enhanced skills requirement and the need for training, combined with the added complexity of pensions business, have led to heavier workloads on all trustees, whether professional or lay and thus the need for trustees' remuneration.[257] However, the problem arises because there are no limits set on trustees' remuneration. The law requires the trustees to give a report on remuneration received to scheme members during the OPS Members' Annual General Meetings.[258] However, this has not stopped trustees from misappropriating the scheme funds in the form of trustees' remuneration especially because the law does not provide for limits. For instance, inspection audit reports by RBA showed that the Kenya Railways SRBS trustees drew sitting allowances of KSh10,000/= and KSh5,000/= for each out of town trips.[259] The audit found the trustees to have held too many meetings over and above the quarterly requirement, in addition to awarding themselves bonuses of KSh50,000/= each in 2010.[260]

[254]The Myners Report, 'Institutional Investment in the United Kingdom: A Review' (2001) <http://www.icaew.com/en/library/subject-gateways/corporate-governance/codes-and-reports/myners-report#.dpuf> accessed 7 March 2015.
[255]Simon Wafubwa, 'Retirement Benefits Scheme Risk and Governance – Trustee Remuneration Perspective', 3 <http://libertypensions.co.ke/?wpdmact=process&did=MTMuaG90bGluaw==> accessed 7 March 2015.
[256] Ibid 3.
[257] Ibid 3.
[258] The Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000, Regulation 8(2) (k) (iv).
[259]Africa Centre for Open Governance, 'Kenya Governance Report' (2012), 22 <http://www.africog.org/sites/default/files/AGR_Report_2012-FINAL.pdf> accessed 23 May 2015.
[260] Ibid 22.

3.5. Loss of Scheme Funds by Trustees

Section 26 (3)[261] requires the appointment of any person as a trustee to be subject to RBA's approval. Trustees are vested with the power to manage the OPS and with the duty to ensure adherence to the terms of the Trust Deed as well as to act in the best interests of scheme members. However, this is not always the case.

3.5.1. Loss of Scheme Assets through Trustees

Loss of scheme assets can occur as a result of inaccurate data in the scheme records, as well as miscalculation of benefits and incorrect payment of any surplus which results in under or over payment of benefits. Sometimes double payments of members may occur due to lack of proper systems either by trustees or the administrators. Over time, this will impact on the funding of a scheme. Further due to negligence by trustees, loss of scheme funds through payment of penalties arising from none or under payment of tax due to Kenya Revenue Authority may occur especially because of the misconception that the scheme is exempt from tax. In the following case, Mackenzie M. Mogere was an employee of Telkom Kenya, which had established Teleposta Pensions Scheme.[262] Mogere appealed to the Retirement Benefits Appeals Tribunal alleging that the Trustees of Teleposta Pensions Scheme had calculated and paid him retirement benefits using a wrong pension formula and period. He asserted that it led to a wrong and lower pension sum being offered to him. The Tribunal made a judgment in his favour. The finding did not however please the Teleposta Pensions Scheme, which decided to appeal to the High Court seeking dismissal of the appeal on various grounds but the Application was struck out.

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[261] The RBA 1997.

[262] The Trustees, Teleposta Pension Scheme v Mackenzie M. Mogere & another [2013] eKLR<http://kenyalaw.org/caselaw/cases/view/87006> accessed 1 February 2015.

In another case the decision of the Retirement Benefits Appeals Tribunal was contested because Trustees were held personally and severally liable for the employer's action.[263] Here, the employer made deductions from an employee's pension benefits to pay the employee's loans and salary advances. The retirement benefits laws clearly prohibit assignment of benefits or contributions accruing to a beneficiary[264] and trustees have the duty to stop such an act by the employer.

In another instance, scheme assets were lost through breach of trust by trustees of Kenya Railways SRBS.[265] An inspection report by RBA on the Kenya Railways SRBS revealed that trustees had sold assets of the scheme for a less value than the valuation price. In addition, besides the chairperson being in office irregularly, the trustees had been extorting the scheme funds through unjustified remunerations.

3.5.2. Reasons for Trustees' Failure to Execute Fiduciary Duties

The problem arises when trustees fail to carry out their fiduciary duty appropriately. Accordingly, research has shown that in DC pension funds, the costs of failure are often borne

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[263]Republic v RB Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR<http://kenyalaw.org/caselaw/cases/view/91831/> accessed 1 February 2015.

[264] The Retirement Benefits (Occupational Retired Benefits Schemes) Regulations 2000, Regulation 22.

[265]A conflict of interest and a severe breach of trust by the trustees of the Kenya Railways staff Retirement Benefits scheme were revealed following an audit carried out by an inspection team from the RBA. One of the findings of the audit was that there were irregularities in the disposal of properties owned by the scheme. One such property, L.R Nairobi/Blocks 31/219, valued at Ksh525 million, but which had attracted an offer of Ksh625 million, was sold for Ksh540 million by private treaty without following due process. The trustees also allegedly accepted Ksh650 million in respect of L.R 209/8760, which was Ksh50 million less than its valuation of Ksh700 million. Additionally, a company had offered Ksh680 million but was unsuccessful in its bid.
The scheme trustees were also accused of abuse of office and disregard of internal controls and procedures. The audit found that Beryl Odinga, the Chair, was irregularly appointed, as no minutes existed to confirm her appointment. Further, in spite of her non-executive status, she drew a monthly pay of Ksh40,000/=, had an office, a driver, a personal assistant and two secretaries. She was found to have been questionably advanced Ksh1.2 million for local and international travel, in addition to having the scheme pay Ksh320,000/= to hire a car for her, over and above fuel costs for her personal vehicle. She allegedly sat in every committee meeting, thus exerting undue influence. See Africa Centre for Open Governance, 'Kenya Governance Report' (2012), 21 <http://www.africog.org/sites/default/files/AGR_Report_2012-FINAL.pdf> accessed 23 May 2015.

by those who should otherwise benefit from fund decision making. This is when the trustees do not provide enough protection from the principal-agent problem.[266] Board of trustees in pension funds may sometimes be weak and this is mainly caused by inadequate expertise of the trustees.[267]

A report that analyzed the competence of pension fund trustees in the UK found that a majority of them had no professional qualifications in finance or investment and had little training prior to or after the appointment.[268] Further, trustees spent hardly any time preparing for pension fund investment decisions.[269] This can be attributed to evidence that trustees often receive their job because of their social and professional roles rather than because of their qualifications.[270] As a result, the report argues that the standards of trustee expertise were less than desirable given their responsibilities, especially with respect to the consequences of their pension investment decisions.[271] Organization for Economic Cooperation and Development noted that trustees and fiduciaries generally lack suitable knowledge, experience or training, which additionally hinders them from being able to understand and challenge advice they receive from outside experts.[272] Corrupt trustees may also divert pension assets to the detriment of the scheme members or service providers may fail to live up to their obligations leading to loss of pension assets.[273] A good example being when NSSF lost assets through Discount Securities

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[266] Krzysztof Jackowicz and Oskar Kowalewski, 'Internal Governance Mechanisms and Pension Fund Performance' (2011), 6 <http://fic.wharton.upenn.edu/fic/papers/11/11-46.pdf> accessed 5 January 2015.
[267] Ibid 6.
[268] Ibid 6.
[269] Ibid 6.
[270] Ibid 6.
[271] Ibid 6.
[272] Stewart, F. and J. Yermo, 'Pension Fund Governance: Challenges and Potential Solutions' (2008) OECD Working Papers on Insurance and Private Pensions, No. 18, OECD publishing, 10 <http://www.oecd.org/finance/private-pensions/41013956.pdf> accessed 30 December 2014.
[273] Nzomo Mutuku, 'Need and viability of a benefit protection fund for RB schemes in Kenya' (2011) RBA Research paper, 18 <http://www.rba.go.ke/research papers> accessed 1 November 2013.

