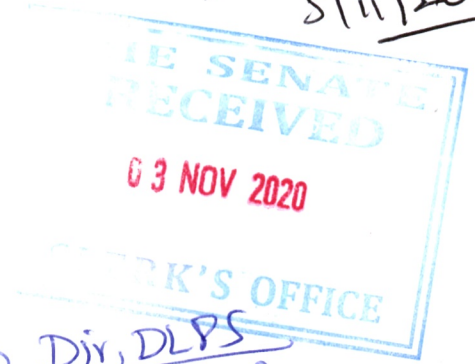
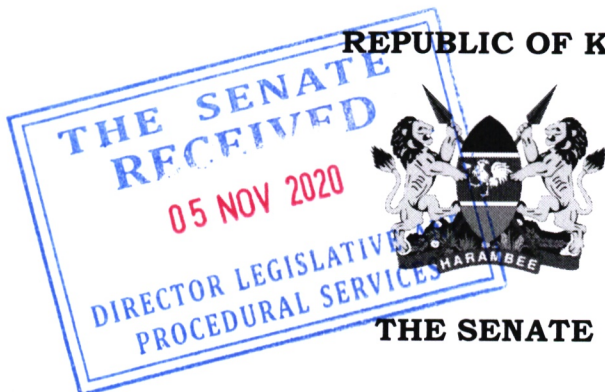


④ Mr. Mogeke (CDD LRS)
pls facilitate presentation
swz
5/11/20



③ Dir, DLPS
Please deal
05/11/2020

INTERNAL MEMO

To: Speaker of the Senate

Through': Clerk of the Senate

Through': Deputy Clerk

Through: Director, Committee Services—forwarded & recommended,

From: Clerk Assistant

Date: 28th October, 2020

② Rt. Hon. Speaker
You may approve for tabling.
05/11/20
① forwarded for approval.
3/11

29/10/2020
Approved
5/11/2020

RE: APPROVAL FOR TABLING OF THE REPORT ON THE PETITION BY PENSIONERS UNDER THE KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME ON THE LOOMING COLLAPSE OF THE SCHEME DUE TO MISMANAGEMENT AND PSYCHOLOGICAL TORTURE ARISING FROM NON-PAYMENT OF BENEFITS

The Standing Committee on Labour and Social Welfare has concluded its consideration on the Petition by Pensioners under the Kenya Railways Staff Retirement Benefits Scheme on the looming collapse of the Scheme due to mismanagement and psychological torture arising from non- payment of benefits

This is to request your approval for tabling of the attached report.

Thank you.

Anaban

Mwanate Shaban





REPUBLIC OF KENYA



THE SENATE

TWELFTH PARLIAMENT – FOURTH SESSION

STANDING COMMITTEE ON LABOUR AND SOCIAL WELFARE

**REPORT ON THE PETITION BY PENSIONERS UNDER THE KENYA
RAILWAYS STAFF RETIREMENT BENEFITS SCHEME ON THE
LOOMING COLLAPSE OF THE SCHEME DUE TO MISMANAGEMENT
AND PSYCHOLOGICAL TORTURE ARISING FROM NON PAYMENT OF
BENEFITS**

PAPERS LAID	
DATE	10.11.2020
TABLED BY	Clerk, Labour
COMMITTEE	Labour C/tee
CLERK AT THE TABLE	J. Mbaya

Clerk's Chambers,
The Senate,
Parliament Buildings,
NAIROBI

October, 2020

The Clerk
forwarded for approval
3/11/20
Approved
3/11/2020

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ABBREVIATIONS AND ACRONYMS

CAS	- Chief Administrative Secretary
CEO	- Chief Executive Officer
DCI	- Director of Public Prosecution
EACC	- Ethics and Anti-Corruption Commission
GDP	- Gross Domestic Product
GoK	- Government of Kenya
KCB	- Kenya Commercial Bank
KeNHA	- Kenya National Highways Authority
KRC	- Kenya Railways Corporation
KRSRBS	- Kenya Railways Staff Retirement Benefit Scheme
KURA	- Kenya Urban Roads Authority
MD	- Managing Director
NLC	- National Land Commission
RBA	- Retirement Benefit Authority
RVR	- Rift Valley Railways
TDR	- Trust Deed & Rules
UK	- United Kingdom
USA	- United States of America

PREFACE

Mr. Speaker, Sir

The Standing Committee on Labour and Social Welfare was constituted in December, 2017 during the first session of the twelfth (12th) Parliament pursuant to the provisions of Senate Standing Order 187. The Committee is mandated to consider all matters related to: *manpower and human resources planning, pension, gender, culture and social welfare, youth, National Youth Service, children's welfare; national heritage, betting, lotteries and sports, public entertainment, public amenities and recreation.*

In executing its mandate, the Committee oversees the Ministry of Labour and Social Protection; the Ministry of Public Service, Youth and Gender Affairs; and the Ministry of Sports Culture and the Arts. The membership of the Committee includes:

- | | |
|---|-------------------|
| 1) Sen. Sakaja Johnson Arthur, CBS, MP | -Chairperson |
| 2) Sen. Mwaruma Johnes, MP | -Vice Chairperson |
| 3) Sen. Madzayo Stewart Mwachiru, MP | -Member |
| 4) Sen. Mwangi Paul Githiomi, MP | -Member |
| 5) Sen. Kihika Susan Wakarura, MP | -Member |
| 6) Sen. Makori Beatrice Kwamboka, MP | -Member |
| 7) Sen. (Dr.) Mwaura Isaac, CBS, MP | -Member |
| 8) Sen. (Dr.) Milgo Alice Chepkorir, MP | -Member |
| 9) Sen. Masitsa Naomi Shiyonga, MP | -Member |

The petition by seven petitioners (Mr. Washika, Mr. Jakaiti, Mr. Boinnet, Mr. Simiyu, Mr. Luka, Mr. Maina and Mr. Ochieng) on behalf of the Kenya Railways Staff Retirement Benefits Schemes pensioners on the looming collapse of the Scheme was presented to the Senate on the 21st July 2020 by Sen. (Dr.) Mbitto, MP and subsequently referred to the Standing Committee on Labour and Social Welfare on the same date.

At its sitting held on Thursday, 6th August 2020, the Committee considered the petition and upon meeting the petitioners held follow up and consultative meetings with the following stakeholders:

- (a) The Ministry of Transport Infrastructure Housing Urban Development and Public Works which was also the caretaker Ministry overseeing Kenya Railways Corporation, the sponsor of the scheme plan;
- (b) Board of Trustees of the Kenya Railways Retirement Benefits Scheme to respond to the issues raised by the petitioners;
- (c) The National Treasury, the caretaker Ministry of the Retirement Benefits Authority and where all pension matters are regulated and supervised;
- (d) Retirement Benefits Authority to share insights on the status of the retirement benefits schemes in Kenya; their compliance with the Retirement Benefit Scheme (RBA) Act 2007; actuarial evaluation of the KRSRBS; and the extent with which the Scheme is in compliant with the RBA Act 2007.

The Committee held seven (7) sittings and made the following observations and recommendations as per the petitioner's prayers:

(i) Compels the RBA to implement the item number 67 of the high court ruling in 2012;

Item 67 of the high court ruling in 2012 was as follows (*"It is apparent, however that there are concerns regarding the management of the KRSRBS, and from pleadings before me, such disagreements within the Scheme are apt to have negative impact on the lives and livelihoods of hundreds of pensioners. It is therefore incumbent on the RBA, in exercise of its statutory mandate, to address the concerns of the petitioners in the spirit of the constitution and the wider interests of the pensioners"*)

The Committee observed that RBA has been facilitating continuous consultative engagement meetings with all stakeholders of the scheme to ensure information flow and full compliance by the scheme and has committed to continue the facilitation with the next meeting scheduled for 31st October 2020;

The Committee Recommends that RBA continues with the facilitation and reports to the Committee on a monthly basis on the progress in line with section 5 of the Retirement Benefits Act which provides for the object and functions of the Authority to include—

- (a) regulate and supervise the establishment and management of retirement benefits schemes;
- (b) protect the interests of members and sponsors of retirement benefits sector;
- (c) approve trustees' remuneration approved by members during the annual general meeting after every three years; and
- (d) promote the development of the retirement benefits sector

(ii) Intervenes and helps the vulnerable petitioners who have not received their pensions for the last 12 months and are now experiencing both financial and psychological torture especially during this pandemic;

The Committee has held various meetings with the stakeholders and up to the date of writing this report, the petitioners, through the Committee's efforts have been paid five out of twelve months' arrears.

It is the duty of the Committee to ensure that –

- i) All pension arrears are paid;
- ii) The Sponsor implements the pension increments as per the Government's directives and pays all the arrears due on this; and
- iii) The Pensioners start receiving timely monthly payments.

The Committee has committed to hold bi-monthly meetings with the relevant stakeholders to monitor the progress of implementation towards making the scheme successful and sustainable.

(iii) Make any other recommendations that it may deem necessary on this matter.

The Committee observes that there are various fiduciary gaps that almost led to the near collapse of the Scheme and resolves –

1. That the Retirement Benefits Authority (RBA) instigates a special forensic audit on the Scheme operations, since its inception with particular reference to -
 - i) The World Bank grant funds that were given to the Scheme to kick-start its operations;
 - ii) The Rent moneys that the Scheme has been receiving and its usage; since its inception;
 - iii) The debts owed by the Scheme, including debts by Kenya Railways Corporation; and
 - iv) The status of the land that Rahimtullah towers sits in regards to the assets owed by the Scheme.

The RBA should report to the Committee within 2 months.

2. That the Sponsors – KRC should publish their annual reports
3. That the RBA ensures that all public retirement pension schemes in the country adhere to the registration requirements under the Retirement Benefits Act.
4. That the National Treasury as the body in charge of Pensions to ensure that Kenya Railways Corporation fulfils its obligations as the Sponsor of the Scheme.

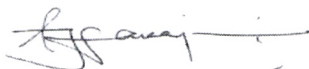
ACKNOWLEDGEMENT

Mr. Speaker Sir,

The Committee wishes to acknowledge the time and considerable effort made by all parties who volunteered information before it. I also wish to express my gratitude to my colleagues for their thoughtful input and engaged contributions to the matter. Further, the Committee is indebted to the Office of the Speaker and the Clerk of the Senate for facilitating all the actions that led to the production of this report. The Committee also wishes to recognize the commitment and dedication of the staff of the committee that made the work of the Committee and the production of this report possible.

Mr. Speaker Sir,

It is now my pleasant duty, pursuant to Standing Order 232 to table the report of the Standing Committees of Labour and Social Welfare on the petition by seven petitioners (*Mr. Washika, Mr. Jakaiti, Mr. Boinnet, Mr. Simiyu, Mr. Luka, Mr. Maina and Mr. Ochieng*) on behalf of the Kenya Railways Staff Retirement Benefits Schemes pensioners on the looming collapse of the Scheme and non-payment of monthly benefits to pensioners.



SIGNATURE.....

**(CHAIRPERSON: SEN. JOHNSON SAKAJA)
STANDING COMMITTEE ON LABOUR AND SOCIAL WELFARE**

DATE: Wednesday, 14th October, 2020

CHAPTER ONE: BACKGROUND

1.1 The Scheme¹ and Underlying Issues

The Kenya Railways Staff Retirement Benefit Scheme, KRSRBS (“Scheme”) was established in July 2006. Prior to this, the Kenya Railways Corporation (“the KRC”) operated an unfunded pension plan governed under regulations made under the Kenya Railways Corporation Act. This was followed by concessions to transfer property assets previously held by KRC to form a portfolio of property based assets for purposes of funding the new scheme. Since its inception, the scheme has operated as a closed scheme, with no active contributing members. As at 31st January 2015 the scheme had a combined membership of 10,097 pensioners comprising of 8,767 main pensioners, 1,330 dependents and deferred members. The deferred members are employed by KRC and Rift Valley Railways (RVR) who upon retirement from the service receive a one off lump sum benefit from the scheme and subsequently admitted into a monthly pension payroll of the scheme. The scheme also provides relief to the dependents of the deceased pensioners for a period of five years.

The petitioner’s prayers were not long coming as KRSRBS has been trending in several media outlets with claims, counter claims and allegations. For example:

- (a) 10th Oct 2018, ‘Court locks up KR’s Ksh 20 billion pension wealth where 5 of the 20 properties had injunctions (2 are encroached by third parties and 3 have no titles)’;²
- (b) 3rd September 2019, allegations of ‘conflict of interest between top level managers and the appointed managers, placing the scheme under threat’;³
- (c) 18th August 2019, ‘Railways pension Trustees wanted DCI to probe Ksh 21million payment by former pension administrators just before the end of their term’;⁴ and
- (d) 29th April 2020, KRC with ‘expanding ranks of retirees faced with deteriorating healthcare and inadequate savings were planning to sell key properties, 5 key land parcels were placed on sale through a gazette notice in April: Upper Hill area, Hurlingham Estate, Ngara Estate, Along Ngong road and in Mombasa’⁵

1.2 The underlying issues in the Petition and the Petitioners’ Prayers

The petition on the looming collapse of the Kenya Railways Staff Retirement Benefit Scheme and the non-payment of pensioners’ monthly benefits was presented to the Senate on the 21st July 2020 by Sen. Dr. Mbiti. It was undersigned by six petitioners (*Mr. Washika, Mr. Jakaiti, Mr. Boinnett, Mr. Simiyu, Mr. Luka, Mr. Maina and Mr. Ochieng*) with the following underlying issues, that:

¹ as provided by the Kenya Railways Staff Benefit Scheme webpage at www.kenrailtrust.co.ke retrieved on 28th July 2020

² businessdailyafrica.com retrieved on 28th July 2020

³ weekllycitizen.co.ke, retrieved on 28th July 2020

⁴ Nation.co.ke, retrieved on 28th July 2020

⁵ www.pd.co.ke, retrieved on 28th July 2020

- (a) the petitioners, representing pensioners whose concern is psychological torture as a result of the eminent collapse of the KRSRBS following mismanagement and illegal practices.
- (b) the KRSRBS was setup through a trust deed signed on 3rd May 2006 to provide pension and other retirement benefits to employees of Kenya Railways Corporation (KRC).
- (c) the trustees were to hold the contributions in trust for the members, paid by the sponsor, KRC and hence members were to be paid in accordance with provisions of the trust deed and rules. The scheme holds 99 percent of its total asset in immovable property (land buildings as per legal notice no. 169 of 2006 transferred to it by the sponsor.
- (d) given that Retirement Benefit Authority (RBA) allows for a maximum investment of 30 percent of scheme funds in immovable property, it was observed that the scheme did not comply with the regulations and it was envisaged that the scheme would have challenges in liquidity and hence the need to ensure it was in compliance with the RBA regulations.
- (e) this necessitated the selection of an expert team (board of trustees) to address the issues, who drafted a strategic plan with timelines to achieve these targets. However, the board of trustees was disbanded by KRC following its disapproval on being enjoined in the 'golf city project', and new trustees were installed who blundered the schemes assets including engaging in corrupt practices and abuse of office.
- (f) following intervention by the RBA, the board of trustees was disbanded, and an inspection team appointed whose findings on the scheme through a report dated 14th Nov 2011 was summarised as *'the scheme was flout with corruption, breach of trust, abuse of office, fraudulent disposal of assets and other malpractices'*.
- (g) KRC appointed corporate trustee rather than have members be represented through the board of trustees with Zamara (formerly Alexander Forbes Financial Services Ltd) providing actuarial services hence further mismanagement of the scheme.
- (h) with the foregoing the members of the scheme have made efforts to ensure the issues are addressed by relevant authorities without satisfaction and none of the issues is pending in any court of law, constitutional court or any other body.

Hence the petitioner's prayers to the Senate, that the Senate:

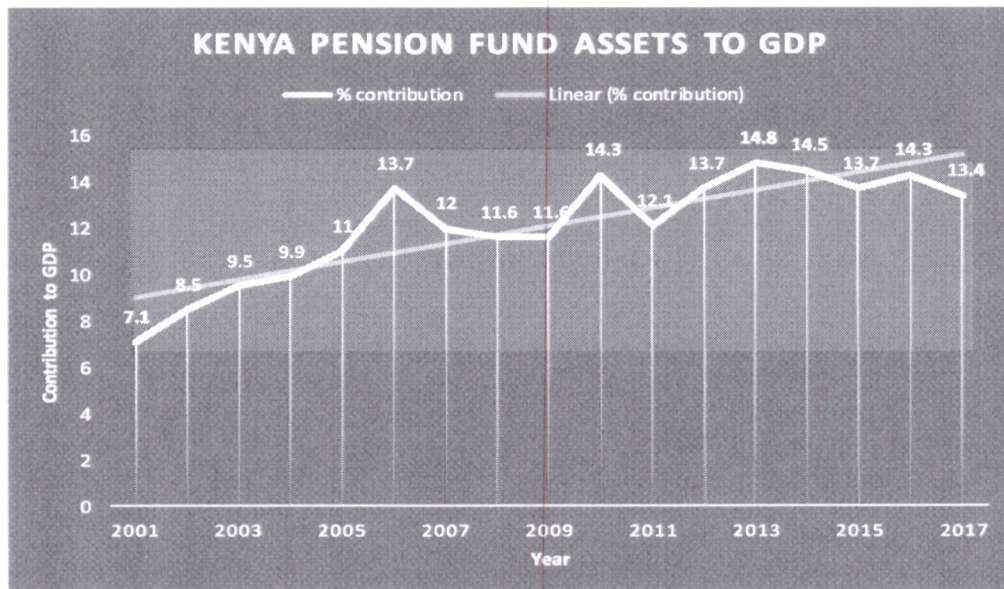
- (iv) Compels the RBA to implement the item number 67 of the high court ruling in 2012;**
- (v) Intervenes and helps the vulnerable petitioners who have not received their pensions for the last 12 months and are now experiencing both financial and psychological torture especially during this pandemic;**
- (vi) Make any other recommendations that it may deem necessary on this matter.**

CHAPTER TWO: INTRODUCTION

2.1 Governance and Retirement Benefit Industry in Kenya

The retirement benefit industry in Kenya has undergone major changes in the last 20 years leading to a current pension coverage of 20 percent of the working population. Much of the growth is attributed to increased regulation that enhanced safeguards on member's contributions⁶. The contribution of retirement benefit assets as a percentage of Gross Domestic Product (GDP) stood at 13.4 percent in 2017 out of the overall contribution of services sector to GDP at 42.33 percent. This is compared to other developed markets like USA at 84.1 percent and UK at 105.3 percent⁷. In terms of assets management, retirement benefit industry grew from Ksh 287.7 billion (2008) to Ksh 1,166.6 billion (2018), a growth of 14.3 percent.