Ltd.[274]

Another problem that arises is how trustees are selected to the board of trustees. The law clearly provides that for a DB scheme the number of trustees nominated by members shall not be less than one third of the Board of trustees.[275] For a DC scheme the number of trustees nominated by members shall not be less than a half of the Board of trustees.[276] However, a study done at KEMRI staff pension scheme showed that election of member trustees was not done openly with 84.6% of the respondents indicating that they did not participate in the election of member representative trustees.[277] Only 15.4% acknowledged participating in these elections.[278]

3.5.3. Certification of Trustees

In a bid to ensure that trustees are equipped with the knowledge and skills of running OPS, RBA issued a Practice Note in August 2011, requiring every scheme to have at least one trustee trained through the Trustee Development Program Kenya (TDPK) by December 31, 2012. Further, RBA issued subsequent Practice Notes in June 2013, January 2014 and 2015 requiring all trustees to attend the training.[279] By September 2012, 512 trustees had been trained, which meant that 264 schemes had at least one trustee trained, out of 1,300 registered schemes.[280] As at June 2013, 496 pension schemes had at least one of their trustees trained and certified.[281] RBA had not stated what penalty would apply to those trustees who failed to become certified

[274] Ibid 18.
[275] The Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000, Regulation 8(1)(c)(I & ii).
[276] Ibid, Regulation 8(1)(c)(I & ii).
[277] Shikhule, Andrew Festus, Momanyi, Gideon, Naibei, Kiprotich Isaac, Oginda, Moses N and Nyakweba, Irene, 'Determinants of Pension Schemes Governance Effectiveness: A Case of Kenya Medical Research Institute' (2012) 6(2) African Research Review, 366 <http://dx.doi.org/10.4314/afrrev.v6i2.30> accessed 10 January 2015.
[278] Ibid 366.
[279] RBA Prudential Guideline Number RBA 001/2013.
[280] RBA, 'The Pensioner' (September 2012) 6 <http://www.rba.go.ke/home/the-pensioner?download=180%3Athe-pensioner-september-2012> accessed 14 February 2015.
[281] RBA, 'The Pensioner' (June 2013) 7 <http://www.rba.go.ke/home/the-pensioner> accessed 14 February 2015.

and thus such a directive may not be taken seriously. The Trustees who have undertaken the training may be better placed to make appropriate decisions for the scheme.

3.6. Poor Investments of the Scheme Assets

Although RBA has been pursuing various initiatives and reforms of protecting members' benefits and developing the retirement benefits industry, risk profiling exercise for the various schemes has found that one of the greatest areas of risk encountered by schemes is in investment.[282] There is need for progressive investment guidelines that can contribute to proper investments while ensuring that the primary objective of member retirement security is not compromised.

Trustees have a personal and fiduciary responsibility to invest the scheme's assets in a prudent way, in compliance with the Trust Deed and Rules and they remain ultimately responsible for the sound management of the affairs of the pension scheme.[283] In a case of Learoyd v Whiteley, 1887, it was noted that a trustee is "to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide".[284] This illustrates the general principle that trustees' duty may involve exercising greater care than they might in their own affairs. Regulation 38 of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000 provides an investment guideline to be adhered to by all OPS. These Regulations have precise guidelines

[282]RBA, 'The Pensioner' (September 2012) 11 <http://www.rba.go.ke/home/the-pensioner?download=180%3Athe-pensioner-september-2012> accessed 14 February 2015.
[283]George Russell, 'Solvency protection for private pension systems – background note on United Kingdom perspective' 1 <http://www.oecd.org/finance/private-pensions/2391391.pdf> accessed 29 December 2014
[284]Mayer Brown, 'Trustee Guide UK' (2013), 1<http://www.mayerbrown.com/files/Publication/684ff63e-d642-4a10-948b-da040f04dccb/Presentation/PublicationAttachment/8dbef32a-5f70-49e2-8298-691101164764/trustee-guide_jan13.pdf> accessed 29 December 2014

on the limits of exposures for each asset class. The recent case of Enron Corporation in the United State of America where pension funds were substantially invested in the stocks of related companies highlights the risk of employer managed pension schemes.[285]

Section 22 of the RBA (1997) mandates the trustees to appoint the investment managers and custodians as a way of improving schemes management. The scheme funds should be invested by the manager of the scheme or through a pooled fund.[286] RBA requires trustees to lay down their investment strategy and funding principles in the scheme's investment policy statements, as well as procedures of appointing investment managers and consultants. Trustees therefore remain responsible for the overall investment strategy to be taken for the scheme assets.[287] However, poor investment performance does not in itself mean that trustees have failed in their obligations, provided that they have followed appropriate processes.[288]

3.6.1. Reasons for Poor Investment Returns

Research has shown that the major impact of RBA (1997) is the fact that it brought order and discipline in the management of pension funds.[289] For instance employers are now mandated by law to pay scheme contributions. The law has also given organized investment guidelines.

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[285] Following the historic case of Enron Ltd in the United States of America (2001) where the pension fund was invested substantially in the employer's stock, it became more necessary to have independent pension fund management and custodial services away from employers. In this case the employer had unlimited access to the pension fund and was totally invested in the group of companies owned by the employer. This caused loss of pension funds due to lack of independence from the employer. To achieve the independent management of pension schemes away from employers it became necessary for legislation, which devolves the responsibilities of pension funds management to trustees from that of employers. Lori Zulauf and Peter Grierson, 'Enron: The Good, The Bad, The Lessons' (2011) 1(11) International Business & Economics Research Journal 49, 60 <http://www.cluteinstitute.com/ojs/index.php/IBER/article/download/3998/4051> accessed 10 August 2016.

[286] The Retirement Benefits (Occupational retirement Benefits Schemes) Regulations 2000, Regulation 10 (8).

[287] George Russell, 'Solvency Protection For Private Pension Systems – background note on United Kingdom perspective' 5 <http://www.oecd.org/finance/private-pensions/2391391.pdf> accessed 29 December 2014

[288] Shikhule, Andrew Festus, Momanyi, Gideon, Naibei, Kiprotich Isaac, Oginda, Moses N and Nyakweba, Irene, 'Determinants of Pension Schemes Governance Effectiveness: A Case of Kenya Medical Research Institute' (2012) 6(2) African Research Review, 361 <http://dx.doi.org/10.4314/afrrev.v6i2.30> accessed 10 January 2015.

[289] Lucy Jepchoge Rono, 'An Evaluation of Factors Influencing Pension Managers' Investment Decisions in Kenya' (2009), 95 <journals.cluteline.com/index.php/IBER/article/viewfile/3179/3227> accessed 11 November 2013.

However, these guidelines have some disadvantages in the sense that they provide an upper limit on investments resulting in limited investment opportunities for instance in the offshore markets.[290] The 15% limit on offshore investments maybe a stumbling block in achieving higher returns.[291]As a result, an analysis of the OPS performance showed that long-run performance has slowed down.[292] This implies that the implementation of the RBA guidelines provided positive governance initially, resulting in enhanced performance of the pension funds in the short-run.[293] However, in the long-run the guidelines have proved unsuccessful, reflecting fund managers and investment trustees' continued laxity in complying with the governance mechanisms introduced by the RBA (1997) guidelines.[294] This is a further indication of the current inadequate capacity of RBA to enforce these guidelines.[295]

It has also been the case that over the last decades investment opportunities for pension schemes have been very limited not only in Kenya but in the sub-Saharan Africa.[296] In addition, investment returns in the sub-continent have been low over the last decades.[297] In the year of 2008 and 2011 many pension schemes in Kenya performed below par. For instance, the period of September 2008 to June 2009 was characterized by the schemes reporting negative returns with average returns falling below zero and scheme members earning negative real rates of

[290] Ibid 95.
[291] Ibid. 95.
[292] Lucy Jepchoge Rono, Julius Kibet Bitok, and Gordon N. Asamoah, ' Impact Of RB Act (RBA) on Investment Returns to Pension Funds in Kenya' (2010), 51 <clute.online.com> accessed 2 November 2013.
[293] Ibid 51.
[294] Ibid 51.
[295] Ibid 51.
[296] Luca Barbone1 & Luis-Alvaro Sanchez B., 'Pension and Social Security in Sub-Saharan Africa Issues and Options' (1999), 17 <http://info.worldbank.org/etools/docs/library/76907/february2003/readings/barbone.pdf> accessed 10 January 2015.
[297] Ibid 17.