Fig 1: The trend in Kenya pension fund assets to GDP between 2001 and 2017



Source: www.theglobaleconomy.com retrieved on 4th August 2020

2.2 Types of Schemes in the Kenyan Market in Relation to the KRSRBS

The Retirement Benefits Scheme in the Kenyan market are classified in five different types with the main differences being the initiator; the carrier of the scheme; mode payment at retirement; the type of investment and the structure of the retirement scheme. The choice of benefits scheme is determined by several factors among them, the risk profile, the extent of returns, and the nature of employment among others. This section briefly differentiates the five types: - *Individual and Occupational Schemes*: The former is setup by an individual to make contributions on their own behalf towards saving for retirement, they are flexible and accommodate individual needs while an occupational scheme is set up by an employer who

⁶ www.cytonn.com retrieved on 28th July 2020

⁷ Ibid.

makes contributions. While an occupational scheme can be characterised by an employer only contribution, in most recent scenarios, the employee also makes contributions.

Multi-employer Umbrella Retirement Benefits and a Stand Alone Occupational Schemes: The multi-employer umbrella retirement benefit scheme pools the contributions of multiple unrelated employers and their employees to participate in single pension scheme. They are cost effective, as they reduce the average cost per member and enhance the overall returns and benefits to the member owing to their cost efficacy. This means that when an employer joins such a scheme, they are joining a pre-existing scheme that has already been registered and operational as these schemes work as professionally outsourced pension solutions. Currently, there exist at least thirty (30) multi-employer umbrella schemes registered by RBA. They include the following among others, UAP Umbrella Retirement Benefit, The Monarch Umbrella Benefit, ICEA LION Guaranteed Umbrella Fund, and Coop Trust Investment Retirement Benefits. On the other hand, Stand Alone Occupational Schemes are the opposite of multi-employer, registered by single employer and mostly closed to only the employees of a particular organization.

Pension Fund and Schemes and Provident Funds: The fundamental difference between the two schemes is in terms of access of benefits at retirement. Pension fund or schemes means that at retirement, the contributions from both employee and employer plus accrued interest are utilised to purchase a pension annuity from an insurance company or approved insurer. The implication being that at the point of retiring a proportion of the retirement fund is commuted as lump sum (equal to no more than one quarter of the retirement benefits in a scheme where members do not make any contributions and not more than one third of the retirement benefits in a scheme where members make contributions) and the remainder is paid out as periodical payments. The reverse is true for provident funds where a member receives their contribution and contributions made on their behalf by the employer plus accrued interest as lump sum. As such, a member may purchase annuity or spend it as they deem fit.

Retirement Benefit Scheme can also be classified on the basis of investment plan of the scheme hence *segregated funds and guaranteed funds*. In this case, segregated funds allow members contributions to be invested directly by the trustees via an appointed fund manager with trustees establishing an appropriate investment policy which is implemented by the fund manager. The scheme therefore holds investments and returns fully accrued to the scheme for the benefit of members. Guaranteed funds are however offered by insurance companies where members' contributions are pooled, with insurance company guaranteeing a minimum rate of return (the maximum by law being 4 percent). As such guaranteed funds are comparable to an insurance policy.

Defined Benefit and Defined Contributions Schemes are characterised by the structure of the retirement scheme which is determined at the initial design stage of establishment of the scheme. The former is a type of employer sponsored pension plan where an employer or sponsor promises a specified pension payment in lump sum or a combination thereof on retirement. Unlike defined contributions where the formula for computing the employers and employees' contributions is defined and known in advance and hence the benefits to be paid out is not known; payment for defined benefits scheme is predetermined by a formula based

on employee earnings history, tenure of service and age rather than depending on an individual investment returns.

In most cases in defined benefit scheme plan, the employer is the only contributor with the funding expenses accruing to the employer hence costly to them. As such employees do not have individual accounts as their rights is not an account but a stream of payments. Defined contribution however, members have individual accounts. Exceptions where the employee also contribute to the plan exist even though they are few and far apart. Further, majority of the defined benefits plans are not transferable to another employer and most of the amounts of defined plans are rarely enough to allow one to live a comfortable life on retirement. The other downside of this plan is that the employer or the sponsor is responsible for making most of the decisions including investment and managing the plans thereby assuming all the risks. It is important to note that this type of retirement scheme is common with many government and public bodies.

2.3 Retirement Benefits Schemes and Regulatory Frameworks

Retirement Benefit Schemes in Kenya in general and KRSRBS in particular are regulated by existing laws, subsidiary legislations, policies and guidelines and specific rules. They include the following specific and relevant provisions -

- (a) The Constitution; Article 43 (1) (e) of the Constitution on economic and social rights states that every person has the right to social security;
- (b) The Retirement Benefit Act, No. 3 of 1997 (revised 2017, 2013);
- (c) Retirement Benefits Regulations; The Retirement Benefit Act, No. 3 of 1997 (subsidiary legislations (regulations): Retirement Benefits (Individual Retirement Benefits Schemes, 1997; Retirement Benefits (Occupational Retirement Benefits Schemes, 2000; Retirement Benefits (Minimum Funding Levels and Winding up of Schemes, 2000; Retirement Benefits (Tribunal Rules, 2000); Retirement Benefits (Transitional Regulations, 2000); Retirement Benefits (Managers and Custodians, 2000); Retirement Benefits (Forms and Fees, 2000); Retirement Benefits (Administrators, 2000); Retirement Benefits (Mortgage Loans, 2000) among others;

The following regulations and underpinning themes are specifically relevant to the substance of the petition under investigation -

- (d) The Retirement Benefits (Good Governance Practices in the Management of Retirement Benefits Schemes) Guidelines, 2018, whose objectives are to—
 - (i) *provide a framework to facilitate schemes to establish and maintain minimum standards of best practices in the governance of schemes;*
 - (ii) *enable and equip sponsors, trustees and service providers to better perform their functions; and*
 - (iii) *Provide governance criteria for evaluating the performance of trustees and service providers.*
- (e) The Retirement Benefits (Treating Customers Fairly) Guidelines, 2019 whose objectives include to ensure that, among other things—
 - (i) *customers are treated fairly by the service providers;*
 - (ii) *service providers focus on the customers' needs and offer the best product or service solutions to the customers;*

- (iii) retirement benefits products or services account for customer needs;
 - (iv) customers are provided with clear, accurate and documented information;
 - (v) service providers keep customers appropriately informed before, during and after the adoption of products and services; and
 - (vi) service providers give customers advice that is suitable and responsive to customers' needs;
- (f) Complains and Procedures
- (g) Supervision Frameworks.
- (h) Investment regulations, guidelines and policies. For example, Table 1: shows the Retirement Benefits Authority Investment guidelines on asset classes

Table 1: Retirement Benefits Authority Investment Guidelines on Asset Classes

ASSET CLASSES	RBA MAX. LIMIT %
1 East African Government Securities	90
2 Fixed & Time Deposits	30
3 Commercial Paper, Non listed bonds and other	30
4 debt instruments issued by private companies	20
5 Corporate Bonds, Mortgage Bonds and Loan Stock	70
6 Listed Equities	5
7 Unlisted Equities	10
8 Private Equity and Venture Capital	15
9 Offshore	30
10 Property	30
11 Real Estate Investment Trust	30
12 All exchange-traded derivate contracts	5
13 Cash and Cash Equivalents	5
14 Any other Assets	10

Source: RBA

Retirement Benefits Authority: The Retirement Benefits Act, 1997 is the principal law on the regulation, supervision and promotion of retirement benefits schemes and the development of the retirement benefits sector in Kenya. The Act provides for the establishment, functions and management of the Retirement Benefits Authority under Part II. Section 5 of the Act provides that *the object and functions of the Retirement Benefits Authority are to—*

- (a) regulate and supervise the establishment and management of retirement benefits schemes;
- (b) protect the interests of members and sponsors of retirement benefits sector;
- (c) approve trustees' remuneration approved by members during the annual general meeting after every three years;
- (d) promote the development of the retirement benefits sector; and
- (e) advise the Cabinet Secretary responsible for retirement benefits scheme on the national policy to be followed with regard to retirement benefits schemes and to implement all Government policies relating thereto.

Under Section 5B of the Act *on the powers of the Authority to investigate, where the Authority has reasonable cause to believe, either on its own motion or as a result of a complaint received from any person, that—*

- (a) an offence has been committed under the Retirement Benefits Act; or*
- (b) a manager, custodian, trustee or an administrator may have engaged in embezzlement, fraud, misfeasance or other misconduct in connection with its regulated activity; or*
- (c) the manner in which a manager, custodian, trustee or an administrator has engaged or is engaging in the regulated activity is not in the interest of the person's clients or in the public interest,*
the Authority shall in writing depute a suitably qualified person to conduct investigations into the matter on behalf of the Authority.

As such, the Retirement Benefits Authority is the statutory body responsible for regulation and supervision of the retirement benefits schemes in Kenya. The Authority is also responsible for investigating embezzlement, fraud, misfeasance or other misconduct in connection with retirement benefits schemes.

Registration of Retirement Benefits Schemes, Managers, Custodians and Administrators: Part III of the Retirement Benefits Act provide for the registration of retirement benefits schemes, managers, custodians and administrators. Under sections 22 and 23 of the Act, all retirement benefits schemes, managers, custodians and administrators are required to be registered with the Retirement Benefits Authority. Section 22A of the Act, provides that-

The Authority, in determining whether a person is suitable to act as a trustee, manager, custodian or an administrator under the Act, considers the—

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

Trustees: Under section 26 on the requirements with regard to trustees, *no person shall be a trustee of any scheme fund if such person—*

- (a) has been sentenced to imprisonment by a court of competent jurisdiction for a period of six months or more;*
- (b) is adjudged bankrupt;*

- (c) *was previously involved in the management or administration of a scheme which was deregistered for any failure on the part of the management or the administration thereof;*
- (d) *is disqualified under any other written law, or his holding office as such is deemed by the Authority as being, in any way, detrimental to the scheme;*
- (e) *does not comply with the guidelines or practice notes issued by the Authority.*

Given the foregoing, the Retirement Benefits Authority is responsible for the registration of retirement benefits schemes, managers, custodians and administrators in the country. The Authority is also mandated to ensure that the retirement benefits schemes, managers, custodians, trustees and administrators meet the suitability criteria prescribed by law.

Regulation and Supervision of Retirement Benefits Schemes: Under section 34 of the Act on annual reports and accounts—

- (a) *the trustees of every scheme shall cause to be kept all proper books and records of account of the income, expenditure and assets of the scheme fund;*
- (b) *within a period of three months after the end of each financial year, the trustees shall cause to be prepared in respect of the scheme fund—*
 - (i) *statement of assets and liabilities;*
 - (ii) *a statement of income and expenditure;*
 - (iii) *a statement of the assets and liabilities of the scheme as on the last day of that year; and*
 - (iv) *such other documents as may be prescribed.*
- (c) *the accounts of the scheme fund in respect of each financial year shall be audited by an auditor appointed by the trustees with the approval of the Retirement Benefits Authority Board; and*
- (d) *within three months after the end of each financial year, the trustees shall submit a copy of the audited accounts of the scheme to the Chief Executive Officer of the Retirement Benefits Authority.*

Actuarial evaluations: Under section 35 of the Act on actuarial evaluations, the Retirement Benefits Authority Board may require the trustees of such schemes or categories of schemes as it may specify, to cause the schemes to be evaluated by an actuary appointed by the trustees with the approval of the Board and to present the actuarial report to the Chief Executive Officer at such regular intervals as the Board may specify.

Investment of scheme funds: Section 37 of the Act on the investment of scheme funds provides that—

- (a) *every scheme shall have a prudent investment policy on the investment of the funds of the scheme so as to maintain the capital funds of the scheme and generally to secure market rates of return on such investment;*
- (b) *the investment policy of a scheme shall be implemented subject to any regulations the Minister may, in consultation with the Authority, make for that purpose; and*
- (c) *there shall be submitted to the Chief Executive Officer of the Retirement Benefits Authority, in respect of every scheme, a statement of all investments*

of the scheme fund, in such form, manner and at such intervals as may be prescribed.

Unsafe and unsound practices: Under section 39 of the Act on unsafe and unsound practices—

- (a) where, in the opinion of the Chief Executive Officer of the Retirement Benefits Authority, a trustee, manager, custodian or administrator of a scheme is pursuing an act or course of conduct which the Chief Executive Officer considers to be an unsafe or unsound practice, or in any way detrimental to the scheme, the Chief Executive Officer shall, by notice in writing, direct such trustee, manager, custodian or administrator to refrain from pursuing such act or course of conduct; and*
- (b) a trustee, manager or custodian who acts in contravention of a direction under section 39 commits an offence and shall be liable, on conviction, to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding two years, or to both.*

General obligations of trustees and managers: Under section 40 of the Act, a trustee, manager, custodian or administrator of a scheme shall—

- (a) ensure that the scheme fund is at all times managed in accordance with the Act, any regulations made thereunder, the scheme rules and any directions given by the Chief Executive Officer;*
- (b) take reasonable care to ensure that the management of the scheme is carried out in the best interests of the members and sponsors of the scheme;*
- (c) report to the Chief Executive Officer, as soon as reasonably practicable, any unusual occurrence which in his view could jeopardize the rights of the members or sponsors of the scheme; and*
- (d) report to the Chief Executive Officer, as soon as reasonably practicable, if any contributions into a scheme fund remain due for a period of more than thirty days.*

Inspection of Retirement Benefits Schemes: Part V of the Act provides for inspection of retirement benefits schemes. Under section 41 of the Act, *the Chief Executive Officer of the Retirement Benefits Authority may, at any time and from time to time, and shall, if so directed by the Board, cause an inspection to be made by an inspector authorized by him in writing, of any scheme or of the business of any manager, custodian or administrator registered under this Act, and of its books, accounts and records.*

Inspection reports: Under section 43 of the Act, *an inspector appointed under the Act shall submit a report to the Chief Executive Officer and the report shall draw attention to any breach of the requirements of this Act and any regulations made thereunder, any mismanagement or lack of management skills in the manager and any other matter revealed or discovered in the course of the inspection warranting, in the opinion of the inspector, remedial action or further investigation.*

Appointment of interim administrator: Section 45 of the Act provides that an interim administrator may be appointed to a retirement benefits scheme under the following circumstances—

- (a) if the trustees of a scheme fail to submit to the Chief Executive Officer the annual accounts for over six months after the end of the financial year to which they relate;*
- (b) if the trustees are found to have submitted or provided any accounts, returns, statements, books, records, correspondence, documents or other information relating to the scheme fund which are false or misleading; or*
- (c) if the Chief Executive Officer, whether on inspection or otherwise, becomes aware of any fact or circumstance which, in his opinion, warrants the exercise of the relevant power in the interests of the sponsors and members of the scheme or in the public interest.*

The responsibilities of an interim administrator include—

- (a) tracing, preserving and securing all the assets and property of the scheme;*
- (b) recovering all debts and other sums of money due to and owing to the scheme;*
- (c) evaluating the solvency and the liquidity of the scheme;*
- (d) assessing the scheme's, the manager's, the custodian's and the administrator's compliance with the provisions of this Act and any regulations made thereunder;*
- (e) determining the adequacy of the capital and reserves and the management of the scheme and recommending to the Chief Executive Officer any restructuring or re-organization which he considers necessary and which, subject to the provisions of any other law, may be implemented by him on behalf of the trustees, the manager, the custodian or the administrator; and*
- (f) obtain from any former trustee, manager or administrator of the scheme or any officer, employee or agent thereof, any documents, records, accounts, statements, correspondence or information relating to the scheme.*

CHAPTER THREE: COMMITTEE MEETINGS AND DELIBERATIONS WITH STAKEHOLDERS

This section highlights the Committee meetings as held with the various stakeholders on various dates regarding the issues and prayers raised in the petition. They include:- the Ministry of Transport Infrastructure Housing Urban Development and Public Works alongside the Kenya Railways Corporation, the Sponsor of the scheme plan; Representatives of the Kenya Railways Retirement Benefits Scheme; National Treasury, the caretaker ministry of the Retirement Benefits Authority and where all pension matters are regulated and supervised.