return.[298] The average rates of return of the industry also fell significantly in 2011.[299] A sample survey of schemes saw weighted average one-year return down from 27.8 percent in December 2010 to negative 11.4 percent in September 2011.[300] Further, the OECD estimated that the 2008 financial crisis had a major impact on global pension assets, with the value of assets losses in countries that were affected by the 2008 global financial meltdown declining by US$5.4trillion (over 20%) as at the end of 2008. [301] This put pressure on funding levels for DB pension schemes. It also served a severe blow to members of DC schemes close to retirement as they did not have a chance to recover their funds in the following years.[302]

Further, the purchasing power that pension benefits provided is continually being eroded by inflation.[303] The standard of living among retirees is declining rapidly while, the life expectancy increases.[304] It has been observed that despite the proliferation of public and private pension schemes in recent years, rising costs and the rate of inflation make them financially unsound to run.[305] Research also found out that besides few avenues of investments, bureaucracy resulting from consultations with trustees and unpredictable or turbulent and dynamic market situations are the major challenges facing fund managers investing pension

[298]Nzomo Mutuku, 'The Impact of the Global Financial Crisis on the Kenyan Retirement Benefits Industry' (June 2010) 15 <http://www.rba.go.ke/publications/research-papers/category/2-research-reports-2009-2010?download=3%3Aimpact-of-global-finanical-crisis-on-kenyan-retirement-benefits> accessed 30 December 2014.
[299]Kenya's Financial Sector Stability Report, 2011 (December 2011 Issue No. 3) 52 <http://www.cma.or.ke/index.php?option=com_docman&task=doc_download&gid=134&Itemid=102> accessed 30 December 2014
[300]Ibid.
[301]Antolín, P. and F. Stewart, 'Private Pensions and Policy Responses to the Financial and Economic Crisis' (2009) OECD Working Papers on Insurance and Private Pensions, No. 36, OECD publishing, 2 <http://www.oecd.org/finance/private-pensions/42601323.pdf> accessed 30 December 2014.
[302] Ibid 2.
[303]Shikhule, Andrew Festus, Momanyi, Gideon, Naibei, Kiprotich Isaac, Oginda, Moses N and Nyakweba, Irene, 'Determinants of Pension Schemes Governance Effectiveness: A Case of Kenya Medical Research Institute' (2012) 6(2) African Research Review, 359 <http://dx.doi.org/10.4314/afrrev.v6i2.30> accessed 10 January 2015
[304] Ibid 359.
[305] Ibid 359.

funds.[306] In addition, the legal framework setting ceilings for certain investment classes is limiting.[307] All this problems do not help in protecting RB funds from major loss.

3.7. Is the RBA Well Placed to Protect Retirement Benefits?

The RBA (1997) established the RBA which is a regulatory and supervisory body charged with the responsibility of "regulation, supervision, promotion of RB schemes, and the development of the retirement benefits sector".[308] RBA is a body corporate and its management is vested in a Board of directors.[309] The Board comprises the Chairman appointed by the Cabinet Secretary of Finance (CS); the Chief Executive Officer of RBA (CEO) (as a non-voting ex officio member), the Principal Secretary of Finance, the Commissioner of Insurance, the Chief Executive of the Capital Markets Authority, and five members, not being public officers, appointed by the CS.[310] Save for the board qualification which members must possess before they are appointed, RBA (1997) does not lay down the procedure of selecting and appointing directors.[311] A proper and fit test is not required in the appointment of Board and the process of appointment is left to the CS.[312]This section gives the CS very broad powers and may appoint his allies so long as they possess the required qualifications at the expense of the public good.[313] Section 11of the RBA (1997), requires the CEO to be appointed by the Board in consultation with the CS and to at least have ten years' experience in a managerial capacity

[306] Lucy Jepchoge Rono, 'An Evaluation of Factors Influencing Pension Managers' Investment Decisions in Kenya' (2009), 97 <journals.cluteline.com/index.php/IBER/article/viewfile/3179/3227> accessed 11 November 2013.
[307] Ibid 97.
[308]HakiJamii Trust, 'The Right to Social Security in Kenya, The gap between international human rights and domestic law and policy' (2007), 5 <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/hakijamiikenya39.pdf> accessed 18 December 2014
[309] The RBA (1997), S 3(2) and S 6.
[310] The RBA (1997), Section 6.
[311]Nyakundi Bonyi David 'Problems Facing Kenyan Pension System: A Case for Reforms of Laws Relating to Pensions' 68 (Masters of Laws Thesis, University of Nairobi 2006).
[312] Ibid 68.
[313] Ibid 68.

in RB, accounting, finance, insurance or the banking sectors. Here RBA (1997) does not also prescribe the appointment process, there is no fit and proper test required and the position is not subject to competitive selection.[314] Therefore, the CS can appoint the CEO and seek the Board's ratification since the Board is subject to him.[315] The manner of appointing the Board of RBA and the CEO can affect the efficiency of RBA's operations.[316]

Section 22 of the RBA (1997) requires administrators, custodians, and fund managers to be registered by RBA. RBA (1997) provides for criminal sanctions for any person convicted of operating without registration. Despite this legal requirement for contravening the law, it has been observed that sometimes there have been unlicensed service providers in the retirement benefits sector.[317] RBA may also not be in a position to conduct frequent on-site inspections, and may adapt a supervisory approach limited to conducting off-site surveillance of institutions it has registered as well as schemes.[318] This is because one of its challenges is to be able to attract and retain technical members of staff.[319] The problem is that not all information sent to RBA by trustees is necessarily correct and it would be difficult to clarify the information if making off-site inspections. One of the reason why a number of schemes have gone down under RBA's watch.

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[314] Ibid 68.
[315] Ibid 68.
[316] Ibid 68.
[317] Eastern and Southern Africa Anti-Money Laundering Group, 'Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism' (2011), 151 <http://www.esaamlg.org/userfiles/Kenya_MER_Executive_Summary%282%29.pdf> accessed 3 March 2015.
[318]Ibid 143.
[319] Ibid 143.

Even where RBA has intervened in order to protect the interests of members especially when members' benefits are endangered, there has been tendency of trustees and employers seeking injunctions from courts in order to stop RBA from performing it functions. Some examples would include LAPTRUST[320] and the trustees of Pentecostal Assemblies of God (PAG) Kenya thus leaving members' benefits exposed. The law provides for means of refunding members' benefits. However, the bigger problem is that the benefits may not be reimbursed in full, coupled with the trauma the members will suffer while the court proceeding is ongoing. It therefore becomes absolutely necessary to have the law fully protect the members' benefits.

3.8. Conclusion

In conclusion, it is evident that pension fund governance is important to OPS members; particularly in terms of protecting members benefits considering that old age poverty in Kenya still remains a concern. This is because there are a lot of loopholes in the RB laws that must be addressed to ensure every Kenyan enjoys their retirement benefits. RBA also needs to take it enforcement role to ensure that the existing law is fully enforced.

[320] LAPTRUST moved to court under certificate of urgency seeking leave to quash the decision of RBA asking for certificate of registration held by the Financial Service Company for destruction. Justice Isaac Lenaola issued an order restraining RBA from calling for forensic inspections of LAPTRUST, pending the hearing and determination of the petition before the court. See Joseph Muraya, 'RBA stopped from delisting CPS Financial Services' *Capital FM* (12 September 2014) <http://www.capitalfm.co.ke/business/2014/09/rba-stopped-from-delisting-cps-financial-services/> accessed 7 March 2015.

CHAPTER FOUR

GLOBAL BEST PRACTICES ON ENHANCING THE SAFETY OF OCCUPATIONAL PENSION BENEFITS

4.1. Introduction

One of the most significant social policy accomplishments of the twentieth century was the growth of social security programmes and systems in many countries of the world.[321] In general, the concept of social security varies from country to country depending on a country's traditions, experiences and level of economic development.[322] Social security remains the most vital government program intended to avert poverty after retirement.[323] All over the world, the danger of losing assets through uncontrolled events calls for additional protective measures.[324] To prevent OPS's asset deficiency, there is need for full funding and continuous payments of contributions by the employer to the OPS. Additionally, there is need to prevent fraud on the scheme assets, govern trustees' operations and ensure proper investment of scheme assets.

OPS all over the world[325], just like Kenya have faced various problems that may have led to

[321]KE Mosito, 'A Panoramic View of The Social Security and Social Protection Provisioning in Lesotho' (2014) 17 Potchefstroom Elec. L.J. 1571, 1572.
[322] Ibid 1572.
[323] Benjamin A. Templin, 'Full Funding: The Future of Social Security' (2006) 22 J.L. & Pol. 395, 395.
[324] Roy Goodet, 'Occupational Pensions: Securing the Pension Promise' (1994) 9 Denning L.J. 15, 17.
[325] For instance, the UK has seen the loss of a lot of pension assets and benefits through for example the scandal of the Maxwell pension fund case, as well as over 65,000 workers in various companies losing large amounts of their pension benefits in recent years on the bankruptcy of their sponsoring companies (including ASW the UK's second largest steel manufacturer). Other pension's scandals in the UK are such as that of Equitable Life and the misselling issues. The UK introduced an explicit pension benefit compensation scheme, the Pension Protection Fund (PPF), which began operating from 6 April 2005 to cater for this losses as well as providing 400 million British pounds compensation for workers who had already lost out. The UK government felt it was necessary to put a new compensation structure and new funding rules in place in order to try and restore faith in the DB pension system in general. See Stewart, F., 'Benefit Security Pension Fund Guarantee Schemes' (2007) OECD Working Papers on Insurance and Private Pensions, No. 5, OECD Publishing, 2 <http://www.oecd.org/finance/private-pensions/37977335.pdf> accessed 18 May 2015. In the United States of America, the case of Enron Corporation which occurred in 2001 is one of the examples where pension benefits were lost. In this case, the pension funds were substantially invested in the stocks of related companies and the employer had unlimited access to the pension fund and was totally invested in the group of companies owned by the employer. This caused loss of pension funds due to lack of independence from the employer. To achieve the independent management of pension schemes away from employers it became necessary for legislation, which devolves the responsibilities of pension funds management to trustees from that of employers. It became more necessary to have independent pension fund management and custodial services away from employers. (see Lucy Jepchoge Rono, 'An Evaluation of Factors Influencing Pension Managers' Investment Decisions in Kenya' (2009), 82

loss of members' pension benefits, including, non-payment of contributions, excessive self-investment, inappropriate withdrawal of scheme funds, and misappropriation of scheme assets. Kenya has come a long way in terms of securing the pension promise, however, as discussed in chapter three, Kenya's OPS still requires more measures of securing the pension promise in order to fully secure members' benefits. This Chapter will look at best practices in some countries around the world that Kenya can adopt in order to safe guide retirement benefits.

4.2. Treatment of Outstanding Contributions

Pension underfunding and employer outstanding contributions can potentially play a huge role in the insolvency process. Having discussed the problems Kenya is facing where OPS are underfunded or contributions are not remitted in Chapter 3, this chapter will discuss best practices used to recover such contributions. Protection of OPS benefits has been a forefront concern for many countries. As discussed in the previous chapter, where contributions remain unpaid or the OPS is not funded fully, there is a risk of the employer becoming insolvent without first paying off what is due to the OPS. In such event, the Kenyan Insolvency Act 2015 does not grant employees priority preference as creditors and therefore, there is the risk of the employees' pension benefits not been recovered at all. Canada has in place good processes for treatment of unremitted contributions where an employer has become insolvent before paying the pension dues. For this study, I will specifically address Canada's, UK's, Nigeria's and Australia's approach of solving this problem.

<journals.cluteline.com/index.php/IBER/article/viewfile/3179/3227> accessed 11 November 2013.). Prior to the 2004 Act, the pension scheme in Nigeria was a largely defective defined-benefits system plagued with several challenges, chiefly, insecurity of pension funds and assets. In the private sector, there were serious structural problems of wrong assessment of liabilities, non-payment and delayed payment of pension benefits, non-coverage, non-preservation of pension benefits, administrative bottlenecks, bureaucracies, gross abuse and misuse of pension fund benefits, and no adequate safeguard of pension funds. See Tosho Suleiman, 'Understanding the Impact of Pension Reforms in Nigeria'<https://www.linkedin.com/pulse/20141120105659-63373791-understanding-the-impact-of-pension-reforms-in-nigeria> accessed 4 June 2016.

There are two sides of scheme solvency. One is the cash flow test which is the ability of an ongoing scheme to meet its liabilities as they fall due.[326] The second side of scheme solvency is the balance sheet test which is the ability of a scheme to meet its liabilities on winding up.[327] One potential way to offer greater protection to employees when their employers become insolvent is demonstrated by the Canadian Wage Earner Protection Program Act (WEPPA)[328] of 2008 together with the Canadian bankruptcy law.[329] This hybrid approach offers strong protection for most employment claims during employer insolvency.[330] Just like the current state in Kenya, before the changes in the bankruptcy legislation in Canada, employees frequently received nothing or only a portion of their claims when their employer became insolvent. Additionally, employees could recover their dues only at the close of the bankruptcy proceedings. The reasoning behind creditor priorities is that vulnerable employees, unlike secured creditors, are unable to guard themselves against employer insolvencies.

4.2.1. Priority Treatment of Pension Benefits during Employer Insolvency

As provided under WEPPA, the priority ranking of pension assets in Canada is clearly provided for during bankruptcy proceedings. Under this scheme, Bankruptcy and Insolvency Act 1985 now provides for a super priority in bankruptcies for outstanding pension scheme contributions that ranks immediately behind the employee remuneration, but otherwise with the same type

[326] Roy Goodet, 'Occupational Pensions: Securing the Pension Promise' (1994) 9 Denning L.J. 15, 18.
[327] Ibid 18.
[328]WEPPA is Canada's national wage guarantee scheme.
[329]Paul M. Secunda, 'An Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the United States' (2013-2014)41 Fordham Urb. L.J. 867, 934.
[330]Canada has a hybrid arrangement in the sense that it offers priority in insolvency proceedings for employees with outstanding pension payments. In addition, Canada has a guarantee fund in place to pay some portion of employee pension claims on employer insolvency. More specifically, this type of system permits impacted employees to get more timely payments from the guarantee fund and then substitutes the guarantee fund in the place of the employees in the bankruptcy process. See Paul M. Secunda, 'An Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the United States' (2013-2014)41 Fordham Urb. L.J. 867, 934.

of priority.[331] The super priority afforded to pension plan contributions is unlimited in amount and extends to all assets of a bankrupt.[332] The Companies' Creditor Arrangement Act R.S.C., 1985, c. C-36 and proposal provisions of the Bankruptcy and Insolvency Act 1985 also contain provisions which protect employees in respect of wage and pension priority claims in a restructuring proceeding.[333] The court is expressly prohibited from sanctioning a proposal, compromise or arrangement or approving a sale of assets outside of the ordinary course, unless it is contented that the debtor has organized to pay an amount equivalent to the amounts secured by the wage and pension priority charges.[334] Prior to the decision of the Ontario Court of Appeal in a precedent setting case, re: Indalex[335], the priority did not extend to unfunded deficits arising upon a wind-up of a DB plan and special payments required to be made by an employer because of the existence of a solvency deficiency.[336] However, this case decided that the pensioners should take priority because they had formed a statutory trust, and should be considered secured creditors.

From the above, Kenya can learn from the Canadian bankruptcy laws and WEPPA to start the process of providing the necessary legal and social protection to employee creditors during employer insolvency.

In Australia, outstanding contributions due to a scheme from an employer are preferred

[331] Paul M. Secunda, 'An Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the United States' (2013-2014) 41 Fordham Urb. L.J. 867, 900.

[332] The priority includes: (1) pension contribution amounts deducted from an employee's pay; (2) any unremitted employer pension contributions towards a DC pension plan; and (3) any ongoing payments made in DB pension plans to meet the plan obligations to members as required by applicable pension legislation. This priority applies to both federally and provincially-regulated pensions. (See Paul M. Secunda, 'An Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the United States' (2013-2014) 41 Fordham Urb. L.J. 867, 900.)

[333] McMillan LLP, 'Insolvency Proceedings in Canada', 9 <http://mcmillan.ca/files/Insolvency%20Proceedings%20in%20Canada.pdf> accessed 28 April 2016.

[334] Ibid 9.