3.1 Meeting with the Petitioners: Mr. Rodgers Washika and Mr. Boinnet

The Committee held a virtual meeting with the Mr. Washika on behalf of other petitioners and KRSRBS pensioners on the **6th August 2020 at 3.00pm**. The following are key highlights of the presentation. That -

- (a) KRSRBS was established in 2006 to provide for the pension benefits of over 12,000 retired and retrenched employees of the conceded Kenya Railways following creation of the Rift Valley Railways Consortium (RVR). In so doing, the scheme was established under the provisions of the Retirement Benefits Scheme Act, 1997 to manage the assets transferred by Government of Kenya (Kenya Railways) under an irrevocable trust pursuant to Legal Notice No. 169 of 7th November 2006 with a value of Ksh 12.4 billion;
- (b) While the trust deed and rules (TDR) is the instrument which legitimizes the operation of KRSRBS as currently constituted, its intentions were that the entity be operated as a defined contributory benefits scheme where the employees of the new KRC, RVR & Railway Training School including any associate member were to contribute monthly at a rate of 23% of the monthly salary, as was provided under provisions of section D of the Concession Agreement;
- (c) However, the foregoing arrangement failed to materialize and KRSRBS became a closed scheme by default with the KRC, the sponsor failing to make contributions to the scheme. According to the petitioners, as a result of the foregoing, KRC lacks the 'locus standi' to interfere with the affairs of KRSRBS in line with provisions of section 8, 30 and 31 of the TDR. The petitioners further allege that despite the status of the scheme, empirical evidence presented in the Ernest and Young forensic investigation report indicate that the sponsor, KRC has continued to irregularly admit members (staff and their dependants), to the pension payroll, thereby inflating the pension payroll;
- (d) As regards governance, the sponsor, KRC has appointed employees of KRC to the KRSRBS board of trustees. This depicts an extension of KRC, a situation that has resulted in incidences of conflict of interest, lack of professional independence including fraudulent financial statements. The present KRSRBS board of trustees comprises of the following KRC officials -

Table 2: KRSRBS Board of Trustees Vis a Vis positions at KRC

No.	Name	Position at KRC	Position at KRSRBS
1.	Ms. Hellen Karu	Director, KRC Board	Trustee Board Member and Chairlady
2.	Mr. Kimanthi Maingi	Director, KRC Board	Trustee Board Member
3.	Mr. Philip Mainga	MD, KRC	Trustee Board Member
4.	Mr. Asava Kadima	General Manager (HR), KRC	Trustee, Board Member
5.	Ms. Jacqueline Bogha	General Manager (F), KRC	Trustee Board Member
6.	Mr. Amoke	Estates Officer, KRC	Trustee Board Member
7.	Ms. Victoria Mulwa	Legal Officer, KRC	Acting Chief Executive Officer

Source: Petitioners submission on the 6th August 2020

- (e) The foregoing contravenes section 6 & 7 of the State Corporations Act; provisions of the Public Ethics Act; the diversity requirement under the Public Service Values & Principles, Act, 2015 and Article 232 of the Kenya Constitution, which demands parity in the fair treatment of on employment matter within the public service. The petitioners also claim that following the establishment of KRSRBS under the transitional and supersession clauses in line with sections 57 and 58 of the RBA Act, the KRC pensions department was given 3 years' window period to wind up its affairs which, ideally, expired in 2009;
- (f) The petitioners further questioned the actions of the Chief Executive Officer, RBA, Mr. Nzomo Mutuku and whether clearance was sought before giving the deed of appointments as required from him under the Retirement Benefits Act, 2007;
- (g) The petitioners also mistrust the intended contributions of KRC towards the financial sustainability of the scheme given the aforementioned arrangement. The reasons for further misgivings being that the employees of KRC, RVR & Railway Training Institute (RTI) are also members of an alternative provident fund but continue to run the affairs of the scheme in total exclusion of the bona fide members. According to the petitioners, the arrangement is not beneficial to the KRSRBS as the same officials represent a different opaque entity named Kenrail Trust where the former CEO of the KRSRBS was appointed the CEO following his resignation from KRSRBS;
- (h) The legal effect calls for a new dispensation at KRSRBS that entails the appointment of an interim committee incorporating the members of the scheme to undertake the holistic review of the KRSRBS systems and processes and subsequently present its findings and recommendations to an AGM. The petitioners argue that this will be in line with the enabling provisions, rule 28 of the TDR and section 45 (2) (c) of the RBA Act. The interim committee officials shall in conjunction with interim administrator expected to undertake the satisfactory exercise of the critical activities outlined at section 45(5) (a to f) of the Act within the prescribed 12 months' period, as specified at section 45 (3) of the Act and as warranted by the sequence of events at the Scheme;
- (i) In terms of KRSRBS assets portfolio, the provisions of Section 21 of the TDR seeks to protect the KRSRBS assets against financial loss and the nominated trustees are

therefore duty bound to ensure that the assets are well managed and disposed, to the benefit of the members. The petitioners argue that Section 21 of the TDR states *'The trustees may take such steps as they deem appropriate to protect the scheme and the individual assets comprising the same against any manner of insurance risk or financial loss which may arise out of the negligence or default of the schemes trustees, officers, administrators, manager or custodian or other professional advisors either by way of guarantee provided by the sponsor or by way of such insurance an in such a amount the trustee shall determine'*;

- (j) KRSRBS, having received 100 percent immovable assets at its inception, was cash strapped. To forestall the liquidity setbacks and enable the settlement of the accrued pension liabilities for the retired and retrenched staff and further commence the renovation of existing housing assets to facilitate market rental, the World Bank supported KRSRBS to a tune of US\$12.60 million i.e. KES 1.26 billion at then exchange rate of Ksh 104 per US dollar. However, despite the foregoing, KRSRBS has remained financially unstable;
- (k) The foregoing situation has been exacerbated by the inability to access certain assets to date despite being listed as transferred to KRSRBS. They include the following -
 - i. Part of LR No. 209/6525 comprising of 8.69 acres, only 2.5 acres was available to KRSRBS with the balance of 6.19 acres being held by the proprietors of Rahimtulla Tower which ironically hosts the offices of the Retirement Benefits Authority;
 - ii. LR No. 209/12178 consisting of 8.77 acres remains inaccessible to date and is held by the family of late Joseph Letting with nineteen (19) built apartments;
 - iii. LR No. 209/12401, Good shed situated along Haile Selassie avenue has lost 3.11 acres out of the 8.11 acres allotted initially and confirmed in the then feasibility report by Lloyd Masika only 5 acres was indicated against the schemes name whereas the estate was wholly given to KRSRBS as indicated in the sub-committee report which confirmed the Assets identified/approved for transfer to KRSRBS;
- (l) The financial situation at the KRSRBS is also attributed to scenarios where KRSRBS properties valued at over Ksh 6 billion possesses titles not in the name of the scheme. According to the petitioners, this setback has over the years been highlighted by the external auditor, Deloitte & Touché, a fact that was also noted in the financial statements for the financial year ended June 30th 2019. An allegation the petitioners argue has not be adequately addressed to safeguard KRSRBS against third parties despite huge expenditures in unprecedented legal fees;
- (m) Out of the twenty-three (23) properties transferred to KRSRBS vide legal Notice No. 169 of 7th September 2006, nine (9) have since been disposed at forced sale. According to the petitioners the continued disposal of KRSRBS assets is in gross violation of the Procurement & Disposal Act, 2005, and is summarized vide a letter to Cabinet Secretary, Ministry of Interior & Coordination of National Government dated April 8th 2020;
- (n) The Ernest and Young forensic investigation report further highlighted the irregular writing off of some outstanding balances due to KRSRBS from properties sold to the Government institutions and Individuals including Parastatals including the current Governor, Nairobi County and a private company and accrued rent arrears due from the sponsor, KRC amounting to Ksh. 400million. According to petitioner, this has

worsened the schemes financial position to a tune of Ksh 1.33 billion due to KRSRBS;

- (o) The KRSRBS rental income from its landed assets for the past one decade has remained static fluctuating between Ksh 25 million and Ksh 50 million monthly as per the financial statements report for the year ending June, 30th 2019. This is despite a rental forecast of over 70% of the rental income percentage. According to petitioners a large portion of the rental income is lost to cartels with built structures on the scheme's properties and working in collusion with some managers at the KRSRBS secretariat with an objective of short-changing pensioners.
- (p) The foregoing missteps have negatively impacted the lives of the KRSRBS pensioners in retirement, as their monthly pension is in arrears by twelve (12) months, with a pending mandatory annual pension increase of 3% p. a. accrued with effect from 1st January 2014.
- (q) As regards the role of RBA in the pensions sub sector, RBA has failed to undertake its mandate as supervisor and regulator of schemes. For instance, RBA as a respondent in constitutional petition No. 353 of 2012, has to date completely failed to implement the court ruling on the instructions of the Honourable Judge, as directed at item 67 which stated thus: *"It is apparent, however that there are concerns regarding the management of the KRSRBS, and from pleadings before me, such disagreements within the Scheme are apt to have negative impact on the lives and livelihoods of hundreds of pensioners. It is therefore incumbent on the RBA, in exercise of its statutory mandate, to address the concerns of the petitioners in the spirit of the constitution and the wider interests of the pensioners."*
- (r) Specifically, the RBA has failed to cause the sponsor, KRC and scheme management to effect the necessary amendments to the TDR to close the scheme following the changed circumstances, as earlier argued in the submission.

3.2 Initial Meeting of the Committee with Stakeholders

During its virtual meeting on **Tuesday, 11th August 2020, at 09.00am**, the Chief Administrative Secretary, Ministry of Transport, Infrastructure Housing Urban Development and Public Works, Hon. Christopher Obure, EGH was present to respond to the issues relating of the eminent collapse of the KRSRBS. This was on behalf of the Cabinet Secretary, Mr. James Macharia. Also present was the, the Chief Administrative Services, National Treasury, Hon. Gaichuhie and representatives of the Retirement Benefits Scheme led by the CEO, Mr. Nzomo Mutuku. The petitioners were in attendance and were presented by Mr. Rodgers Washika. The following summaries of submissions offer key highlights of the presentations.

3.2.1 Submission by Ministry of Transport Infrastructure Housing Urban Development and Public Works/ Kenya Railways Corporation

During the meeting the Committee heard that -

- (a) Following the concessioning of railways operations in 2006 to a private entity, that is RVR, KRC restructured its operations, which culminated in the transfer of part of the workforce to the concessionaire, whilst the remaining employees were offered the

option of early retirement. As such, and as part of restructuring, KRC established the Kenya Railways Staff Retirement Benefit Scheme ('Scheme') to cater for its pensioners and transferred assets which included land and property through a legal notice of September, 2006 to the Scheme;

- (b) The Scheme was subsequently registered with RBA on 4th May, 2006 under the Retirement Benefits Authority Act 1997 with the sole purpose of providing pension and other retirement benefits to the employees of the sponsor, KRC upon their retirement from the Sponsor's service;
- (c) On commencement of the scheme it consisted of 9,000 pensioners and about 2,500 deferred pensioners;
- (d) In terms of management of the scheme, the role of KRC in line with Article seven (7) of the Trust Deed and Rules, is to fund the Scheme, and under Article eleven (11), further, it is required to appoint two thirds (2/3) of the trustees. As such the initial board of trustees was a natural board comprising of sponsor nominated members. However, this changed as the scheme took shape with the board constituted in accordance with the TD&R where the sponsor and pensioners nominated their representatives. The culmination of these was that the sponsor appointed its employees and other representatives from the public and government institutions including the National Treasury and Ministry of Transport;
- (e) In 2011, following complaints by pensioners to RBA on the management of scheme assets, RBA initiated an inspection of the scheme after which all the trustees of the scheme resigned following the release of the inspection report;
- (f) The appointment of the corporate trustee, M/S. Corporate and Pension Trust Services Ltd by the sponsor with the mandate to turn around the performance of the scheme, was through invoking the TD&R in 2012. This was a culmination of numerous court cases filed by the pensioners barring the election of new pensioners' nominated trustees hence denying the board its full constitution;
- (g) The anticipated turnaround of the scheme performance was not achieved and on July 2019, KRC terminated their contract hence reverting to natural trustee leadership;
- (h) In terms of the role of the trustees, the scheme is governed by the RBA Act, 1997 and the establishing instrument, the TD&R which provide the guidelines for its operations. As such the scheme has a board of trustees, both natural and corporate which is vested with the responsibility of running of the scheme. The trustees are therefore required to ensure strict adherence to the RBA rules as well as the TD&R while ensuring financial sustainability and payment of benefits and general administration of the Scheme;
- (i) As regards the persisting challenges bedeviling the scheme, KRC had a pension liability of Ksh 12.6 billion at the point of inception of the scheme, a situation that necessitated approval from Government and subsequent transfer of assets, including land and buildings worth Ksh 12.4 billion to the scheme. As such, at the time of its establishment, it was envisaged that the scheme would liquidate the assets transferred to it to achieve the desired ratio. However, this has remained the biggest challenge to the scheme with the scheme assets comprising of 99.9% land and property against the RBA requirement of 70:30 cash or cash equivalents to property;
- (j) In addition to the illiquidity of the scheme, other challenges include:- (i) litigation by members of the scheme who have filed numerous cases to stop disposal of properties and election of pensioner nominated trustees; (ii) refusal by members (pensioners) to

pay rent on scheme owned houses that they occupy; (iii) lack of competent staff to administer the scheme; (iv) non performing debtors among them government agencies who owe the scheme over Ksh 300million and (v) the effects of investigations by state agencies on persons who have entered into sale transactions with the scheme regarding its properties.

- (k) To sustain its cash flow, the scheme relies on rent collection and sale of assets with the expected collections from the rental income approximated to be Ksh 46,399,857.00 per month. However, with an active pensioners totalling 7,776 and a payroll of Ksh 73,456,123 a month, the scheme has a deficit of Ksh 27,000,000 hence the ten months' pension arrears. A deficit that requires the scheme to dispose its properties or upgrade the existing properties to fetch higher rental returns;
- (l) To unlock the cash flow challenges, the current board of trustees has adopted various strategies including aggressive disposal of assets. For example, in a meeting held on 25th September, 2019 the board of trustees resolved to sell the following properties-
- i) L.R 209/6506 & 7 -Matumbato, Nairobi
 - ii) L.R 209/378/5 - Hurlingham, Nairobi
 - iii) L.R XXV1/941 - Chambilo, Mombasa (XXV1/237)
 - iv) L.R 1/420 - Kindaruma Road, Nairobi
 - v) L.R 1/437 - Kindaruma Road, Nairobi
 - vi) L.R 209/12401 Goodshed area.
 - vii) L.R 209/19382 Ngara area.
- (m)To commence the process, the trustees advertised the following properties for sale as per the Public Procurement Act. The table show the status of the various assets in question.

Table 3: The Status of Specific Assets of the Scheme

No.	Property	Value (Ksh)	Status
1.	L.R. 1/420 Kindaruma Road, off Ngong Road	212 million	Sold. The balance of the proceeds are being held in an escrow account as one of the conditions for the bank loan.
2.	L.R 209/378/5 Hurlingham	135 million	To be re-advertised for sell.
3.	L.R. No. 209/6507 Matumbato (part)	498 million	Sold at Ksh 498million. The purchaser paid a deposit of Ksh 145million, the balance of the purchase price of Ksh 353million cannot be paid since the sale was stopped by EACC in April 2020, pending the conclusion of ongoing investigations. Scheme officials have recorded statements and submitted relevant documents to EACC. The Scheme has appealed to EACC to allow the sale to proceed so as to address the

			Scheme's urgent cash flow requirements.
4.	L.R No. 209/12401 Goodshed are Nairobi	2 billion	This property is being sold back to Kenya Railways.
5.	L.R XXV1/941 Chambilo, Mombasa (XXV1/237)	300 million	After the advertisement for sale, the tenants got a court injunction to stop the sale.
6.	L.R 209/19382 Ngara estate, Nairobi	7.6 billion	The Scheme did not receive suitable offers after advertising this property. The property is proposed for re-advertisement (within the next 7 days) for outright sale or Joint Venture, whichever is profitable.

- (n) To address the immediate challenge of pending arrears, on 12th March 2020, the scheme applied for a banking facility of Ksh 850 million at the Kenya Commercial Bank in order to meet its current debt obligations (an existing bank debt of Kshs. 225,628,817.99) including pension arrears. The Bank considered the application favourably and on 9th June 2020 and as such the scheme received a letter of offer from the bank to grant the facility hitherto with several conditions and new securities required before advancing the loan. One of these pre-conditions is a corporate guarantee of Ksh 850million to be executed by KRC together with a supporting board resolution. Kenya Railways is also expected to execute the Letter of Offer to signify acceptance. The Board of KRC approved the execution of the corporate guarantee subject to approval by National Treasury which was submitted in June 2020.
- (o) There are ongoing modalities to pursue the various government agencies with pending debts owed to the scheme, the following government institutions and agencies owe the scheme on land sales already executed.

Table 4: Debts to the Scheme by Government Institutions and other Agencies

No.	Description	Amount (Ksh)	Status
1.	Kenya Urban Roads Authority (KURA) acquired land from the scheme for construction of a proposed Nairobi Viaduct and Road development project on LR 209/6502/R	227.5million	All documents submitted to National Treasury to commence payment.

2.	The Ministry of Devolution purchased a portion of land measuring 0.6665 hectare to be excised from LR. NO. 209/19433/1 at a valuation of Kshs. 325M. The GOK paid 227M leaving a balance of Kshs. 105M. The Local Government took over possession of the land. The debt is not disputed and will be paid as soon as all documents are availed to National Treasury.	Muthurwa, measuring approximately 5.4 acres. 105million	All the required documents have been submitted to National Treasury to process payment.
3	Sale of Valley Road property	Sold to Mahinda Investment Ltd. 79 million	The property is in the process of being discharged by KRC so that the title can be released to the buyer.

- (p) The scheme through the Ministry of Transport is in collaboration with the government, specifically the state department of Housing and Urban Development, on the possibility of investing in the vast scheme properties. The schemes properties in question are -

Table 5: Proposed Properties for Government Consideration

No	L. R No.	Location	Size Acres	Value (Ksh)	Proposal
1	209/6829	Makongeni Estate, Nairobi	141	5.8billion	To be redeveloped under the affordable housing program.
2	209/6502 (Part)	Muthurwa Estate, Nairobi	35	2.4billion	To be leased out to the GOK for the Railway City Project.
4	209/12088	Land Mawe Along factory street.	20.9	4.8billion	To be leased to GOK for Railway City Development.

Source: Ministry of Transport Infrastructure Housing Urban Development and Public works/ Kenya Railways Corporation.