[335] Sun Indalex Finance LLC v. United Steelworkers 2013 SCC 6

[336] McMillan LLP, 'Insolvency Proceedings in Canada', 9 <http://mcmillan.ca/files/Insolvency%20Proceedings%20in%20Canada.pdf> accessed 28 April 2016.

creditors within the Australian bankruptcy system.[337] Under section 556(1)(e) of the Australian's Corporations Act 2001, employment entitlements are given priority over other unsecured debts, except liquidation expenses.[338] Where money is available to pay employees entitlements, pension contributions are paid after wages.[339] A further provision (section 596AA) of the Corporations Act 2001 protects employees' entitlements, including contributions, from agreements and transactions entered into, with the intention of defeating the recovery of those entitlements (even if the company is not a party to the agreement or transaction or the agreement is approved by a court). Directors of companies can also become personally liable for unremitted contributions to the scheme in some circumstances. These directors are usually given an opportunity to defend the allegations and if not successfully then the unpaid contributions are recovered from them.

4.2.2. Pension Guarantee Systems

As noted above, protecting the already-earned employees' pension, wages, and other employee benefits when the employer becomes insolvent in a timely and competent manner would be good for Kenyan employees. However, the granting of insolvency priority can be supplemented in order to have a very stable method of protecting employees' benefits during an employer's insolvency. In this regard, some countries have developed the guarantee system[340]. The purpose of the guarantee system is to provide a more timely structure of

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[337] Stewart, F., 'Benefit Protection: Priority Creditor Rights for Pension Funds' (2007) OECD Working Papers on Insurance and Private Pensions, No. 6, OECD Publishing, 11 <http://www.oecd.org/finance/private-pensions/41013956.pdf> accessed 30 December 2014.
[338] Ibid 11.
[339] Ibid 11.
[340] According to OECD, a pension guarantee can be established in accordance with best practices as below: (1) benefit coverage should be limited so that potential beneficiaries share some of the risk; (2) pricing or levies should be risk based; (3) the guarantee fund should have in place accurate and consistent funding rules and should operate under prudent asset-liability management; and (4) the system must have adequate powers to avoid moral hazard. One way to reduce the chances of moral hazard in such a scheme would be to require that payment of unfunded benefits agreed to within five years prior to the employer's insolvency be postponed until all other benefits under the plan are satisfied. See Paul M. Secunda, 'An Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under

payment of benefits to employees and wages when the employers become insolvent.[341] For instance, the UK has a pension guarantee fund. The Pension Act 2004 established the Pension Protection Fund (PPF). The purpose of PPF is to provide payment to employees in occupational defined benefit plans for both unpaid contributions and unfunded liabilities where the sponsoring employer became insolvent.[342] The PPF is obtained through yearly statutory levies on all occupational DB pension schemes.[343] The PPF does not guarantee defined contribution plans and payments are subject to a statutory cap and are restricted to only a part of the accumulated pension benefits under the PPF.[344] It would be good for Kenya to look into having a guarantee system that can protect employee benefits in both DB and DC plans. Other countries that have a similar fund include the United States' Pension Benefit Guarantee Corporation and Nigeria's Pension Protection Fund.

In Africa, Nigeria is the only country that has a Pensions Protection Fund. Nigeria enacted the Pension Reform Act of 2004 (the 2004 Act) which ultimately transformed their pensions system. However, in a bid to build on the advantages of the 2004 Act, Nigeria enacted the Pension Reform Act of 2014 (the 2014 Act). This Act introduced the Pensions Protection Fund (PPF) to guarantee pensioners' benefits. The key objective of this PPF is to secure for the beneficiaries of the scheme the minimum guaranteed pension and make up any shortfalls to

Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the United States' (2013-2014) 41 Fordham Urb. L.J. 867, 935.

[341] Paul M. Secunda, 'An Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the United States' (2013-2014) 41 Fordham Urb. L.J. 867, 994.

[342]Ibid 995.

[343] Ibid 995.

[344] Ibid 995.

that amount as may arise[345].[346] Section 82 of the 2014 Act requires the Nigerian National Pension Commission (PENCOM)[347] to establish and maintain the PPF for the benefits of eligible pensioners. The PPF is funded by an annual grant of 1% of the total monthly wage bill payable to employees in the public service of Nigeria; annual pension protection levy to be paid by PENCOM and licensed operators at a rate to be determined by PENCOM; and income from investments of funds in the PPF.[348] Section 82 and 84 of the Pension Reform Act, 2014 provided for the establishment of a statutory PPF as a means of actualizing the minimum pension guarantee. Accordingly, OPS in Nigeria are required to provide minimum pension for employees irrespective of their contributions. Therefore, in the event of loss of benefits, including investment losses, the minimum guarantee pension covers the loss ensuring that employee do not receive less that the statutorily required pension.

RBA tried to show cause why Kenya needs a protection fund. They addressed the need and practicability of founding a benefit protection fund for retirement benefits in Kenya. Amongst other recommendations, RBA was of the view that Kenya should establish a RB protection fund under the RBA (1997).[349] The losses that the Fund should cover need to be restricted to losses arising from counterparty default or fraud on the part of trustees and service providers

[345] Funds in the PPF are utilised to pay minimum guaranteed pension, an amount that is determined by PENCOM from time to time, to every employee who has held a Retirement Savings Account for a period, also to be determined by PENCOM where there is a shortfall or financial loss arising from investment of pension funds. This provides security to pension contributions, which is a good incentive for voluntary contributions. (See Tosho Suleiman, 'Understanding the Impact of Pension Reforms in Nigeria' <https://www.linkedin.com/pulse/20141120105659-63373791-understanding-the-impact-of-pension-reforms-in-nigeria> accessed 6 May 2016.)

[346] KPMG Newsletter, July 2014 <https://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/taxnewsflash/Documents/nigeria-july23-2014.pdf> accessed 6 May 2016.

[347] The Pensions Protection Fund's (PENCOM) main objective is to make sure that pension matters are managed with little or no exposure to fraud and risk.

[348] Tosho Suleiman, 'Understanding the Impact of Pension Reforms in Nigeria' <https://www.linkedin.com/pulse/20141120105659-63373791-understanding-the-impact-of-pension-reforms-in-nigeria> accessed 6 May 2016.

[349] Nzomo Mutuku, 'Need and viability of a benefit protection fund for retirement benefits schemes in Kenya' (2011) RBA Research paper, I <http://www.rba.go.ke/research papers> accessed 1 November 2013.

registered under the RBA (1997).[350] Both DB and DC schemes should be covered by this fund.[351] The Fund should only cover defaults not covered by existing protection funds in the financial sector.[352] However, to date the government has not implemented the same.

Accordingly, using the two methods, i.e. insolvency priorities and pension guarantees, the law in Kenya if duly amended can easily protect the vulnerable Kenyan employees who find themselves as involuntary creditors due to employer insolvency.

4.3. Handling of Misappropriated Funds

As discussed in my Chapter three, Kenya has experienced fraud and misappropriation of OPS assets and funds on several occasions, to an extent that schemes have been liquidated, with the members losing out on their benefits. Other countries have similar experiences, for instance the UK. The UK Maxwell case[353] highlighted the ways pension money can be siphoned from the OPS. It included excessive self-investment, failure to pay contributions when due, and the theft of pension fund assets or their diversion to improper purposes which wrongfully benefited third parties at the expense of the pension fund.[354] All in all the pension funds lost from this Maxwell incident amounted to £450 million.[355] As a result, it became necessary for the UK government to enhance the protection of employees' pension benefits, thus enacting the

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[350] Ibid I.
[351] Ibid I.
[352] Ibid I.
[353] In the Maxwell case, several methods were used to remove pension fund assets from the control of the trustees. Large quantities of Maxwell's companies' pension fund assets were lent to private companies owned by Maxwell against poor security, or were invested directly in them. When the companies became insolvent, with liabilities of up to £1 billion, the assets were lost. See Roy Goodet, 'Occupational Pensions: Securing the Pension Promise' (1994) 9 Denning L.J. 15, 23. The Maxwell case partly revealed the inadequacy of legal provisions, as well as vulnerability of pension funds to fraud. The case has cast doubt on the use of trust law as applied in the UK, as the means of redress - civil action against trustees by members once things go wrong - were seen as inadequate. This is especially as members lack prudential standards against which to monitor the fund and the trustees. E. Philip Davis, 'Regulation of Private Pensions - A Case Study of the UK' (2000), 24 <http://www.ephilipdavis.com/wp0009.pdf> accessed 16 June 2016.
[354] Roy Goodet, 'Occupational Pensions: Securing the Pension Promise' (1994) 9 Denning L.J. 15, 16.
[355] Ibid 16.

Pensions Reform Act, 1995. This Act set up the Occupational Pension Regulatory Authority (OPRA) that was replaced by the Pensions Regulator, created under the Pensions Act 2004. The regulator replaced OPRA from 6 April 2005 and has broad powers, a hands-on and risk-based method used to protect members' benefits. Accordingly, this regulator works closely with the OPS that pose greater risk to members' pension benefits to ensure that members do not lose their benefits. It also ensures that schemes use the best administrative methods as well as making sure that the trustees have adequate knowledge to run the schemes.

Kenya can learn from the UK. In UK, the Pensions Regulator continues to use education as the means to change behavior across schemes and provide trustees with adequate knowledge to run the scheme.[356] Trustees are required to comply with trustee knowledge and understanding requirements and develop further their knowledge to ensure they are confident in dealing with the more complex aspects of running their schemes.[357] The UK Pension Regulator's governance survey (Pensions Regulator (2007b)) established that higher levels of trustee training continue to be associated with higher levels of governance activity and understanding of the board.[358] Therefore, such trustees more likely to be able to govern their schemes better.[359]

Section 83 of the Pension Act 2004 requires trustees to report to the Pension Regulator whenever they have any reasonable cause to believe that misappropriation or fraud of the scheme assets is happening, has happened or is to be attempted. Non remittance of contribution

[356] Stewart, F. and J. Yermo, 'Pension Fund Governance: Challenges and Potential Solutions' (2008) OECD Working Papers on Insurance and Private Pensions, No. 18, OECD publishing, 9 <http://www.oecd.org/finance/private-pensions/41013956.pdf> accessed 30 December 2014.
[357] Ibid 9.
[358] Ibid 23.
[359] Ibid 23.

could be an indication of fraudulent activities or misappropriation of scheme assets. Investigations could also give such an indication. The RSM Pensions Fraud Survey of 2015 revealed a major increase in the level of pension fraud in the UK, with almost four in ten schemes saying they have suffered fraud, half of which said it was within the past two years.[360] It was noted that 79% of trustees have in the past 12 months, considered fraud risk.[361] However, the RSM survey showed that too many pension scheme trustees, managers and administrators are still failing to properly recognise the risk of fraud within their schemes.[362] This survey made UK recognizes that pension trustees require more training in order to recognize and prevent fraud.

4.4. Requirement of Scheme Trustees

The criteria Australia uses to qualify the persons who act as trustees in OPS is quite stringent and Kenya can learn from it. This is the reason why it forms part of my study as a best practice for trustees' appointment. OPS are commonly known as superannuation funds in Australia.[363] The Australian funds operate as a trust under the sole responsibly of the trustees.[364] These funds are supervised by Australian Prudential Regulation Authority (APRA).

In Australia, the licensing of trustees was made mandatory in July 2006, a first among

[360] RSM UK Group LLP, 'Pensions Fraud Survey' (2015),20 <https://www.rsmuk.com/~/media/files/pensions/rsm-pensions-fraud-risk-report.pdf?la=en> accessed 17 June 2016.
[361] Ibid 10.
[362] Ibid 4.
[363] In most other countries the term "private pensions" tends to be used to describe what is known as superannuation in Australia. While it is not entirely clear why the term superannuation is used in Australia, the term does provide a clear distinction for private arrangements from the government provided Age Pension. It also is more consistent with the availability of lump sum benefits in Australia, which are taken by a substantial number of retirees. Ross Clare, 'Australian superannuation: an equitable and sustainable arrangement in a post crisis world?' (2013), 3 <https://www.imf.org/external/np/seminars/eng/2013/oapfad/pdf/clare.pdf> accessed 20 February 2016.
[364] Martin REIN and John TURNER, 'Public-Private Interactions: Mandatory Pensions in Australia, the Netherlands and Switzerland' (2001) 10 Review of Population and Social Policy, 122 <http://www.ipss.go.jp/publication/e/R_s_p/No.10_P107.pdf> accessed 10 February 2016.

AngloSaxon countries.[365] The assessment of fit-and-proper requirements is an integral part of the licensing process.[366] The licensing regime in Australia requires trustees to fulfill certain conditions on an ongoing basis, in order to receive a license from APRA to operate a superannuation fund.[367] These conditions would include requirement for trustees to meet minimum standards of competency and to have adequate resources, fraud control plans, and proper systems for managing risks and outsourcing.[368] Further, the standards for fitness and propriety of the governing body include reference to character, competence, diligence, experience, honesty, integrity, judgment as well as educational and technical qualifications, knowledge and skills.[369] The propriety standard must be met on an individual basis, whilst the fitness standard is required to be met on a collective basis such that the governing body must have the collective skills, qualifications and experiences to fulfill its role.[370] Guidance is provided on what APRA considers minimum standards for fitness of individuals but minimum qualifications, skills and experiences are not prescribed.[371] However, trustees are expected to develop a policy in relation to fitness and propriety in which they outline how they meet the fitness and propriety standard on an ongoing basis, including minimum requirements of new

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[365]Stewart, F. and J. Yermo, 'Pension Fund Governance: Challenges and Potential Solutions' (2008) OECD Working Papers on Insurance and Private Pensions, No. 18, OECD publishing, 10 <http://www.oecd.org/finance/private-pensions/41013956.pdf> accessed 30 December 2014.

[366]Ibid 10.

[367]Shikhule, Andrew Festus, Momanyi, Gideon, Naibei, Kiprotich Isaac, Oginda, Moses N and Nyakweba, Irene, 'Determinants of Pension Schemes Governance Effectiveness: A Case of Kenya Medical Research Institute' (2012) 6(2) African Research Review, 358 <http://dx.doi.org/10.4314/afrrev.v6i2.30> accessed 10 January 2015.

[368]Ibid, to ensure compliance with the licensing framework, APRA has appropriate powers, including issuing directions, disqualifying trustees, varying conditions and suspending or revoking the licence, subject to appropriate safeguards and review processes. The Government agreed to amend the Superannuation Industry (Supervision) Act 1993 to require all trustees to prepare a risk management strategy (RMS) for itself and a risk management plan (RMP) for each fund under its trusteeship. The RMS would demonstrate arrangements trustees have in place to mitigate relevant risks, including risks relating to governance and decision making processes, outsourcing, potential fraud and theft and changes to the relevant law. The RMP for each fund must encompass investment, risks to the fund's financial position, outsourcing, and audit. See International Organization of Pension Supervisor's, 'Supervisory oversight of Pension fund Governance' (2008) Working Paper No. 8 <http://www.iopsweb.org/41269776.pdf> accessed 17 June 2016.

[369]Stewart, F. and J. Yermo, 'Pension Fund Governance: Challenges and Potential Solutions' (2008) OECD Working Papers on Insurance and Private Pensions, No. 18, OECD publishing, 17 <http://www.oecd.org/finance/private-pensions/41013956.pdf> accessed 30 December 2014.

[370]Ibid 17.

[371] Ibid 17.

individuals and ongoing training requirements.[372] APRA has the ultimate ability to work with or replace conflicted trustees.[373]

Unlike Australia, Kenya is more like the UK in terms of requirement of trustees. The law in UK only requires trustees to ensure that they are adequately acquainted with their duties and responsibilities as trustees. Trustees have the duty to undertake trustee training within six months of their appointment and at least every two years thereafter. Section 59 of the UK Pensions Act 2004 states in general terms the broad duties of trustees of schemes. In the UK, the 2004 Pensions Act obligates trustees to have the required knowledge and understanding of applicable laws (including trust law), scheme rules, funding and investment matters.[374] However, it does not evaluate these requirements through a licensing regime for trustees as is the case in Australia.[375] The Pension Authority is currently considering proposals relating to minimum standards of knowledge, training and experience that would be prescribed for trustees which would be significantly more challenging than the existing training prerequisite.[376]

Accordingly, licensing of trustees is one way to ensure that a board of trustees only has the most qualified for the job. This coupled with constant training and monitoring of trustees' actions by RBA would ensure that trustees in Kenya will act in the members' best interest.