- (q) Overall, the former and current board of trustees of the scheme have encountered and continue to experience challenges when disposing off properties in a bid to comply with the RBA Act investment guidelines. Some of the challenges include -
- (i) Decline in property demand in recent years due to the deteriorating economic environment, complicated further by the Covid-19 pandemic;

- (ii) Continued negative publicity on the status of the scheme hence discouraging willing investors from buying properties belonging to the scheme. The negative publicity has been exacerbated by reports on EACC investigations into the sale of two portions of LR NO: 209/6507 Nairobi - Matumbato to Premix Enterprises Ltd;
- (iii) Emotional attachment by the pensioners to the properties with majority of them being current tenants of the scheme houses. Further, some pensioners have filed a case ELC Petition No. 131 of 2020 seeking to stop disposal of scheme properties;
- (iv) Interference from local leaders who continue to incite tenants not to pay rent court and further injunctions stopping the scheme from interfering with non-rent paying tenants leading to huge rent arrears;
- (v) In April 2020, the Scheme received a letter from the EACC stopping the sale of L.R 209/6507 -Matumbato, Nairobi which is about 3.2 acres, pending investigations. EACC also stopped the ongoing subdivision and advertisement for sale of the property;
- (vi) The Covid-19 pandemic has further affected the scheme's rental income exacerbating its dire financial position.
- (vii) Court injunctions on L.R Number Mombasa/Block XXVI/941 measuring 2.67 acres located along Chambilo Road, Kizingo area has a court injunction that continues to prevent its disposal;
- (viii) Since 2012, various scheme properties have been held up in court injunctions in civil suit no. 294/2012 which prevented the sale or redevelopment of the properties. The said properties are: (i) L.R. No. 209/6829, Makongeni (ii) L.R. No. 209/11953, Nairobi Railway Club and (iii) L.R. No. 1/437, Kindaruma Road, Nairobi. The trustees have however managed to negotiate an out of court settlement and a consent to release the properties was signed on 3rd July, 2020. The properties are therefore available for outright sale, joint venture or redevelopment under the Railway City project.

3.2.2 Submission by the National Treasury/the Retirement Benefits Authority

During the virtual meeting the committee was also informed as follows. That -

- (a) Indeed, KRSRBS was registered as retirement benefits scheme in 2006 in accordance with the provisions of the Retirement Benefits Act, 1997 with the sole purpose of paying pensions and other retirement benefits to employees of Kenya Railways Corporation (KRC) and provision of relief to dependents in case of the death of a member. Prior to these, the pension benefit was provided under a non-contributory, pay as you go scheme provided in accordance to the Pension Regulations issued under the Kenya Railways Corporation Act.
- (b) Upon restructuring of KRC in 2006, the unfunded pension liability was approximately Ksh 14 billion of which was transferred to the newly established pension scheme and backed by illiquid assets mainly land and buildings through Legal Notice No. 169 of 7th September 2006.
- (c) The last audited financial statement of the scheme as 30th June 2019 reports total assets of Ksh 31.1 billion and estimated actuarial pension liability of Ksh 10.2 billion.

Table 6: Key Information and Statistics on KRSRBS as at August 2020 and its compliance to the law.

Audited Accounts as at 30th June 2019	Total Assets Ksh 31.1 billion	
Actuarial Valuation report as at 30 th June 2017	Total Assets Ksh 24.3 billion and Total liabilities Ksh 10.22 Billion	Compliant. The law requires schemes to be 100% funded. The scheme is overfunded; however, the assets are illiquid.
	Funding level - 238%	
	Surplus - Ksh.14.08 billion	
Scheme Investments	Immovable property value as at 31 st March 2020 investment report is Ksh 33.3billion equivalent to 99.9% of the overall scheme assets	Non-compliant. The law stipulates the maximum limit to be invested in immovable property as 30 percent
Total membership	According to the audited accounts for the period ended 30 th June 2019, the scheme consists of 8,778 members, broken down as 7,780 pensioners and dependents and 998 deferred pensioners.	

Source: RBA

- (d) As at August 2020, pension payment is in arrears with pensions remaining outstanding for eleven (11) months. The schemes liquidity challenges that has led to delays in payment of pensions are attributed to the following: - (i) Unique nature of the scheme at the point of establishment where it holds 99.9% of its assets in immovable property against the requirement for schemes to hold a maximum of 30% of the assets in immovable property; (ii) being a closed scheme, no new members are allowed to join and as such it does not receive any contributions; and (iii) governance challenges with numerous complaints from the pensioners with respect to management of the scheme including allegations of corruption, abuse of office and delays in payment of monthly pension.
- (e) The main cash flow items of the scheme are: - (i) investing activities and income primarily from rental income and proceeds on disposal of property assets with the monthly rental income being insufficient to meet monthly pension obligations and other operational expenses; (ii) operating activities including payment of pension, gratuities and administrative expenses; and (iii) financing activities that entail loan portfolio to cover cash flow shortfalls.
- (f) To address the foregoing challenges, the Authority continues to engage with the sponsor, trustees and pensioners to address issues relating to management of the scheme in line with the provisions of the Retirement Benefits Act and the Regulations.
- (g) The Authority caused an inspection to be undertaken on the scheme in 2011 in accordance with the provisions of Sections 41 to 43 of the Retirement Benefits Act. The inspection revealed some irregularities in management of the scheme and conflict of interest. As a result, the Authority recommended various supervisory interventions including the appointment of an independent Corporate Trustee to manage the affairs of the scheme as opposed to individual Trustees.

- (h) The appointment of an independent Corporate Trustee was aimed at enhancing good governance in the management of the scheme. The recommendations culminated in the appointment of Corporate & Pension Trust Services Ltd. as Trustees of the scheme by KRC and the removal of individual Trustees from office with the former serving until July 2019.
- (i) Pursuant to the provisions of Section 5B of the Retirement Benefits Act, in January 2019, the Authority appointed Ernst & Young LLP (EY) to undertake a forensic investigation into the operations of KRSRBS for the period July 2013 to June 2018. This was informed by a build-up of unpaid pension and also numerous complaints from pensioners on the governance of the Scheme.
- (j) The report on the investigation was received and reviewed by the Authority where it identified some shortcomings in management of the scheme. As such, the current board of trustees is working towards implementing the recommendations of the report and addressing the shortcomings.
- (k) In the long-term, saving the KRSRBS requires the creation of liquidity to enable the scheme meet its obligations and to further comply with the provisions of the Retirement Benefits Act. However, efforts to dispose some of the scheme properties and reduce the exposure in property and to comply with the provisions of the investment guidelines have faced several hurdles, among them: - court injunctions for sale of the properties following complaints by pensioners; encumbrances on some of the properties impeding their sale; failure to attract suitable bids and lack of title deeds for some of the properties.
- (l) With the foregoing status and challenges bedeviling the scheme, the Authority makes the following proposals as options to streamline the scheme's financial position -
 - (i) Immediate injection of capital into the scheme by KRC as the sponsor of the scheme to enable payment of outstanding pensions as trustees finalise on sale of properties already advertised;
 - (ii) Cash buy back of some strategic properties by KRC or the Government as the nature of some of the scheme's properties make it difficult for their disposal. Additionally, government intervention could be handy through buy back of some of the properties vested in the scheme which could contribute towards the Government agenda of affordable housing as well as the mass rapid transport system. These properties include Land Mawe, Makongeni and Muthurwa estates;
 - (iii) Non-cash considerations for some of the properties of the scheme for example exchange of strategic properties with customized government securities and or financial instruments;
 - (iv) Lease of some of the scheme's properties to a suitable and strategic investor; and
 - (v) With respect to allegations of corruption and abuse of office, the Authority does not have the technical capacity to investigate some of these allegations and supports investigations by independent bodies such as the Directorate on Criminal Investigations and the Ethics and Anti-Corruption Commission on KRSRBS, some of which are ongoing.
- (m) RBA urges the pensioners to give the new trustees an opportunity to manage the scheme and to support their efforts at disposal of property which is key to unlocking the liquidity concern. As such the pensioners should endeavour to enhance dialogue with the trustees rather than opt for courts interventions.

3.3 A Further Meeting with Stakeholders to Assess Progress

A further meeting of all stakeholders was held virtually on **Monday, 14th September 2020 at 10.00am** to review the progress in addressing the plight of pensioners of the KRSRBS following the delayed payment of monthly pensions. Further, the session also offered an opportunity for the Committee to review some of the concrete measures the various stakeholders specifically KRC, the KRSRBS and RBA intended to put in place to ensure sustainability of the scheme. The meeting was attended by the Chief Administrative Secretary, Ministry of Transport, Infrastructure Housing Urban Development and Public Works, Hon. Christopher Obure, EGH. This was on behalf of the Cabinet Secretary, Mr. James Macharia. Also present was the, the Chief Administrative Services, National Treasury, Hon. Gaichuhie and representatives of the Retirement Benefits Scheme led by the CEO, Mr. Nzomo Mutuku, representatives of the Kenya Railways Corporation and the petitioners represented by Mr. Rodgers Washika.

During the meeting the following was brought to the attention of the Committee on the status of payment of outstanding monthly pension to pensioners and the way forward in ensuring the scheme remains liquid and sustainable -

Outstanding Pension Arrears: - As regards the outstanding pension arrears and following up to the Committees consultative meetings with all the stakeholders (petitioners, KRC, Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, National Treasury and RBA) on the 11th August 2020, KRSRBS reported to having concluded the payment of five (5) months of outstanding arrears totaling Ksh 312million (for the period between September 2019 and January 2020). At the point of reporting two (2) months arrears had been received by the pensioners and a further three (3) months arrears was due to be debited in pensioners' accounts in the coming days. A further Ksh. 20million was paid as an outstanding lump sum payment for the year 2018. The implication for these is that the scheme has a pending arrears of seven (7) months (February 2020 to August 2020) with an understanding that Ksh 325 million that is yet to be disbursed by the lender, KCB once the requisite documentation is finalized.

The Committee therefore noted that conditions set by KCB to allow for the release of the outstanding balance of Ksh 325million to the scheme was work in progress as the scheme administrators are in consultation with the EACC on the ongoing investigations and subsequent clearance to conclude the sales of plots of land: Matumbato plot in upper hill to Premix enterprises for Ksh 498million. The latter is expected to act as security against the Ksh 850million cooperate guarantee issued by KCB

Unlocking Liquidity Issues at the Scheme to ensure that the scheme is capable of sustaining its monthly obligations to pensioners. The stakeholders committed to support the following initiatives -

- (a) Engagement with government following interest in the acquisition of the scheme property towards facilitating its agenda on affordable housing, including any possible buy back by KRC for the development of mass rapid transport system. In this regard, the Committee noted the governments (through the Nairobi Metropolitan service and KeNHA) interest to compulsorily acquire property L.R. No.209/11953 –Nairobi

Railway Club based on the Special Gazette Notice No. 163 of 2020 published on 4th September, 2020.

- (b) Deliberate support efforts to dispose some of the scheme properties including collection of debts owed to the scheme. As such, the scheme administrators have engaged auctioneers to issue demand notices to defaulting tenants with further action where appropriate. However, it was observed that in as much as the management of KRC was carrying out this aggressive follow ups on rent payment, numerous court injunctions issued in favor of some pensioners who double up as tenant have setback the process. In terms of disposing the scheme properties, the Committee was also informed that that KRSRBS is finalizing the sale documents of the property L.R No. 1/420 being sold to South River Homes Ltd. for Ksh 212 million hence an outstanding purchase price of Ksh 148 million. Additionally, it is expected that tender openings on sale of L.R No. 209/378/5 Hurlingham will be successful, this follows previous advertisements on the same on the 18th September 2020 following.
- (c) KRC to provide all relevant documents in relation to pending sales pertaining to the specific properties to KURA and the Ministry of Devolution, and as such the Committee urged the National Treasury to ensure the release of funds.
- (d) The KRSRBS to support the new board of trustees to implement the scheme strategies that are likely to improve liquidity hence making it possible to realize the periodic pension increases as provided in the Trust Deed and Rules and as recommended by the Actuary
- (e) RBA to facilitate continuous consultative engagement meetings with all stakeholders of the scheme to ensure information flow and full compliance by the scheme with the next meeting scheduled for 31st October 2020.

3.4 Final Meeting with all Stakeholders to Assess Gains in Addressing Petitioners Prayers

A further meeting with all stakeholders to assess the gains made so far in addressing the prayers contained in the petition was held virtually on **Thursday, 8th October 2020 at 09.00am**. The meeting was attended by the following stakeholders: Hon. Nelson Gaichuhie, CAS National Treasury; alongside Mr. Michael of the pensions department; Mr. Solomon Kitungu, PS State Department of Transport and Infrastructure; Mr. Pharis Ngotho, Ag. CEO, KRSRBS; Mr. Nzomo Mutuku CEO, Retirement Benefit Authority Representation from the Kenya Railways Corporation; and the petitioners represented by Mr. Rodgers Washika and Mr. Boinnett.

During the meeting, the Permanent Secretary, State department of Transport and Infrastructure on behalf of the Cabinet Secretary briefed the committee as follows. That -

- (a) A total of five (5) months pension arrears for the period September 2019 to January 2020 had been paid to pensioners. The CEO, Retirement Benefit Authority, Mr. Nzomo Mutuku reiterated this status pointing out that so far partial payments have been effected for five (5) months (between September 2019 and January 2020).
- (b) The Scheme administrators are in the process of finalizing the various loan conditionality as per the KCB requirements to access the balance of Ksh 325million loan, and as such it is expected in the next two (2) weeks, that is by 22nd of October

2020; this was also confirmed by RBA who indicated that upon finalization of the contractual obligations with KCB by the trustees of the KRSRBS, the balance of Ksh 325million will be effected. With the foregoing, the trustees will be enabled to clear the pending six (6) months from February 2020 to July 2020. The CEO however emphasized the need to unlock the liquidity challenges bedeviling the scheme as long term solutions some of which were outlined during earlier meetings.

- (c) The National Treasury is in the process of fast tracking the payment of the pending bills owed to KRSRBS by the KURA, amounting to Ksh 227million and the Ministry of Devolution, Ksh 105million. This however became apparent that the aforementioned government agencies did not factor these expenditures in their 2020/21 approved budgets and as such into this may take longer as the National Treasury will follow up to ensure that the expenditure is provided for in the upcoming supplementary budget.
- (d) Upon addressing the liquidity challenges within the scheme, the pending annual increment in pension as provided in 2014 at 3 percent and 2017 at 5 percent will be taken into consideration and further backdated to ensure the pensioners receive all that is due to them.
- (e) In terms of sustainability of the scheme, the scheme administrator alongside the regulator, RBA and other government agencies are in the process of developing a road map that will result in sale of various scheme properties with an aim of achieving the requisite 30:70 asset mix as per the RBA guidelines, as a key ingredient for the scheme sustainability and prompt payment of its financial obligations;
- (f) With the foregoing, the following property sales are at various advanced stages of disposal -

No.	Property	Value (Ksh)	Status
1.	Valley Road Property; LR No.209/1064/1,2,3,4 &5	400 million	Sold to Mahandi Investment ltd, Paid Ksh 321million with a balance of Ksh 79million pending following completion of documentation
2.	Two plots on Matumbato Road ; LR No. 209/6507	498 million	Sold to Primix Enterprises Ltd, Paid Ksh 145 million with a balance of Ksh 353 million. Sale in pending following investigations by EACC, with follow up ongoing to fasten conclusion of cases; This will allow for the disposal of four other adjacent plots measuring 0.5 acres.
3.	Bristol; LR No. 1/420	212,080 million	Sold on 22 nd June 2020 to South River Homes. Paid Ksh 22million (28 th May 2020); Ksh 42 million (23 rd June 2020)- paid pensioners; Balance of Ksh to be channeled to KCB Escrow account for loan obligation upon completion of documentation, that is by 22 nd Oct 2020

4.	18 acre property, Nairobi Railway Club	Market value of Ksh 17 billion Forced sale value of Ksh 13billion	Under compulsory acquisition as per gazette notice number 6601, VolCXXII-No.163 dated 4 th September 2020; Scheme has agreed to down payment of Ksh 5billion from National Land Commission (NLC) pending joint valuation
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Source: Ministry of transport, Infrastructure, housing, Urban Development and Public Works

While responding to the submission by the Ministry of transport, Infrastructure, housing, Urban Development and Public Works; RBA and the National Treasury, the petitioners raised concerns regarding the following -

- (a) The manner in which the compulsory acquisition of the Kenya Railways club was undertaken devoid of consideration of the investments of the lessees;
- (b) As to whether the pensioners will receive value for money for the Kenya Railways Club property following the compulsory acquisition. According to the petitioners, Ernst & Young forensic investigation report placed the market value of the 18-acre compulsory acquired property at the Kenya Railways club at Ksh 13.550 billion including the 15% disturbance allowance provided by the Land Act, 2012 hence Ksh 2.032billion. According to representative of KRC, the corporation has communicated to KENHA on the disturbances caused by the compulsory acquisition to the lessees and hence the need to subsequently and adequately address the matter.

CHAPTER FOUR: COMMITTEE OBSERVATIONS & RECOMMENDATIONS

4.1 Committee Observations

Following the Committee's engagement with the stakeholders on the 6th August 2020, 11th August 2020, 14th September and 8th October 2020 and subsequent deliberations rising therein, the Committee makes the following observations -

On the petitioner's prayer that the Senate compels the RBA to implement the item number 67 of the high court ruling in 2012 as follows (*"It is apparent, however that there are concerns regarding the management of the KRSRBS, and from pleadings before me, such disagreements within the Scheme are apt to have negative impact on the lives and livelihoods of hundreds of pensioners. It is therefore incumbent on the RBA, in exercise of its statutory mandate, to address the concerns of the petitioners in the spirit of the constitution and the wider interests of the pensioners"*)

- (1) THAT, RBA is responsible for the registration of retirement benefits schemes, managers, custodians and administrators in the country, and as such mandated to ensure that the retirement benefits schemes, managers, custodians, trustees and administrators meet the suitability criteria prescribed by law. Further that supervision entails investigating embezzlement, fraud, misfeasance or other misconduct by schemes by causing an actuarial audit to be conducted;
- (2) THAT, the scheme is governed by the RBA Act, 1997 and the establishing instrument, the Trust Deed & Rules which provide the guidelines for its operations;
- (3) THAT, with regards persistent governance issues and subsequent complaints by petitioners, the Authority caused an inspection to be undertaken on the scheme in 2011 in accordance with the provisions of Sections 41 to 43 of the Retirement Benefits Act. Further, that the inspection revealed irregularities in management of the scheme and conflict of interest with investigation ongoing by relevant state agencies;
- (4) THAT, following recommendations by RBA, Corporate & Pension Trust Services Ltd were appointed as corporate trustees and served until July 2019;
- (5) THAT, following numerous complaints from pensioners on the governance of the Scheme and inability for the scheme to meet its pension obligations overtime, the Authority, in accordance with its supervisory and regulatory role and pursuant to the provisions of Section 5B of the Retirement Benefits Act, in January 2019, appointed Ernst & Young LLP (EY) to undertake a forensic investigation into the operations of KRSRBS for the period July 2013 to June 2018;
- (6) THAT, the current board of trustees is in the process of implementing the recommendations of the report and addressing the shortcomings as revealed in the report of the forensic investigation and possible strategies with an aim to increase liquidity; and
- (7) THAT, RBA commits to facilitate continuous consultative engagement meetings with all stakeholders of the scheme to ensure information flow and full compliance by the scheme with the next meeting scheduled for 31st October 2020.

On the prayer that the Senate intervenes and helps the vulnerable petitioners who have not received their pensions for the last 12 months and are now experiencing both financial and psychological torture especially during this pandemic;

- (8) THAT, KRC, the sponsor, following restructuring as a result of concessioning of railways operations in 2006 to a private entity, RVR established and registered KRSRBS in accordance with the provisions of the Retirement Benefits Act of 1997 on 4th May, 2006. As such the scheme was to provide pension and other retirement benefits to the employees of KRC upon their retirement from the service;
- (9) THAT, to fund the scheme, KRC transferred assets to the scheme which included land and property through a Legal Notice No. 169 of 7th September 2006;
- (10) THAT, from the onset, the scheme was established without adequately addressing the pertinent pending question of sustainability. For example, as at 2006, the Kenya Railways had a pension liability of Ksh 12.6 billion (Ksh 14 billion - RBA). Even though there was a subsequent transfer of assets, including land and buildings worth Kshs 12.4 billion to the scheme vide Legal Notice of September, 2006, the scheme assets translated to 99.9% land and property against the RBA requirement of 70:30 cash or cash equivalents to property; Further, that immovable property value as at 31st March 2020 as per investment report show Ksh 33.3 billion, equivalent to 99.9 percent of scheme asset, hence non-compliant with the law to date;
- (11) THAT, (10 above) notwithstanding, the scheme is in compliant with the law which requires that a schemes be 100 percent funded, actuarial valuation reports as at 30th June 2017 and audited accounts as at 30th June 2019 show total assets valued at Ksh 24.3 billion and Kshs 31.1 billion respectively against total liabilities of Ksh 10.22 billion hence an overfunding of 238 percent. However, that liquidation of the scheme assets to achieve the desired ratio as envisioned at the point of its establishment, remains the biggest threat to the schemes viability;
- (12) THAT, at commencement of the scheme, it consisted of 9,000 pensioners and about 2,500 deferred pensioners, with audited accounts for the period ending 30th June 2019 showing a membership of 8,778 of which 7,780 are pensioners and their dependents and 998 deferred pensioners, figures consistent with a closed scheme;
- (13) THAT, the scheme relies on rent collection and sale of assets to undertake its pension's obligations, all of which have proved insufficient to meet monthly pension obligations and other operational costs. This is explained by collections from the rental income amounting to approximately Ksh 46,399,857.00 per month against 7,776 active pensioners and a payroll of Ksh 73,456,123 a month, hence a deficit of Ksh 27,000,000 monthly;
- (14) THAT, the deficit in rent is attributed to non-payment of rent by members (pensioners) on scheme owned houses, and lack of competent staff to administer the scheme, even as Covid-19 pandemic has worsened the situation;
- (15) THAT, in addition to rental deficits, slow disposal of schemes assets has worsened the schemes cash flow. The Committee observing that the latter is occasioned by numerous litigation and subsequent court injunctions for sale of the properties following complaints by pensioners, effects of investigations by EACC and other state agencies on persons who have entered into sale transactions with the scheme, encumbrances on some of the properties impeding their sale; failure to attract suitable bids and lack of title deeds for some of the properties. For example, in April 2020,

EACC stopped the ongoing subdivision and advertisement of sale of the property L.R No. 209/6507, Matumbato, Nairobi, 3.2 acres citing ongoing investigation, Court injunctions on L.R Mombasa/Block XXVI/941 measuring 2.67 acres located along Chambilo Road, Kizingo area which continues to prevent its disposal; Additionally since 2012, and up until 3rd July, 2020 following an out of court settlement, the following scheme properties were held up in court injunctions in civil suit no. 294/2012 which prevented their sale or redevelopment:- (i) L.R. No. 209/6829, Makongeni (ii) L.R. No. 209/11953, Nairobi Railway Club and (iii) L.R. No. 1/437, Kindaruma Road, Nairobi;

- (16) THAT, the liquidity challenges at KRSRBS have been exacerbated by pending debts associated with several government agencies to a tune of Ksh 332.5million, as KURA and Ministry of Devolution owes Ksh 227.5 million and Ksh 105million respectively. Further that the National Treasury is following up on the matter to ensure that funds are budgeted for in the 2020/21 supplementary budget and thereafter ensure immediate release of funds on receipt of the relevant documents;
- (17) THAT, despite the foregoing challenges, the current board of trustees has adopted aggressive strategies that are expected to result in disposal of assets in Mombasa and Nairobi. Further that the process of disposal of property are at various stages, for example, property L.R. 1/420 on Kindaruma Road, off Ngong Road valued at Ksh 212 million was sold and the balance of the proceeds are being held in an escrow account as one of the conditions for the bank loan; L.R 209/378/5 Hurlingham worth Ksh 135million is to be re-advertised for sell. Others are L.R 209/19382 Ngara estate, Nairobi worth Ksh 7.6billion did not receive suitable offers after advertising and is therefore set for re-advertisement within the next 7 days for outright sale or joint venture and L.R No. 209/12401 Goodshed in Nairobi is to be sold back to Kenya Railways at a cost of Ksh 2 billion;
- (18) THAT, the scheme administrators have engaged auctioneers to issue demand notices to defaulting tenants with further action where appropriate despite numerous court injunctions issued in favor of some pensioners who double up as pensioners;
- (19) THAT, to address the immediate challenge of unpaid pension for twelve (12) months (as at August 2020), the scheme had on the 12th March 2020, applied for a banking facility of Ksh 850million from the Kenya Commercial Bank to be executed by KRC as a corporate guarantee subject to approval by the National Treasury. In making this observation, the Committee had raised concerns on the resultant cycle of debt by the scheme taking into consideration an existing debt obligation of Ksh 225.62million;
- (20) THAT, as at 8th October 2020, KRSRBS had remitted five (5) months of outstanding arrears totaling Ksh 312million (for the period between September 2019 and January 2020 hence in arrears of seven (7) months (February 2020 to August 2020) with a further Ksh 20 million being payment of an outstanding lump sum payment for the year 2018;
- (21) THAT, in the long term the scheme is considering pursuing opportunities with the government through the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works in collaboration with the state department of Housing and Urban Development, on the possibility of investing in the vast scheme properties. These properties include: - LR. 209/6829, Makongeni Estate, Nairobi, 141 acres worth Kshs 5.8billion to be redeveloped under the affordable housing program; (Part

of LR. 209/6502, Muthurwa Estate, Nairobi, 35 acres worth Ksh 2.4 billion and LR. 209/12088, Land Mawe along Factory Street, 20.9 acres at Ksh 4.8 billion be leased to GOK for Railway City Development;

- (22) THAT, there exist other options for the KRSRBS to improve its financial position in the long term, for example non-cash transactions for strategic properties with customized government securities and or financial instruments; lease of some of the scheme's properties to a suitable and strategic investor; and
- (23) THAT, the Scheme is expected to improve its liquidity in the coming months it has agreed to a down payment of Ksh 5billion from National Land Commission (NLC) pending joint valuation the Kenya Railways Club property. The latter was acquired by government through compulsory acquisition vide gazette notice number 6601, VolCXXII-No.163 dated 4th September 2020.

(iii) On the prayer that the Senate makes any other recommendations that it may deem necessary on this matter;

- (24) THAT, the contribution of the retirement benefit sub sector to GDP of 13.4 percent in 2017 and a growth of 14.3 percent in combined asset management in the last ten years can only be safeguarded and improved through deliberate enforcement of existing regulatory frameworks;
- (25) THAT, KRSRBS existed as a defined benefits standalone occupational scheme, with KRC as its sponsor and only contributor absorbing all funding expenses and hence likely to make most of the decisions. A scenario that is likely to disadvantage the pensioners and their dependants as their rights is relegated to a stream of payments;
- (26) THAT, defined benefits schemes were a common occurrence in many government and public bodies including but not limited to former Kenya Posts and Telecommunication Corporation (Teleposta Pension Scheme), the public service. However, most institutions including the public service have since converted their pension plans to defined contributory schemes for sustainability of the pension bill; and
- (27) THAT, the retirement benefit sub sector in general and the KRSRBS in particular is not short of regulatory and supervisory frameworks as there exist laws, subsidiary legislations, policies, guidelines and specific rules that guide its operations and ensure its compliance and sustainability.

4.2 Committee Recommendations

The Committee made the following recommendations in respect to the Prayers of the Petitioners -

(i) Compels the RBA to implement the item number 67 of the high court ruling in 2012;

Item 67 of the high court ruling in 2012 was as follows (*“It is apparent, however that there are concerns regarding the management of the KRSRBS, and from pleadings before me, such disagreements within the Scheme are apt to have negative impact on the lives and livelihoods of hundreds of pensioners. It is therefore incumbent on the RBA, in exercise of its statutory mandate, to address the concerns of the petitioners in the spirit of the constitution and the wider interests of the pensioners”*)

1. The Committee observed that RBA has been facilitating continuous consultative engagements with all stakeholders of the scheme to ensure information flow and full compliance by the scheme and has committed to continue the facilitation with the next meeting scheduled for 31st October 2020;
2. The Committee recommends that RBA continues with the facilitation and reports to the Committee on a monthly basis on the progress in line with section 5 of the Retirement Benefits Act which provides for the object and functions of the Authority to include—
 - a) regulate and supervise the establishment and management of retirement benefits schemes;
 - b) protect the interests of members and sponsors of retirement benefits sector;
 - c) approve trustees' remuneration approved by members during the annual general meeting after every three years; and
 - d) promote the development of the retirement benefits sector.

(ii) Intervenes and helps the vulnerable petitioners who have not received their pensions for the last 12 months and are now experiencing both financial and psychological torture especially during this pandemic;

3. The Committee has held various meetings with the stakeholders and up to the date of writing this report, the petitioners, through the Committee's efforts have been paid five out of twelve months' arrears.

It is the duty of the Committee to ensure that –

- a) All pension arrears are paid;
- b) The Sponsor implements the pension increments as per the Government's directives and pays all the arrears due on this; and
- c) The Pensioners start receiving timely monthly payments.

Based on the amount that the stakeholders said they were expecting within two weeks from the last meeting, Kenya Railways Corporation as the Sponsors shall, in a

months' time, sort out all pension arrears and submit an Investment Policy and Action Plan on the Scheme.

4. The Committee has committed to hold bi-monthly meetings with the relevant stakeholders to monitor the progress of implementation towards making the scheme successful and sustainable.

(iii) **Make any other recommendations that it may deem necessary on this matter.**

The Committee observes that there are various fiduciary gaps that almost led to the near collapse of the Scheme and resolves –

5. That the Retirement Benefits Authority (RBA) instigates a special forensic audit on the Scheme operations, since its inception with particular reference to -
 - a) The World Bank grant funds that were given to the Scheme to kick-start its operations;
 - b) The Rent moneys that the Scheme has been receiving and its usage; since its inception;
 - c) The debts owed to the Scheme, including debts by Kenya Railways Corporation; and
 - d) The status of the land that Rahimtullah towers sits in regards to the assets owed by the Scheme.

The RBA should report to the Committee within 2 months.

6. The RBA should review the structure and the Composition of the Board of Trustees so as to ensure compliance with Regulation 8 (c) (i) of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000; and that any existing or potential conflicts of interest are resolved.
7. The Auditor General shall conduct an independent special audit on the management of the Scheme and report to the Committee within three (3) months; including but not limited to –
 - a) The World Bank grant funds that were given to the Scheme to kick-start its operations;
 - b) The Rent moneys that the Scheme has been receiving and its usage; since its inception;
 - c) The debts owed to the Scheme, including debts by Kenya Railways Corporation, as claimed by the Petitioners; and
 - d) The status of the land that Rahimtullah towers sits in regards to the assets owed by the Scheme.
5. That the RBA ensures that all public retirement pension schemes in the country adhere to the registration requirements under the Retirement Benefits Act.
6. That the National Treasury as the body in charge of Pensions to ensure that Kenya Railways Corporation fulfils its obligations as the Sponsor of the Scheme.

CHAPTER FIVE: ANNEXURES

Annex A: Minutes of the Sitzings of the Committee

Annex B: Copy of the Petition

Annex C: Submission: Petitioners

Annex D: Submission: Ministry of Transport Infrastructure Housing and Urban Development and Public Works / KRC)

Annex E: Submission: National Treasury / RBA)

ANNEX A – MINUTES OF THE COMMITTEE

MINUTES OF THE 51ST MEETING OF THE STANDING COMMITTEE ON LABOUR & SOCIAL WELFARE HELD ON WEDNESDAY, 14TH OCTOBER, 2020 FROM 3.30 PM AT THE BARAZA 3 CONFERENCE ROOM, SAROVA WHITESANDS BEACH RESORT AND SPA, MOMBASA COUNTY

MEMBERS PRESENT

- | | |
|-------------------------------------|---------------|
| 1. Sen. Sakaja Johnson Arthur, CBS | - Chairperson |
| 2. Sen. Madzayo Stewart Mwachiru | - Member |
| 3. Sen. Mwangi Paul Githiomi | - Member |
| 4. Sen. (Dr.) Milgo Alice Chepkorir | - Member |
| 5. Sen. (Dr.) Mwaura Isaac, CBS | - Member |
| 6. Sen. Makori Beatrice Kwamboka | - Member |
| 7. Sen. Masitsa Naomi Shiyonga | - Member |

ABSENT WITH APOLOGIES

- | | |
|-------------------------------|--------------------|
| 1. Sen. Mwaruma Johnes | - Vice Chairperson |
| 2. Sen. Kihika Susan Wakarura | - Member |

SENATE SECRETARIAT

- | | |
|-----------------------|---|
| 1. Ms. Mwanate Shaban | - Clerk Assistant |
| 2. Ms. Merale Sande | - Senior Research Assistant – Joined via Zoom |
| 3. Mr. Jeremy Chabari | - Legal Counsel |
| 4. Mr. Ian Otieno | - Audio Officer |
| 5. Ms. Sarah Rukwaro | - SAA |

MINUTE SEN/SCLSW/235/2020: PRELIMINARIES

The Chairperson called the meeting to order at 3.30 pm followed by a word of prayer.

MINUTE SEN/SCLSW/236/2020: ADOPTION OF THE AGENDA

The retreat program was adopted as the agenda after being proposed by Sen. Mwaura and seconded by Sen. Shiyonga as follows –

AGENDA

1. Preliminaries (Prayers);
2. Adoption of the Agenda;
3. **Adoption of the Report on the Petition by Sen. (Dr.) Michael Mbito on behalf of the KRSRBS Pensioners on the looming collapse of the Kenya Railways Staff Retirement Benefits Scheme;**
4. **Adoption of the Report on the Petition Sen. Susan Kihika on behalf of Nakuru Residents on the unlawful rounding up, detention, transfer and dumping of street children by the County Government of Nakuru; and**
5. Any Other Business & Adjournment.

MINUTE SEN/SCLSW/237/2020: ADOPTION OF THE REPORT ON THE PETITION BY SEN. (DR.) MICHAEL MBITO ON BEHALF OF THE KRSRBS PENSIONERS ON THE LOOMING COLLAPSE OF THE KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME;

The Committee considered the draft report on the petition by Sen. (Dr.) Michael Mbito on behalf of the KRSRBS pensioners on the looming collapse of the Kenya Railways Staff Retirement Benefits Scheme;
and adopted it after being proposed by Sen. Kwamboka and seconded by Sen. (Dr.) Milgo.

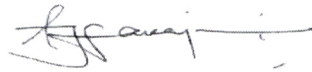
The Committee committed to follow up with the Scheme on the details of Kenrail Trust and specific details of debts.

MINUTE SEN/SCLSW/238/2020: ADOPTION OF THE REPORT ON THE PETITION BY SEN. SUSAN KIHKA ON BEHALF OF NAKURU RESIDENTS ON THE UNLAWFUL ROUNDING UP, DETENTION, TRANSFER AND DUMPING OF STREET CHILDREN BY THE COUNTY GOVERNMENT OF NAKURU;

The Committee considered the draft report on the petition by Sen. Susan Kihika on behalf of Nakuru Residents on the unlawful rounding up, detention, transfer and dumping of street children by the County Government of Nakuru and adopted it after being proposed by Sen. Kwamboka and seconded by Sen. Shiyonga.

MINUTE SEN/SCLSW/239/2020: ANY OTHER BUSINESS AND ADJOURNMENT

There being no other business, the meeting was adjourned at 4.30 pm.