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[372] Ibid 17.

[373] Ibid 25.

[374] Stewart, F. and J. Yermo, 'Pension Fund Governance: Challenges and Potential Solutions' (2008) OECD Working Papers on Insurance and Private Pensions, No. 18, OECD publishing, 20 <http://www.oecd.org/finance/private-pensions/41013956.pdf> accessed 30 December 2014.

[375] Ibid 20.

[376] Pension Authority, 'Synopsis of Responses to the Pensions Authority Consultation on Trustee Qualifications' <http://www.pensionsauthority.ie/en/News_Press/News_Press_Archive/Synopsis_of_responses_to_trustee_qualifications_consultation1.pdf> accessed 7 May 2016.

4.5. Best Practices in Investment of Scheme Funds

A wealth of empirical research recommends that the largest sole portion of the disparity in investment returns over time is explained by the portfolio's basic asset allocation.[377] As at 2012, Switzerland had one of the world's largest occupational pension systems.[378] A study was carried out in Switzerland examining the connection between governance structure, investment performance and asset allocation decisions of OPS. Based on survey responses of 139 pension funds, the empirical evidence showed that pension fund governance is positively related to investment performance, but only marginally to the funds' asset class choices.[379] Modem portfolio theory shows that the risk that characterizes any given asset may be reduced by grouping that asset with another asset that is not exposed to the same sort of risk.[380] From a purely economic point of view, OPS should diversify their portfolio to include various investment options.[381] In Nigeria, the pension reforms of 2014 and the recently proposed regulations on investment of pension fund assets are focused at expanding the pension market, mainly by increasing the list of allowable investment instruments open to pension fund operators.[382] Kenya needs to look at expanding the OPS investment vehicles as well as the set limits.

[377] Nicholas Greifer, 'Pension Investing: Fundamentals and Best Practices' (2002) the Government Finance Officers Association of the United States and Canada' (2002), 15<http://www.gfoa.org/sites/default/files/PensionInvesting_FundamentalsAndBestPractices.pdf> accessed 7 May 2016.
<http://www.gfoa.org/sites/default/files/PensionInvesting_FundamentalsAndBestPractices.pdf> accessed 7 May 2016.

[378] As measured in total pension assets as percentage of gross domestic product in 2012. (See Manuel Ammann and Christian Ehmann, 'Is Governance Related to Investment Performance and Asset Allocation? Empirical Evidence from Swiss Pension Funds' (2014), 4<http://www.asip.ch/assets/Corporate-Governance/Pension-Fund-Governance-Paper-2014-03-31.pdf> accessed 7 May 2016.

[379] Manuel Ammann and Christian Ehmann, 'Is Governance Related to Investment Performance and Asset Allocation? Empirical Evidence from Swiss Pension Funds' (2014), 40 <http://www.asip.ch/assets/Corporate-Governance/Pension-Fund-Governance-Paper-2014-03-31.pdf> accessed 7 May 2016.

[380] Benjamin A. Templin, 'Full Funding: The Future of Social Security' (2006) 22 J.L. & Pol. 395, 425.

[381] Ibid 425.

[382] Banwo & Ighodalo, 'Investing Pension Fund Assets Securely and Profitably' 1 <http://www.banwo-ighodalo.com/assets/grey-matter/0fde3b55e92ec330b7af42c21983f2fb.pdf> accessed 7 May 2016.

4.6. Conclusion

Other jurisdictions are making efforts to ensure that retirement benefits are completely safeguarded against loss. Canada has a hybrid arrangement that offers priority for unremitted contributions where an employer has become insolvent before paying the pension dues. Further, Canada has a guarantee fund in place to pay some portion of employee pension claims on employer insolvency. Australia, UK and Nigeria are also taking measures to cub the loss of pension benefits during an employer's insolvency. Kenya should aim at having very stringent supervisory and intervention powers from RBA in order to eliminate the risk of unremitted contributions amongst others. In addition, Kenya has to work towards ensuring that members' benefits are secured by enacting laws that will assist beneficiaries to fully recover their benefits, in case an employer becomes insolvent before paying the pension dues. Where such loss does occur, hopefully a protection fund will soon be in place in order to be used for eliminating the risk of hardship and suffering which we have seen some of our fellow Kenyans undergo during the loss of their retirement benefits. The process of nominating scheme trustees should be that which enables nomination of competent professionals of integrity. Australia has put in place good processes that Kenya can adopt. Kenya can also look into diversifying the investment portfolio provided as well as expanding the set limits.

CHAPTER FIVE

A SUMMARY OF THE STUDY, RECOMMENDATIONS AND CONCLUSION

5.0. A Summary of the Study

Pensions have a big impact on the financial well-being of a retiring person, and a 'wrong' decision cannot be undone at a later age as people may be left without money after retirement.[383] The point at which people understand they have made a mistake in an investment decision may be too late to fill the gap or may be possible only at very high cost.[384] Financial insecurity is one of the main factors that lead to financial uncertainty in retirement, which is witnessed in Kenya today.[385]

The RBA (1997) has been amended severally since its enactment which has improved the protection of member's benefits. We are however seeing a few loopholes that need to be sealed in order for benefits held in OPS to be completely protected. This study has shown that non-remittance of monthly contributions by employers, misappropriation of scheme assets by the trustees, loss of scheme funds through negligence of trustees and poor investment of the scheme assets, continue to be problems that need to be watched in order to avoid loss of members' benefits under occupational schemes.

This study has shown that an employer in financial difficulty may delay remitting required contributions to the OPS. If the employer becomes insolvent, those unremitted contributions will have to be collected through the insolvency proceeding. The risk is that the retirement

[383] Prof. Pius TangaTangwe, 'The Impact of the Old Age Grant on Rural Households in Nkonkobe Municipality in the Eastern Cape Province of South Africa'(2013) 4(13), 629 <http://mcser.org/journal/index.php/mjss/article/viewFile/1554/1566> accessed 8 January 2015.
[384] Ibid 629.
[385]Kenya National Commission on Human Rights, 'Growing Old in Kenya: Making it a PositiveExperience' (2009), 36 <http://www.knchr.org/Portals/0/StateOfHumanRightsReports/2nd%20SHRR%20 %20Growing%20Old.pdf> accessed 2 March 2015.

benefits may never be recovered in full or not recovered at all. Further, the process of recovering these funds in the event of loss is often tedious, long and sometimes futile. This loss therefore translates directly to members' well-being. Thus affecting them financially, as well as psychologically especially after retirement whereby they do not have another source of income.

In order for RBA to effectively implement its mandate, it should be free from interferences in pursuing its objective and meeting its responsibility. RBA needs to strengthen its compliance and enforcement function in order to ensure that it appropriately deals with emerging present and future regulatory challenges. The appointment of the RBA Board needs to be reviewed in order to provide for a proper and fit test from all members of the Board. Further, fulfillment of the pension promise under DB pension schemes is premised on the employer's continued existence.[386] This is throughout the scheme member's employment and the financial capacity to pay the promised benefits at the time they are due.[387] The employer insolvency can destroy those promises because the employer may not survive and its assets may be distributed amongst its co-creditors leaving nothing for the pensioners. RBA (1997) and it Regulations provides for protection against this risk by requiring tri-annual actuarial valuations of the solvency of the pension fund. Accordingly, if those assessments indicate that liabilities exceed assets, the employer is required to make special payments. The payments to the fund should be over the next three to six years depending on the circumstances in order to extinguish the

[386] Dr. Janis P. Sarra & Dr. Ronald B. Davis, 'Analysis of Factors Leading to Insolvency and Restructuring and their Effects on Pension Plan Wind-Ups and Closures' (2007), 2 <http://s3.amazonaws.com/zanran_storage/www.blakes.com/ContentPages/52448509.pdf>accessed 7 February 2015.
[387] Ibid 2.

shortfall. However, this timeframe for curing the deficiency can expose the scheme members to a shortfall risk in the event of the employer's insolvency.