SIGNATURE.....
(CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS)

DATE: 19th October, 2020

MINUTES OF THE 49TH MEETING OF THE STANDING COMMITTEE ON LABOUR & SOCIAL WELFARE HELD ON WEDNESDAY, 14TH OCTOBER, 2020 FROM 9.30 AM AT THE BARAZA 3 CONFERENCE ROOM, SAROVA WHITESANDS BEACH RESORT AND SPA, MOMBASA COUNTY

MEMBERS PRESENT

- | | |
|-------------------------------------|---------------|
| 1. Sen. Sakaja Johnson Arthur, CBS | - Chairperson |
| 2. Sen. Madzayo Stewart Mwachiru | - Member |
| 3. Sen. Mwangi Paul Githiomi | - Member |
| 4. Sen. (Dr.) Milgo Alice Chepkorir | - Member |
| 5. Sen. (Dr.) Mwaura Isaac, CBS | - Member |
| 6. Sen. Makori Beatrice Kwamboka | - Member |
| 7. Sen. Masitsa Naomi Shiyonga | - Member |

ABSENT WITH APOLOGIES

- | | |
|-------------------------------|--------------------|
| 8. Sen. Mwaruma Johnes | - Vice Chairperson |
| 9. Sen. Kihika Susan Wakarura | - Member |

SENATE SECRETARIAT

- | | |
|-----------------------|---|
| 1. Ms. Mwanate Shaban | - Clerk Assistant |
| 2. Ms. Merale Sande | - Senior Research Assistant – Joined via Zoom |
| 3. Mr. Jeremy Chabari | - Legal Counsel |
| 4. Mr. Ian Otieno | - Audio Officer |
| 5. Ms. Sarah Rukwaro | - SAA |

MINUTE SEN/SCLSW/228/2020: PRELIMINARIES

The Chairperson called the meeting to order at 9.56 am followed by a word of prayer.

MINUTE SEN/SCLSW/229/2020: ADOPTION OF THE RETREAT PROGRAM

The retreat program was adopted as the agenda after being proposed by Sen. Kwamboka and seconded by Sen. Madzayo as follows –

AGENDA

1. Preliminaries (Prayers);
2. Adoption of the Agenda;
3. **Consideration of the Report on the Petition by Sen. (Dr.) Michael Mbito on behalf of the KRSRBS Pensioners on the looming collapse of the Kenya Railways Staff Retirement Benefits Scheme; and**
4. Any Other Business & Adjournment.

MINUTE SEN/SCLSW/230/2020: CONSIDERATION OF THE REPORT ON THE PETITION BY SEN. (DR.) MICHAEL MBITO ON BEHALF OF THE KRSRBS PENSIONERS ON THE LOOMING COLLAPSE OF THE KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME;

The Committee considered the draft report of the above report and made the following observations and resolutions as per the petitioners' prayers –

(i) Compels the RBA to implement the item number 67 of the high court ruling in 2012;

Item 67 of the high court ruling in 2012 was as follows (*“It is apparent, however that there are concerns regarding the management of the KRSRBS, and from pleadings before me, such disagreements within the Scheme are apt to have negative impact on the lives and livelihoods of hundreds of pensioners. It is therefore incumbent on the RBA, in exercise of its statutory mandate, to address the concerns of the petitioners in the spirit of the constitution and the wider interests of the pensioners”*)

8. The Committee observed that RBA has been facilitating continuous consultative engagements with all stakeholders of the scheme to ensure information flow and full compliance by the scheme and has committed to continue the facilitation with the next meeting scheduled for 31st October 2020;
9. The Committee recommends that RBA continues with the facilitation and reports to the Committee on a monthly basis on the progress in line with section 5 of the Retirement Benefits Act which provides for the object and functions of the Authority to include—
 - e) regulate and supervise the establishment and management of retirement benefits schemes;
 - f) protect the interests of members and sponsors of retirement benefits sector;
 - g) approve trustees' remuneration approved by members during the annual general meeting after every three years; and
 - h) promote the development of the retirement benefits sector.

(iii) Intervenes and helps the vulnerable petitioners who have not received their pensions for the last 12 months and are now experiencing both financial and psychological torture especially during this pandemic;

10. The Committee has held various meetings with the stakeholders and up to the date of writing this report, the petitioners, through the Committee's efforts have been paid five out of twelve months' arrears.

It is the duty of the Committee to ensure that –

- d) All pension arrears are paid;
- e) The Sponsor implements the pension increments as per the Government's directives and pays all the arrears due on this; and
- f) The Pensioners start receiving timely monthly payments.

Based on the amount that the stakeholders said they were expecting within two weeks from the last meeting, Kenya Railways Corporation as the Sponsors shall, in a months' time, sort out all pension arrears and submit an Investment Policy and Action Plan on the Scheme.

11. The Committee has committed to hold bi-monthly meetings with the relevant stakeholders to monitor the progress of implementation towards making the scheme successful and sustainable.

(iv) Make any other recommendations that it may deem necessary on this matter.

The Committee observes that there are various fiduciary gaps that almost led to the near collapse of the Scheme and resolves –

12. That the Retirement Benefits Authority (RBA) instigates a special forensic audit on the Scheme operations, since its inception with particular reference to –

- e) The World Bank grant funds that were given to the Scheme to kick-start its operations;
- f) The Rent moneys that the Scheme has been receiving and its usage; since its inception;
- g) The debts owed to the Scheme, including debts by Kenya Railways Corporation; and
- h) The status of the land that Rahimtullah towers sits in regards to the assets owed by the Scheme.

The RBA should report to the Committee within 2 months.

13. The RBA should review the structure and the Composition of the Board of Trustees so as to ensure compliance with Regulation 8 (c) (i) of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000; and that any existing or potential conflicts of interest are resolved.

14. The Auditor General shall conduct an independent special audit on the management of the Scheme and report to the Committee within three (3) months; including but not limited to –

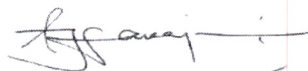
- e) The World Bank grant funds that were given to the Scheme to kick-start its operations;
- f) The Rent moneys that the Scheme has been receiving and its usage; since its inception;
- g) The debts owed to the Scheme, including debts by Kenya Railways Corporation, as claimed by the Petitioners; and
- h) The status of the land that Rahimtullah towers sits in regards to the assets owed by the Scheme.

15. That the RBA ensures that all public retirement pension schemes in the country adhere to the registration requirements under the Retirement Benefits Act.

16. That the National Treasury as the body in charge of Pensions to ensure that Kenya Railways Corporation fulfils its obligations as the Sponsor of the Scheme.

MINUTE SEN/SCLSW/230/2020: ANY OTHER BUSINESS AND ADJOURNMENT

There being no other business, the meeting was adjourned at 12.00 noon to allow the Secretariat time to clean the Reports for adoption.



SIGNATURE.....

(CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS)

DATE: 19th October, 2020

MINUTES OF THE 48TH ONLINE MEETING OF THE STANDING COMMITTEE ON LABOUR & SOCIAL WELFARE HELD ON THURSDAY, 8TH OCTOBER, 2020 FROM 9.00 AM.

MEMBERS PRESENT

- | | |
|-------------------------------------|--------------------|
| 1. Sen. Sakaja Johnson Arthur, CBS | - Chairperson |
| 2. Sen. Mwaruma Johnes | - Vice Chairperson |
| 3. Sen. Mwangi Paul Githiomi | - Member |
| 4. Sen. (Dr.) Milgo Alice Chepkorir | - Member |
| 5. Sen. (Dr.) Mwaura Isaac, CBS | - Member |
| 6. Sen. Makori Beatrice Kwamboka | - Member |
| 7. Sen. Masitsa Naomi Shiyonga | - Member |

ABSENT WITH APOLOGIES

- | | |
|----------------------------------|----------|
| 8. Sen. Madzayo Stewart Mwachiru | - Member |
| 9. Sen. Kihika Susan Wakarura | - Member |

IN ATTENDANCE

1. National Treasury – Hon Nelson Gaichuhie
2. Ministry of Transport –
3. Retirement Benefits Authority – Mr. Nzomo Mutuku
4. Kenya Railways Corporation – Mr. Mathenge
5. Petitioners

SENATE SECRETARIAT

- | | |
|-----------------------|-----------------------------|
| 1. Ms. Mwanate Shaban | - Clerk Assistant |
| 2. Ms. Merale Sande | - Senior Research Assistant |
| 3. Mr. Jeremy Chabari | - Legal Counsel |
| 4. Ms. Fatuma Abdi | - Audio |
| 5. Ms. Sarah Rukwaro | - SAA |

MINUTE SEN/SCLSW/224/2020: PRELIMINARIES

The Chairperson called the meeting to order at 9.13 am followed by a word of prayer. This was followed by introductions by all present.

MINUTE SEN/SCLSW/225/2020: ADOPTION OF THE AGENDA

The agenda of the meeting was adopted after being proposed by Sen. Shiyonga and seconded by Sen. Kwamboka as follows –

AGENDA

1. Preliminaries (Prayers & Introductions);
2. Adoption of the Agenda;
3. **Stakeholders' 2nd Follow-up Meeting on the Petition by Pensioners under the Kenya Railways Retirement Benefits Scheme on the looming collapse of the Scheme due to mismanagement and psychological torture due to non-payment of benefits; and**
4. Any Other Business & Adjournment.

MINUTE SEN/SCLSW/226/2020: STAKEHOLDERS' 2ND FOLLOW-UP MEETING ON THE PETITION BY PENSIONERS UNDER THE KENYA RAILWAYS RETIREMENT BENEFITS SCHEME ON THE LOOMING COLLAPSE OF THE SCHEME DUE TO MISMANAGEMENT AND PSYCHOLOGICAL TORTURE DUE TO NON-PAYMENT OF BENEFITS;

a) Welcoming Remarks by the Chairperson

The Chairperson welcomed everyone and requested the institutions to give a status update on the pension arrears.

Apologies were received from the Cabinet Secretary National Treasury, Cabinet Secretary Ministry of Transport and Infrastructure, and the Managing Director – Kenya Railways.

b) Presentation by Ministry of Transport and the Kenya Railways Corporation

1. Five (5) months arrears have been paid;
2. The Pensioners will be paid six-months arrears up to July 2020 within the next two (2) weeks;
3. The National Treasury will report on the amounts owed to KRC by the Government institutions; and
4. The KRC will factor the pension increases.

c) Presentation by the National Treasury

1. Treasury looked at the budgets of the 2 agencies that owe money to KRC but they had not factored the debts payment in their current budget; and
2. Treasury will request them to factor the debts in the supplementary budget.

d) Presentation from Retirement Benefits Authority

1. The Scheme can comfortably pay for the pensioners and the increments; the challenge is liquidity;
2. The scheme is a closed scheme and therefore does not affect the current workers; and
3. RBA is comfortable as long as the time frames are expedited.

e) Interventions from the Pensioners

1. The Pensioners thanked the Senate Committee for the intervention into the matter;
2. They confirmed that they have received five (5) month arrears;
3. Raised concerns that the Scheme has not paid any money from the rental income for 15 months while it gets 46 million rental income per month;
4. KRC owes the Pensioners Kshs. 400 million rental income from the use of Block B;
5. The World Bank Money of Kshs. 2.5 Billion never reached the Scheme;

6. The amounts to be received in two weeks' time will be adequate to clear the pension arrears;
7. Many things are swept under the carpet, for example the World Bank money of and
8. The scheme has not identified the 30% or 70% that will be liquidated and the rest that will be for development.

f) Members' interventions

1. Is RBA comfortable with the plan?
2. How will the scheme treat new retirees?
3. Where is the money from the rental income?
4. How can the process be expedited?

g) Responses from the Institutions

1. Rental Collection is Kshs. 40 million per month while the payroll is of Kshs. 73 million. There is always a deficit of Kshs 33 million;
2. New management has not been able to dispose any property until recently in June, 2020;
3. The KRC does not owe the Scheme any money;
4. KRC is administratively under Treasury, and the focus is to clear arrears as they re-organize.
5. Due process was followed in the disposal of Railways club and KENHA is supposed to compensate the tenants.
6. KENHA has confirmed availability of funds on the Kshs. 5 Billion and will have a joint valuation with NLC.
7. The Treasury is waiting for the conclusion so that they can release the Kshs 5 Billion

h) Way Forward

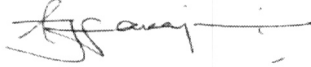
1. RBA should be more keen on its job as a regulator to ensure the success of the Schemes; and
2. The Sponsors of the Scheme should submit a financial plan going forward in terms of asset mix and the 70-30 liquidation and also the sustainability of the Scheme.

MINUTE SEN/SCLSW/227/2020: ANY OTHER BUSINESS AND ADJOURNMENT

1. A meeting should be scheduled on the implementation of the County Governments Retirement Act, 2019 with the National Treasury, RBA and the County Governments;
2. An official status of schemes should be gotten from RBA;
3. Senate may have to allocate conditional grants in the CARA for payment of pensions; and

4. A special audit on all pension schemes may be required from the Auditor General.

There being no other business, the meeting was adjourned at 10.51 am.



SIGNATURE.....

(CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS)

DATE: 19th October, 2020

MINUTES OF THE 35TH ONLINE MEETING OF THE STANDING COMMITTEE ON LABOUR & SOCIAL WELFARE HELD ON MONDAY, 14TH SEPTEMBER, 2020 FROM 10.00 AM.

MEMBERS PRESENT

- | | |
|-------------------------------------|--------------------------------|
| 1. Sen. Mwaruma Johnes | - Vice Chairperson (Ag. Chair) |
| 2. Sen. Mwangi Paul Githiomi | - Member |
| 3. Sen. (Dr.) Milgo Alice Chepkorir | - Member |
| 4. Sen. Masitsa Naomi Shiyonga | - Member |
| 5. Sen. (Dr.) Mwaura Isaac, CBS | - Member |
| 6. Sen. Makori Beatrice Kwamboka | - Member |

ABSENT WITH APOLOGIES

- | | |
|------------------------------------|---------------|
| 7. Sen. Sakaja Johnson Arthur, CBS | - Chairperson |
| 8. Sen. Madzayo Stewart Mwachiru | - Member |
| 9. Sen. Kihika Susan Wakarura | - Member |

SENATE SECRETARIAT

- | | |
|-----------------------|---------------------------|
| 1. Ms. Mwanate Shaban | - Clerk Assistant |
| 2. Ms. Merale Sande | - Senior Research Officer |
| 3. Mr. Jeremy Chabari | - Legal Counsel |
| 4. Ms. Sarah Rukwaro | - SAA |
| 5. Ms. Fatuma Abdi | - Audio |

IN ATTENDANCE

1. National Treasury – Hon Nelson Gaichuhie
2. Ministry of Transport – Hon Chris Obure
3. Retirement Benefits Authority – Mr. Nzomo Mutuku
4. Kenya Railways Corporation – Mr. Mathenge
5. Petitioners

MINUTE SEN/SCLSW/171/2020: PRELIMINARIES

The Chairperson called the meeting to order at 10.15 am followed by a word of prayer. This was followed by introductions by all present.

MINUTE SEN/SCLSW/172/2020: ADOPTION OF THE AGENDA

The agenda of the meeting was adopted after being proposed by Sen. Kwamboka and seconded by Sen. Shiyonga as follows –

AGENDA

1. Preliminaries (Prayers & Introductions);
2. Adoption of the Agenda;
3. **Stakeholders' Follow-up Meeting on the Petition by Pensioners under the Kenya Railways Retirement Benefits Scheme on the looming collapse of the Scheme due to mismanagement and psychological torture due to non-payment of benefits; and**
4. Any Other Business & Adjournment.

MINUTE SEN/SCLSW/173/2020: STAKEHOLDERS' FOLLOW-UP MEETING ON THE PETITION BY PENSIONERS UNDER THE KENYA RAILWAYS RETIREMENT BENEFITS SCHEME ON THE LOOMING COLLAPSE OF THE SCHEME DUE TO MISMANAGEMENT AND PSYCHOLOGICAL TORTURE DUE TO NON-PAYMENT OF BENEFITS;

a) Presentation by the Chief Administrative Secretary, Hon. Nelson Gaichuhie, the National Treasury

Hon. Gaichuhie informed the Committee that Treasury had approved the request for a corporate guarantee for Kshs. 850 Million for the Kenya Railways Corporation. Treasury had also written to the institution that owe the Kenya Railways Staff Retirement Benefits Scheme money, requesting them to submit a repayment plan.

b) Presentation by the Kenya Railways Corporation

Mr. Mathenge, the General Manager, Human Resources of the Kenya Railways Corporation stated the following –

1. The Kenya Commercial Bank had released Kshs. 525 Million and the first charge was a previous loan that the Corporation had with the bank;
2. They paid the pensioners three-months arrears with the remaining amount;
3. The petitioners were to be paid two – months arrears before close of business on 14th September, 2020 making the payments total of five months;
4. The Corporation is waiting for the release of the balance of the loan so that it may make more payments to the Pensioners;
5. The Corporation also has a recovery plan of the arrears to ensure sustainability; this include a balance of 79 Million from sale of property that will also be used to clear the arrears;
6. The Corporation is discussing an arrangement with Kenya Highways Authority (KENHA) to acquire some of the KRC land at Railways Club at a cost of 21B but will pay 5 billion upfront.

c) Presentation by the Petitioners

1. Mr. Rodgers Washika who spoke on behalf of the petitioners started by thanking the Committee for looking in to the matter and stated that they are grateful that they have received 3 months' pension arrears payments;
2. He also stated that they had received a bulk text message promising them that 2 months' payment will be credited in their accounts by Monday 14th September, 2020.
3. He added that the pensioners expected at least 5 months' payment upfront.

d) Members interventions

1. Whether they used the whole loan amount from KCB to pay the pensioners; and if not why were the funds diverted?

2. Whether the Sponsors have implemented the Government's increase of 2012 and 2017?

e) Response by KRC

1. The Bank facility was to fund the deficit experienced by the Scheme and therefore, the Bank deducted its old facility before disbursing the money and therefore the balance was what was used to pay the pensioners;
2. The recent executive order that has merged the Kenya Railways Corporation, Kenya Ports Authority and other infrastructural entities has changed the way of doing business; and
3. The Trustees have already started factoring the 3% and 5% increase of 2012 and 2017.

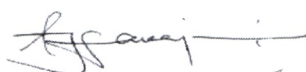
f) Way Forward

The Senate and the Institutions to hold another consultative session for the institutions to report on the following –

1. Payment of the pension arrears;
2. Progress on implementation of factoring in the 3% increase of 2012 and the 5% increase of 2017; and
3. Sustainability Plan for the Scheme.

MINUTE SEN/SCLSW/174/2020: ANY OTHER BUSINESS AND ADJOURNMENT

There being no other business and the meeting was adjourned at 11.07 am.



SIGNATURE.....

(CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS)

DATE: 4th October, 2020

MINUTES OF THE 28TH ONLINE MEETING OF THE STANDING COMMITTEE ON LABOUR & SOCIAL WELFARE HELD ON MONDAY, 11TH AUGUST, 2020 FROM 10.00 AM.

MEMBERS PRESENT

- | | |
|-------------------------------------|----------------------|
| 1. Sen. (Dr.) Milgo Alice Chepkorir | - Member (Ag. Chair) |
| 2. Sen. Masitsa Naomi Shiyonga | - Member |
| 3. Sen. (Dr.) Mwaura Isaac, CBS | - Member |
| 4. Sen. Mwangi Paul Githiomi | - Member |

ABSENT WITH APOLOGIES

- | | |
|------------------------------------|---------------------------|
| 5. Sen. Sakaja Johnson Arthur, CBS | - Chairperson |
| 6. Sen. Mwaruma Johnes | - Vice Chairperson |
| 7. Sen. Madzayo Stewart Mwachiru | - Member |
| 8. Sen. Kihika Susan Wakarura | - Member |
| 9. Sen. Makori Beatrice Kwamboka | - Member |

SENATE SECRETARIAT

- | | |
|-----------------------|---------------------------|
| 1. Ms. Mwanate Shaban | - Clerk Assistant |
| 2. Ms. Merale Sande | - Senior Research Officer |
| 3. Mr. Jeremy Chabari | - Legal Counsel |
| 4. Mr. Reuben Kimosop | - SAA |
| 5. Ms. Fatma Abdi | - Audio Officer |

IN ATTENDANCE

1. Officials from the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works led by the Chief Administrative Secretary, Hon. Chris Obure.
2. Officials from the National Treasury led by the Chief Administrative Secretary Hon. Nelson Gaichuhie.
3. Officials from Retirement Benefits Authority led by the CEO, Mr. Nzomo Mutuku.
4. Officials from the Kenya Railways Corporation led by the Managing Director, Mr. Philip Mainga.
5. Mr. Rodgers Washika – Lead petitioner
6. Mr. Kenneth Boinet – Petitioner
7. Mr. Gordon Ochieng - Petitioner

MINUTE SEN/SCLSW/138/2020: PRELIMINARIES

The Chairperson called the meeting to order at 2.55 pm followed by a word of prayer. This was followed by introductions from all present.

MINUTE SEN/SCLSW/139/2020: ADOPTION OF THE AGENDA

The agenda of the meeting was adopted after being proposed by Sen. Mwaura and seconded by Sen. Githiomi as follows –

AGENDA

1. Preliminaries Prayers;
2. Adoption of the Agenda;
3. **Stakeholder Meeting on the Petition by Pensioners under the Kenya Railways Retirement Benefits Scheme on the looming collapse of the Scheme due to mismanagement and psychological torture due to non-payment of benefits; and**
4. Any Other Business & Adjournment.

MINUTE SEN/SCLSW/140/2020: STAKEHOLDER MEETING ON THE PETITION BY PENSIONERS UNDER THE KENYA RAILWAYS RETIREMENT BENEFITS SCHEME ON THE LOOMING COLLAPSE OF THE SCHEME DUE TO MISMANAGEMENT AND PSYCHOLOGICAL TORTURE DUE TO NON-PAYMENT OF BENEFITS;

a) Presentation by the Ministry of National Treasury and the Retirement Benefits Authority

Mr. Nzomo Mutuku started by thanking the Committee and stated that KRSRBS was registered as retirement benefits scheme in 2006 in accordance with the provisions of the Retirement Benefits Act No. 3 of 1997 with the main purpose of payment of pensions and other retirement benefits to employees of Kenya Railways Corporation (KRC) and provision of relief to dependents in case of the death of a member.

He stated that the pension benefit was previously provided under a non-contributory, pay as you go scheme provided in accordance to the Pension Regulations issued under the Kenya Railways Corporation Act. Upon restructuring of KRC in 2006 the unfunded pension liability was approximately Kshs.14Billion. This liability was transferred to the newly established pension scheme and backed by illiquid assets mainly land and buildings through Legal Notice No. 169 of 7th September 2006.

He also stated that last Audited financial statement of the scheme as 30th June 2019 reports total assets of Kshs 31.1 Billion and estimated Acturial pension liability of 10.2Billion.

He summarized the information concerning the scheme as per the table below -

Audited Accounts as at 30 th June 2019	Total Assets Kshs.31.1 Billion	
Actuarial Valuation report as at 30 th June 2017	Total Assets Kshs.24.3 Billion and Total liabilities Kshs 10.22 Billion	Compliant. The law requires schemes to be 100% funded. The scheme is overfunded; however, the assets are illiquid.
	Funding level - 238%	
	Surplus - Kshs.14.08 Billion	

Scheme Investments	Immovable property value as at 31 st March 2020 investment report is Kshs. 33.3Billion equivalent to 99.9% of the overall scheme assets	Non- compliant - The law stipulates the maximum limit to be invested in immovable property as 30%
Total membership	According to the audited accounts for the period ended 30 th June 2019, the scheme has 8,778 members. 7,780 are pensioners and dependants and 998 are deferred pensioners	

He outlined the key challenges of KRSRBS as follows -

- a) Pension payment was in arrears with pensions remaining outstanding for eleven (11) months, resulting in stress and suffering for pensioners who rely on payment of pension to secure their livelihood.
- b) Arising from the unique nature of the scheme presented when it was established, the scheme holds 99.9% of its assets in immovable property. This is against the requirement for schemes to hold a maximum of 30% of the assets in immovable property. As a result, the scheme faced liquidity challenges that has led to delays in payment of pensions.
- c) The scheme is a closed to new members and as earlier indicated, it does not receive any contributions. The main cash flow items of the scheme are:
 - Investing activities: Investment income primarily from rental income and proceeds on disposal of property assets. The monthly rental income is insufficient to meet monthly pension obligations and other operational expenses.
 - Operating activities: Payment of pension, gratuities and administrative expenses
 - Financing activities: Loan portfolio to cover cash flow shortfalls
- d) Governance issues and complaints: There have been several complaints from the pensioners with respect to management of the scheme including allegations of corruption, abuse of office and delays in payment of monthly pension

He added that the Authority had consistently and through engagement with the Sponsor, Trustees and pensioners addressed issues relating to management of the scheme in line with the provisions of the Retirement Benefits Act and the Regulations. Some specific interventions by the Authority included:

- i) An onsite inspection carried out on the scheme in 2011 in accordance with the provisions of Sections 41 to 43 of the Retirement Benefits Act. The inspection revealed some irregularities in management of the scheme and conflict of interest.

As a result, the Authority recommended various supervisory interventions including the appointment of an independent Corporate Trustee to manage the affairs of the scheme as opposed to individual Trustees. The appointment of an independent Corporate Trustee was aimed at enhancing good governance in the management of the scheme.

The recommendations culminated in the appointment of Corporate & Pension Trust Services Ltd. as Trustees of the scheme by KRC and the removal of individual Trustees from office. The Corporate Trustee served until July 2019.

- ii) Pursuant to the provisions of Section 5B of the Retirement Benefits Act, in January 2019, the Authority appointed Ernst & Young LLP (EY) to undertake a forensic investigation into the operations of KRSRBS for the period July 2013 to June 2018. This was a result of build-up of unpaid pension and also numerous complaints from pensioners on the governance of the Scheme.

The report on the investigation was received and reviewed by the Authority. It identified some shortcomings in management of the scheme. The Current board of Trustees are working towards implementing the recommendations of the report and addressing the shortcomings.

He stated that the key intervention to saving the KRSRBS is the creation of liquidity to enable the scheme meet its obligations and also to comply with the provisions of the Retirement Benefits Act. The Authority is aware of various efforts to dispose of some of the scheme properties and reduce the exposure in property to comply with the provisions of the Investment Guidelines but noted that the Trustees face various challenges in disposal of properties including court injunctions for sale of these properties following complaints by pensioners, encumbrances on some of the properties impeding their sale, failure to attract suitable bids and lack of title deeds for some of the properties.

He concluded by advising the following -

- a) Immediate injection of capital into the scheme by KRC as the sponsor of the scheme to enable payment of outstanding pensions as Trustees finalise on sale of properties already advertised;
- b) Cash buy back of some strategic properties by KRC or the Government. The nature of some of the scheme's properties make it difficult to dispose these properties. Government intervention could come in handy through buy back of some of the properties vested in the scheme which could contribute towards the Government agenda of affordable housing as well as the mass rapid transport system. These properties include Land Mawe, Makongeni and Muthurwa estates;
- c) Non-cash considerations for some of the properties of the scheme for example exchange of strategic properties with customized government securities/financial instruments;
- d) Lease of some of the scheme's properties to a suitable and strategic investor; and

- e) With respect to allegations of corruption and abuse of office, the Authority does not have the technical capacity to investigate some of these allegations and supports investigations by independent bodies such as the Directorate on Criminal Investigations and the Ethics and Anti-Corruption Commission on KRSRBS some which are already ongoing.

He finally called for enhanced dialogue between the pensioners and the Trustees as opposed to court processes which always resulting to the Courts to put injunctions against sale of property.

b) Presentation by Ministry of Transport and Kenya Railways Corporation

The presentation was made by the Chief Administrative Secretary, Hon. Chris Obure and he stated as follows -

1. Following the concessioning of railways operations to a private entity, (Rift Valley Railways (RVR)), in 2006, Kenya Railways restructured its operations, which culminated in the transfer of part of the workforce to the Concessionaire, whilst the remaining employees were offered the option of early retirement.
2. As part of that restructuring, KRC established the Kenya Railways Staff Retirement Benefit Scheme (Scheme) to cater for its pensioners and transferred assets of equal value or more to the Scheme. The assets included land and property transferred through a legal notice of September, 2006.
3. The Scheme was registered with the Retirement Benefits Authority in May 4, 2006, under the Retirement Benefits Authority Act 1997. The main purpose of the Scheme was to provide pension and other retirement benefits to the employees of the Sponsor (KRC) upon their retirement from the Sponsor's service.
4. On commencement, the scheme had 9,000 pensioners and about 2,500 deferred pensioners.
5. Under Article Seven (7) of the Trust Deed and Rules, Kenya Railways Corporation is required to fund the Scheme, and under Article Eleven (11), it is required to appoint two thirds (2/3) of the trustees.
6. The initial Board of Trustees was a natural board comprising of Sponsor nominated members. Over time, and as the Scheme took shape, the Board was constituted in accordance with the Trust Deed and Regulations (TD&R) where the Sponsor and Pensioners nominated their representatives. The Sponsor appointed its employees and other members from the public and government institutions (Treasury and Ministry of Transport).
7. In 2011, following complains to RBA by pensioners on the management of scheme assets, RBA initiated an inspection of the Scheme. After the release of the inspection report, all the trustees of the Scheme resigned. Owing to

numerous court cases filed by the pensioners barring the election of new pensioners' nominated trustees, the Board could not be fully constituted, thus forcing the Sponsor to invoke the TD&R and, in 2012, appoint a Corporate Trustee, M/s. Corporate and Pension Trust Services Ltd., with the mandate to turn around the performance of the scheme. However, this was not achieved and on July 2019, Kenya Railways terminated the contract to revert natural trustee leadership.

8. The Scheme is governed by the RBA Act, 1997 and the establishing instrument, the Trust Deed and Rules, which provide the guidelines for operations of the Scheme. The Scheme has a Board of Trustees (natural and Corporate) which is vested with the responsibility of running of the scheme.
9. The Trustees are required to ensure strict adherence to the RBA rules as well as the Trust Deed and Rules (TD&R)
10. It is the obligation of the trustees to ensure financial sustainability and payment of benefits and general administration of the Scheme.
11. By 2006, Kenya Railways had a pension liability of Kshs. 12.6 billion. This was however not funded hence the corporation, after obtaining approval from GoK, transferred assets of Kshs 12.4 billion to the Scheme. This included land and buildings.
12. At the time of establishment, it was envisaged that the Scheme would liquidate the assets transferred to it to achieve the desired ratio. To date, this has remained the biggest challenge to the Scheme. The Scheme assets comprise of 99.9% land and property against the RBA requirement of 70:30 cash or cash equivalents to property.
 - i. Litigation by members of the Scheme who have filed numerous cases to stop disposal of properties and election of Pensioner nominated Trustees.
 - ii. Refusal by members (Pensioners) to pay rent on scheme owned houses that they occupy.
 - iii. The administration of the Scheme is affected by lack of competent staff. The Corporate Trustee failed to restructure the Scheme and the problem has persisted.
 - iv. Non performing debtors among them Government agencies who owe the Scheme over Kshs. 300M.
 - v. Effects of investigations by State Agencies on persons who have entered into sale transactions with the Scheme regarding its properties.
13. The Scheme relies on rent collection and sale of assets to sustain its cash flows. The expected collections from the rental income is approximately Kshs. 46,399,857.00 per month.
14. The Scheme currently has active pensioners totaling 7,776 with a payroll of Kshs. 73,456,123. On a monthly basis, the scheme has a deficit of Kshs 27,000,000.

15. As a result, the Scheme is in pension arrears of more than ten months. To bridge the deficit gap, the scheme has to dispose its properties or upgrade the existing properties to fetch higher rental returns.

16. The Current Board of Trustees have embarked on various strategies to stabilize the cash flow status at the scheme. One of these options is the disposal of assets.

In a Meeting held on 25th October, 2019 the Board of Trustees resolved to sell the following properties:

- i. L.R 209/6506 & 7 -Matumbato, Nairobi
- ii. L.R 209/378/5 - Hurlingham, Nairobi
- iii. L.R XXVI/941 - Chambilo, Mombasa (XXVI/237)
- iv. L.R 1/420 -Kindaruma Road, Nairobi
- v. L.R 1/437 -Kindaruma Road, Nairobi
- vi. L.R. No. 209/12401 Goodshed area.
- vii. LR No. 209/19382 Ngara area.

17. The Trustees advertised the following properties for sale as per the Public Procurement Act:

Sno	Property	Value (Kshs)	Status
1	L.R.No. 1/420 Kindaruma Road, off Ngong Road	212M	Sold. The balance of the proceeds are being held in an escrow account as one of the conditions for the bank loan.
2	L.R No. 209/378/5 Hurlingham	135M	To be re-advertised for sell.
3	L.R. No. 209/6507 Matumbato (part)	498M	The purchaser paid a deposit of 144M, the balance of the purchase price of Kshs. 353m cannot be paid since the sale was stopped by EACC in April 2020, pending the conclusion of ongoing investigations. Scheme officials have recorded statements and submitted relevant documents to EACC. The Scheme has appealed to EACC to allow the sale to proceed so as to address the Scheme's urgent cash flow requirements.
4	L.R No. 209/12401 Goodshed are Nairobi	2B	This property is being sold back to Kenya Railways Corporation.
5	L.R XXVI/941 - Chambilo, Mombasa (XXVI/237)	300m	After the advertisement for sale, the tenants got a court injunction to stop the sale.
6	L.R 209/19382 Ngara estate, Nairobi	7.6B	The Scheme did not receive suitable offers after advertising this property.

			The property is proposed for re-advertisement (within the next 7 days) for outright sale or Joint Venture, whichever is profitable.
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18. On 12th March 2020, the Scheme applied for a banking facility of 850M at the KCB Bank in order to meet its current debt obligations and other obligations to the pensioners. The Bank considered the application favorably and on 9th June 2020, the Scheme received a Letter of Offer from the Bank to grant the facility. Part of the loan will be used to repay an existing bank debt of Kshs. 225,628,817.99, and the rest will be used to pay pension arrears.
19. The Letter of Offer has several conditions and new securities required before advancing the loan. One of these pre-conditions is a Corporate Guarantee of Kshs. 850M to be executed by Kenya Railways Corporation together with a supporting Board Resolution. Kenya Railways is also expected to execute the Letter of Offer to signify acceptance. The Board of Kenya Railways approved the execution of the corporate guarantee subject to approval by National Treasury. The request to approve the corporate guarantee was submitted to NT in June 2020.
20. The scheme is owed by various entities and Government institutions on land sales as follows:

Sno.	Description	Amount (Kshs.)	Status
1	KURA The Kenya Urban Roads Authority acquired land from the Scheme for construction of a proposed Nairobi Viaduct and Road development project in LR No. 209/6502/R Muthurwa, measuring approximately 5.4 acres.	227,508,348.00 for the land.	All the required documents have been submitted to NT to progress payment.
2	The Ministry of Local Government purchased a portion of land measuring 0.6665 hectare to be excised from LR. NO. 209/19433/1 at a valuation of Kshs. 325M. The GOK paid 227M leaving a balance of Kshs. 105M. The Local Government took over possession of the land. The debt is not disputed and will be paid as soon as all documents are availed to NT.	105M	All the required documents have been submitted to NT to process payment.

Sno.	Description	Amount (Kshs.)	Status
3	Mahidi investments Ltd. Sale of Valley Road property	79M	The property is in the process of being discharged by KR so that the title can be released to the buyer.

21. The Scheme has been in discussions with the GOK through MOTIHUDPW, and the State Department of Housing and Urban Development, on the possibility of GOK investing in the vast scheme properties. The proposal is as follows:

Properties proposed for GOK intervention.					
No	LR No	Location	Size Acres	Value	Proposal
1	209/6829	Makongeni Estate, Nairobi	141	5.8B	To be redeveloped under the affordable housing program.
2	209/6502 (Part)	Muthurwa Estate, Nairobi	35	2.4B	To be leased out to the GOK for the Railway City Project.
4	209/12088	Land Mawe Along factory street.	20.9	4.8B	To be leased to GOK for Railway City Development.

The Scheme has requested the GOK for financial support for the rolling out of the proposed programs.

22. The current and former Board of Trustees have encountered several challenges when disposing off properties in order to comply with the RBA Act on investment mix. The Act requires the Scheme to retain only 30% of the total fund assets in form of real properties versus the current position where 99 % of the assets are in the form of immovable properties. The following are some of the challenges that have been experienced:

- i) The demand for property has declined in recent years due to the deteriorating economic environment. This has been complicated further by the Covid-19 pandemic which has further depressed demand for property.
- ii) Continued negative publicity on the status of the Scheme hence making willing investors hesitate from buying properties from the Scheme. The negative publicity, further exacerbated by reports on EACC investigations into the sale of two portions of LR NO: 209/6507 Nairobi - Matumbato to Primix Enterprises Ltd., continues to hamper the disposal of properties.