Further, RBA (1997) has addressed some of these risks by requiring pre-funding of the promised benefits. This is by insulating the pension scheme's funds from the claims of the employer's creditors in the case of the employer's insolvency by requiring all schemes to be established as irrevocable trusts managed separately from the employer's assets by trustees. These legislative and regulatory requirements have substantially mitigated the insolvency risk for scheme members. However, there is still some risk of underfunding at the time of employer's insolvency. Although RBA (1997) attempts to provide some protection by deeming contributions to be held in trust, the statutory deemed trust has not proved effective in separating the amount of contributions owed from the other assets of the employer in insolvency proceedings. These unremitted contributions are therefore treated as unsecured claims in the distribution of the employer's assets amongst its creditors. The result being that the OPS may recover only a small fraction of the contributions owing. Proposed legislative reform would address this insolvency risk with respect to unremitted contributions.

The Trustees of the pension scheme are responsible for running the scheme. They have an overriding responsibility to act in the best interests of all the members of the pension scheme and to protect the security of accrued benefits. From this study it has been established that trustees need stringent appointment requirements and frequent training on the running of the scheme. Further, ways of protecting the scheme must be established for every OPS to avoid trustees misappropriating scheme funds as well as losing funds through other means. Asset misappropriation of scheme funds most often involves theft of cash, although this is not always the case. Misappropriations can potentially threaten the economic well-being of members after retirement. This is because fraud reduces the OPS assets.

The performance of pension schemes in Kenya, with regard to return on investment, is not sustainable. This is as a result of low levels of growth experienced against a backdrop of high overall inflation.[388] The other factors include "after-effects of the global financial and economic crisis, the inadequate legal and regulatory environment and the incapacity challenges of the industry regulator to monitor and enforce governance, and investment guidelines for pension schemes and fund managers".[389] The current Regulations on investments are rigid because they include quantitative asset restrictions on investment vehicles. These Regulations were effective in the short run, but have proved ineffective in the long-term.

All in all, the investment risk is borne by the members and not the employer.[390] However, without proper mechanisms in place, the members may continue to suffer losses until the law provides better mechanisms to protect them. Accordingly, RBA should be granted adequate power to enforce the suggested mechanism. Based on this study, several recommendations emanate as a way of improving the OPS' governance and thus protecting members' retirement benefits as below.

[388] Lucy Jepchoge Rono, Julius Kibet Bitok, and Gordon N. Asamoah, ' Impact Of Retirement Benefit Act (RBA) on Investment Returns to Pension Funds in Kenya' (2010), 51 <clute.online.com> accessed 2 November 2013.
[389] Ibid 51.
[390] Amos Gitau Njuguna, 'Determinants of Pension Governance: a Survey of Pension Plans in Kenya' (2011), 103 <URL: http://dx.doi.org/10.5539/ijbm.v6n11p101> accessed 2 November 2013.

5.1. Recommendations

The recommendations proposed below may not present the perfect situation but will go a long way in the securing the pension promises if adapted. Ensuring that the OPS are completely secure is a process that will take time and resources in Kenya. It is possible for the Kenyan government to implement these recommendations. However, they would require changes of the RBA (1997), its Regulations, related laws and thereafter the enforcement by RBA. As shown in chapter four, other countries have adapted these changes, leading to better protection of the scheme members' benefits.

5.1.1. Unremitted Contributions

While unfunded liabilities and unremitted contributions owed to OPS during insolvency of the employer do not currently qualify for a preference, amendments in the legislation would enhance the position of such claims. This would be done by securing pension contribution arrears with a charge over the assets of the employer in both insolvencies and receiverships. This would therefore grant priority rights to pension claims by both scheme members and scheme beneficiaries in case of employer insolvency like in Canada. The amendments would also enhance the position of such claims in an insolvency restructuring proceeding. The reasoning behind creditor priorities is to protect vulnerable employees, unable to guard themselves against employer insolvencies.

There is also need to criminalize the non-payment of contributions so as to expose employers to prosecution by the state. The study recommends the enhanced monitoring and enforcement in relation to underfunded pension schemes during the years that employers are financially healthy. This may assist in ensuring that costs of underfunding are not inappropriately or unnecessarily transferred to scheme members and the scheme as a whole at the point of insolvency.

RBA (1997) should be amended to provide a specific actuarial assumption that the actuaries are to apply during actuarial valuations. This is in order to avoid any incidences that employers and trustees together with the contracted actuary can agree to use assumptions which could create a surplus in the scheme with a view of enabling the employer enjoy a contribution holiday. A separate set of actuarial assumptions specifically set for the OPS would be important because it would include the different forms and methods of retirement provisions, the extent of their development and the extent to which taxation and RBA place restrictions on the method and/or basis to be used when making actuarial calculations.[391]

5.1.2. Trustees Remuneration

The RBA needs to come up with guidelines on trustees' remuneration specifically giving limitation to the number of trustees' meetings that allowance to trustees can be paid. A limit can also be provided on the amount to avoid misuse of scheme funds in this regard. The limits set should be determined after a market research.

5.1.3. Trustees

It's essential that trustees understand their scheme rules and all relevant legal requirements to ensure that the scheme is administered and managed in accordance with these rules. The

[391] David Collinson MA FIA (ed), Actuarial Methods and Assumptions used in the Valuation of Retirement Benefits in the EU and other European countries, (2001) 38 http://actuary.eu/documents/actuarial_methods.pdf accessed 18 March 2016.

Trustees should be subjected to a rigorous selection process in order to ensure a high level of integrity and professionalism in the administration of OPS. Besides, they need to undertake an assessment of the skills and knowledge of trustees individually and collectively covering analytical and decision making skills as well as technical knowledge in pension matters. Training of trustees in Kenya through the TDPK is a good start. However, RBA should ensure that the trustees undertake the training immediately upon appointment. Therefore, Kenya can adopt some methods embraced by other countries. For instance, the UK authority does a great deal of communication work with the pensions industry, including, providing an online training programme for trustees.[392] In Australia, it is mandatory for trustees to be licensed. However, before licensing, they are required to meet certain conditions such as meeting the minimum standards of competency and to have adequate resources, fraud control plans, and proper systems for managing risks and outsourcing.[393] Training of trustees will not only make them manage the OPS better but also recognize in advance and thus prevent fraud.

RBA has to also ensure that the trustees disclose properly any transactions which may give rise to conflicts of interest and that they have put in place proper internal control mechanisms.

5.1.4. OPS Funds' Investments

It is also necessary for RBA to review the investment guidelines provided in the law with a view of enhancing the limits to enable schemes diversify their investments. There is need for a portfolio that will give higher returns. On this note, RBA needs to regularly study the market and adjust the set limits to reflect the prevailing market conditions. Further, RBA needs to

[392] <http://www1.previdencia.gov.br/docs/pdf/IOPS-Pension-Supervision-in-Focus.pdf> accessed 26 May 2015.
[393] Ibid.

implement measures to ensure pension funds are insulated from inflationary and other risks. An effective way is to institute a pension risk insurance fund or guarantee fund that will underwrite and compensate such losses as will be prescribed. The investment policy of fund managers should ensure that the retirement benefits are ahead of inflation.

5.1.5. The Retirement Benefits Authority

In order for RBA to effectively implement its mandate, it should be free from interferences in pursuing its objective and meeting its responsibility. RBA needs to strengthen its compliance and enforcement function in order to ensure that it appropriately deals with emerging present and future regulatory challenges. The appointment of the RBA Board needs to be reviewed in order to provide for a proper and fit test from all members of the Board. In order to deter fraud of scheme funds; RBA can provide trustees' education, actively supervise the schemes and conduct research on the current trends of fraud and the means to prevent such fraud.

5.1.6. Setting up of a Guarantee Fund

The study recommends establishing a retirement benefits protection fund under the RBA (1997) in order to enhance protection of members' retirement benefits. This fund would cater for any losses emanating from misappropriation of scheme funds, scheme investment losses, unremitted contributions and underfunding of scheme where in both cases the employer becomes insolvent.

5.2. Conclusion

This Chapter concludes this study by presenting the summary of the study and the recommendations. What is obvious from the study is that the RBA (1997) and its Regulations do not guarantee full protection of the scheme members' retirement benefits. This is so because the retirement benefits laws have loopholes which are been exploited. Guaranteeing full protection of scheme assets would require the Kenyan government to address the weaknesses in the retirement benefits laws and related laws. It can be concluded that Kenya needs to pay attention to the RB sector as the effects directly translate to the citizens' well-being, reduction of poverty during retirement as well as the growth of the country's economy.

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