- iii) Emotional attachment by the pensioners to the properties. These pensioners were housed free of charge by KRC and majority are current tenants of the Scheme houses. Some pensioners have filed a case ELC Petition No. 131 of 2020 seeking to stop disposal of Scheme properties.
- iv) Interference from local leaders who incite tenants not to pay rent.
- v) Court injunctions stopping the Scheme from interfering with non-rent paying tenants which has led to huge rent arrears.
- vi) In April 2020, the Scheme received a letter from the EACC stopping the sale of L.R 209/6507 -Matumbato, Nairobi which is about 3.2 acres, pending investigations. EACC also stopped the ongoing subdivision and advertisement for sale of the property.
- vii) The outbreak of Covid-19 has severely affected the Scheme's rental income further exacerbating the Schemes dire financial condition.
- viii) Court injunctions - Land Reference Number Mombasa/Block XXVI/941 Measuring 2.67 acres located along Chambilo Road, Kizingo area has a court injunction that prevents the sale of the property.
- ix) Since 2012, various scheme properties had been held up in court injunctions in civil suit no. 294/2012 which prevented the sale or redevelopment of the properties. The said properties are:
 - i. L.R. No. 209/6829, Makongeni
 - ii. L.R. No. 209/11953, Nairobi Railway Club
 - iii. L.R. No. 1/437, Kindaruma Road, Nairobi

The Trustees managed to negotiate an out of court settlement and a consent to release the properties was signed on 3rd July, 2020. The properties are now available for outright sale, joint venture or redevelopment under the Railway City project.

c) Interventions by Petitioners

1. Petitioners wanted to know what happened to the Funds that the World Bank gave to the Scheme?
2. Petitioners also raised concerns that some assets transferred to the scheme were non-existence;
3. Petitioners also noted that some properties amounting to 13.4 Billion have already been sold but pensioners had not been paid.

d) Committee observations and interventions

1. Members noted that KRC may have transferred properties that the Corporation itself knows that they have problems;
2. Committing government by way of more loans to pay petitioners may not be the best way to solve the problems;
3. Though the Retirement Benefits Authority requires that pension schemes maintain a ratio of 70:30 cash equivalent to property, the Kenya Railways

Staff Retirement Pension Scheme assets comprise 99.9% land and property. There was therefore need for the Kenya Railway pension scheme to liquidate some of its assets to achieve the desired ratio;

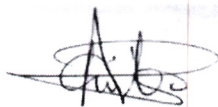
4. The scheme currently totally relies on sale of its properties and on rent collection from its properties to finance pension payments and other operational costs, leading to the accumulation of arrears to pensioners of over 11 Months;
5. Public institutions including government agencies owe the scheme substantial amounts of money;
6. The scheme has been unable to complete sale agreements in respect of properties earmarked for sale court cases; and
7. There have been instances where state investigative agencies have stopped sale transactions pending conclusion of investigations.

The committee therefore directed the Ministry of National Treasury, the Ministry of Transport, Infrastructure, Housing and Urban Development, and Public Works, the Management of Kenya Railways Corporation and the Retirement Benefits Authority to carry out urgent consultations among themselves and present a comprehensive report within two weeks on how it would address the above concerns. The report should also detail –

1. The actions taken to compel all the tenants to pay outstanding arrears and thereafter to pay promptly every month;
2. The measures taken to ensure that sale agreements are completed as intended;
3. The measures taken (with the National Treasury taking the lead) to ensure public institutions and government agencies discharge their debt obligations to the pension scheme;
4. Report on Agenda 4 plans on the Scheme's properties;
5. Proof of consultations between the institutions and the state investigative agencies including Ethics and Anti-Corruption Commission to fast track their investigations to allow sale of properties affected to come to fruition; and
6. Strategy on how Kenya Railways Corporation is going to pay the pensioners all arrears, and plan for sound management to guarantee sustainability of the pension Scheme.

SEN/SCLSW/141/2020: ANY OTHER BUSINESS AND ADJOURNMENT

There being no other business, the Chairperson thanked all present, and the meeting was adjourned at 11.16 am.



SIGNATURE.....

(CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS)

DATE: 3rd September. 2020

MINUTES OF THE 27TH ONLINE MEETING OF THE STANDING COMMITTEE ON LABOUR & SOCIAL WELFARE HELD ON THURSDAY, 6TH AUGUST, 2020 FROM 2.30 PM.

MEMBERS PRESENT

1. Sen. (Dr.) Milgo Alice Chepkorir - **Member (Ag. Chair)**
2. Sen. Masitsa Naomi Shiyonga - Member
3. Sen. (Dr.) Mwaura Isaac, CBS - Member
4. Sen. Mwangi Paul Githiomi - Member

ABSENT WITH APOLOGIES

5. Sen. Sakaja Johnson Arthur, CBS - **Chairperson**
6. Sen. Mwaruma Johnes - **Vice Chairperson**
7. Sen. Madzayo Stewart Mwachiru - Member
8. Sen. Kihika Susan Wakarura - Member
9. Sen. Makori Beatrice Kwamboka - Member

SENATE SECRETARIAT

1. Ms. Mwanate Shaban - Clerk Assistant
2. Ms. Merale Sande - Senior Research Officer
3. Mr. Jeremy Chabari - Legal Counsel
4. Mr. Reuben Kimosop - SAA
5. Ms. Fatma Abdi - Audio Officer

IN ATTENDANCE

1. Sen. (Dr.) Michael Mbito
2. Mazera Junior - Sen. Madzayo's office
3. Mr. Rodgers Washika – Petitioner
4. Mr. Kenneth Boinet – Petitioner
5. Mr. Gordon Ochieng - Petitioner

MINUTE SEN/SCLSW/134/2020: PRELIMINARIES

The Chairperson called the meeting to order at 2.55 pm followed by a word of prayer. This was followed by introductions from all present.

MINUTE SEN/SCLSW/135/2020: ADOPTION OF THE AGENDA

The agenda of the meeting was adopted after being proposed by Sen. Mwaura and seconded by Sen. Githiomi as follows –

AGENDA

5. Preliminaries (Prayers & Introductions);
6. Adoption of the Agenda;
7. **Meeting with Petitioners on the Petition by Pensioners under the Kenya Railways Retirement Benefits Scheme on the looming collapse of the Scheme due to mismanagement and psychological torture due to non-payment of benefits; and**
8. Any Other Business & Adjournment.

MINUTE SEN/SCLSW/136/2020: MEETING WITH PETITIONERS ON THE PETITION BY PENSIONERS UNDER THE KENYA RAILWAYS RETIREMENT BENEFITS SCHEME ON THE LOOMING COLLAPSE OF THE SCHEME DUE TO MISMANAGEMENT AND PSYCHOLOGICAL TORTURE DUE TO NON-PAYMENT OF BENEFITS;

a) Presentation by the Petitioners

Mr. Rodgers Washika and Mr. Kenneth Boinett who spoke on behalf of the petitioners presented as follows –

1. KRSRBS was established to provide for the pension benefits of then over 12,000 retired and retrenched employees of the conceded Kenya Railways following creation of the Rift Valley Railways Consortium (RVR), in the year 2006. In so doing, the scheme was established under the provisions of the Retirement Benefits Scheme Act, 1997 to manage the assets transferred by Government of Kenya (Kenya Railways) under an irrevocable trust pursuant to Legal Notice No. 169 of 7th November 2006 with a value of Ksh 12.4 billion;
2. While the Trust Deed and Rules (TDR) is the instrument which legitimizes the operation of KRSRBS, as currently constituted, its intentions were that the entity be operated as a Defined Contributory Benefits Scheme where the employees of the new KRC, RVR & Railway Training School including any associate member were to contribute monthly at a rate of 23% of the monthly salary, as was provided under provisions of Section D of the Concession Agreement;
3. However, the foregoing arrangement failed to materialize and KRSRBS became a closed scheme by default with the KRC, the sponsor failing to make contributions to the scheme. The implication being that KRC lacks the ‘locus standi’ to interfere with the affairs of KRSRBS in line with section 8, 30 and 31 of the TDR provisions. The petitioners further argue that despite the status of the scheme, empirical evidence presented in the Ernest and Young forensic investigation report indicate that the Sponsor, KRC has continued to irregularly admit members (staff and their dependants), to the pension payroll, thereby inflating the pension payroll;
4. As regards governance, the Sponsor, KRC has appointed employees of KRC to the KRSRBS Board of Trustees, almost like an extension of KRC, a situation that has resulted in incidences of conflict of interest, lack of professional independence including fraudulent financial statements.

The present KRSRBS Board of Trustees comprises of the following KRC officials –

No.	Name	Position at KRC	Position at KRSRBS
1.	Ms. Hellen Karu	Director, KRC Board	Trustee Board Member and Chairlady
2.	Mr. Kimanthi Maingi	Director, KRC Board	Trustee Board Member

3.	Mr. Philip Mainga	MD, KRC	Trustee Board Member
4.	Mr. Asava Kadima	General Manager, (HR) KRC	Trustee, Board Member
5.	Ms. Jacqueline Bogha	General Manager (F), KRC	Trustee Board Member
6.	Mr. Amoke	Estates Officer, KRC	Trustee Board Member
7.	Ms. Victoria Mulwa	Legal Officer, KRC	Acting Chief Executive Officer

5. The foregoing contravenes section 6 & 7 of the State Corporations Act; provisions of the Public Ethics Act; the diversity requirement under the Public Service Values & Principles, Act, 2015 and Article 232 of the Kenya Constitution, which demands parity in the fair treatment of on employment matter within the public service. The petitioners also claim that following the establishment of KRSRBS under the transitional and supersession clauses in line with sections 57 and 58 of the RBA Act, the KRC pensions department was given 3 years' window period to wind up its affairs which, ideally, expired in 2009;
6. Clarity is required as to whether the Chief Executive Officer, RBA, Mr. Nzomo Mutuku sought clearance before giving the Deed of appointments as required from him under the Retirement Benefits Act, 2007;
7. The petitioners also mistrust the intended contributions of KRC towards the financial sustainability of the scheme given the aforementioned arrangement. The reason for these is that the employees of KRC, RVR & Railway Training Institute (RTI) have subscribed to an alternative provident fund but continue to run the affairs of the scheme in total exclusion of the bona fide members. According to the petitioners, the arrangement is not beneficial to the KRSRBS as the same officials represent a different opaque entity named Kenrail Trust where the former CEO of the KRSRBS was appointed the CEO following their resignation from KRSRBS;
8. The legal effect calls for a new dispensation at KRSRBS that entails the appointment of an interim committee incorporating the members of the scheme to undertake the holistic review of the KRSRBS systems and processes and subsequently present its findings and recommendations to an AGM. The petitioners argue that this will be in line with the enabling provisions, rule 28 of the TDR and section 45 (2) (c) of the RBA Act. The interim committee officials shall in conjunction with interim administrator expected to undertake the satisfactory exercise of the critical activities outlined at section 45(5)(a to f) of the Act within the prescribed 12 months period, as specified at section 45 (3) of the Act and as warranted by the sequence of events at the Scheme;
9. In terms of KRSRBS assets portfolio, the provisions of Section 21 of the Trust Deed Rules (TDR) seeks to protect the KRSRBS assets against financial loss and the nominated trustees are duty bound to ensure that the assets are well managed and disposed, to the advantage of the members;

10. Section 21 of the TDR thus states *“The trustees may take such steps as they deem appropriate to protect the scheme and the individual assets comprising the same against any manner of insurance risk or financial loss which may arise out of the negligence or default of the schemes trustees, officers, administrators, manager or custodian or other professional advisors either by way of guarantee provided by the sponsor or by way of such insurance an in such an amount the trustee shall determine”*.
11. KRSRBS, having received 100 percent immovable assets, was cash strapped. To forestall the liquidity setbacks and enable the settlement of the accrued pension liabilities for the retired and retrenched staff and further commence the renovation of existing housing assets to facilitate market rental, the World Bank supported KRSRBS to a tune of US\$12.60 million i.e. KES 1.26 billion at the exchange rate of Ksh 104 per US dollar. However, since its inception, KRSRBS has remained in the financially unstable;
12. The foregoing situation has been exacerbated by the inability to access certain assets to date despite being listed as transferred to KRSRBS. They include the following -
- a) part of LR No. 209/6525 comprising of 8.69 acres, only 2.5 acres was available to KRSRBS with the balance of 6.19 acres being held by the proprietors of Rahimtulla Tower which ironically hosts the offices of the Retirement Benefits Authority;
 - b) LR No. 209/12178 consisting of 8.77 acres remains inaccessible to date and is held by the family of late Joseph Letting with nineteen (19) built apartments; and
 - c) LR No. 209/12401, Good shed situated along Haile Selassie avenue has lost 3.11 acres out of the 8.11 acres allotted initially and confirmed in the then feasibility report by Lloyd Masika only 5 acres was indicated against the schemes name whereas the estate was wholly given to KRSRBS as indicated in the sub-committee report which confirmed the Assets identified/approved for transfer to KRSRBS.
13. The financial situation at the KRSRBS is also linked situations where KRSRBS properties valued at over Ksh 6 billion possesses titles not in the name of the scheme. According to the petitioners, this status has over the years been highlighted by the external auditor, Deloitte & Touché, a fact that was noted in the financial statements for the financial year ended June 30th 2019. A claim the petitioners allude, KRSRBS has not adequately addressed to safeguard KRSRBS against third parties despite huge expenditures in unprecedented legal fees;
14. Out of the twenty-three (23) properties transferred to KRSRBS vide legal Notice No. 169 of September 7th, 2006, nine (9) have since been disposed at forced sale. According to the petitioners some the continued disposal of KRSRBS assets is in gross violation of the Procurement & Disposal Act, 2005, and is summarized vide a letter to Cabinet Secretary, Ministry of Interior & Coordination of National Government dated April 8th 2020;
15. The Ernest and Young forensic investigation report further highlighted the irregular writing off of some outstanding balances due to KRSRBS from

properties sold to the local government, Parastatals including the current Governor, Nairobi County and a private company and accrued rent arrears due from the sponsor, KRC amounting to Ksh 400million. According to petitioner, this has worsened the schemes financial position to a tune of Ksh 1.33 billion due to KRSRBS;

16. The KRSRBS rental income from its landed assets for the past one decade has remained static fluctuating between Ksh 25 and Ksh 50 million monthly as per the financial statements report for the year ending June, 30th 2019. This is despite a rental forecast of over 70% of the rental income percentage. According to petitioners a large portion of the rental income is lost to cartels with built structures on the scheme's properties and working in collusion with some managers at the KRSRBS secretariat with an objective of short-changing pensioners;
17. The foregoing missteps have negatively impacted the lives of the KRSRBS pensioners in retirement, as their monthly pension is in arrears by twelve (12) months, with a pending mandatory annual pension increase of 3% per annum accrued with effect from 1st January 2014;
18. As regards the role of RBA in the pensions sub sector, RBA has failed to undertake its mandate as supervisor and regulator of schemes. For instance, RBA as a respondent in constitutional petition No. 353 of 2012, that petition has to date completely failed to implement the court ruling on the instructions of the Honourable Judge, as directed at item 67 which stated thus: *"It is apparent, however that there are concerns regarding the management of the KRSRBS, and from pleadings before me, such disagreements within the Scheme are apt to have negative impact on the lives and livelihoods of hundreds of pensioners. It is therefore incumbent t on the RBA, in exercise of its statutory mandate, to address the concerns of the petitioners in the spirit of the constitution and the wider interests of the pensioners."* And;
19. Specifically, the RBA has failed to cause the Sponsor, KRC and Scheme management to effect the necessary amendments to the TDR to close the scheme following the changed circumstances, as earlier argued in the submission.

b) Interventions by Members

1. The petitioners have presented very weighty matters that speak issues of corruption in the country; and Members noted that corruption has disabled very many Kenyans.
2. The Members wondered why the scheme has not paid lawyer's fees of Ksh. 600 million.
3. The matters also seem criminal in nature, show lack of integrity, and conflict of interests.
4. The Committee needs to contact the Director of Criminal Investigations, Ministry of Interior and Coordination of National Government to look into the matter;
5. Members felt that governance issues fell squarely at the realm of RBA as the regulatory body and that it has to answer the following questions –

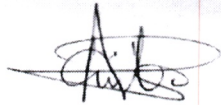
- i) Why the KRSBS has 8 employees of KRC serving in the Board of Trustees;
- ii) Why there is a lack of proper asset register; and
- iii) Why the scheme it has failed to reign the scheme.

Petitioners in their conclusion requested the Committee to look at the bigger picture. The private businessmen who have looted the corporation, the theft of the World Bank money and dishonouring of court orders and not holding annual general meetings periodically should also be investigated.

SEN/SCLSW/137/2020: ANY OTHER BUSINESS AND ADJOURNMENT

The Committee was informed that they will be meeting the stakeholders – the Kenya Railways Corporation and its parent Ministry – Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, the Retirement Benefits Authority and its parent Ministry - the National Treasury and Ministry of Labour and Social Welfare. The Petitioners will also be part of the meeting.

There being no other business, the Chairperson thanked all present, and the meeting was adjourned at 16.16 pm.



SIGNATURE.....

For (CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS)

DATE: 3rd September, 2020

MINUTES OF THE 26TH ONLINE MEETING OF THE STANDING COMMITTEE ON LABOUR & SOCIAL WELFARE HELD ON THURSDAY, 6TH AUGUST, 2020 FROM 1.45 PM.

MEMBERS PRESENT

- | | |
|-------------------------------------|----------------------|
| 1. Sen. (Dr.) Milgo Alice Chepkorir | - Member (Ag. Chair) |
| 2. Sen. Masitsa Naomi Shiyonga | - Member |
| 3. Sen. (Dr.) Mwaura Isaac, CBS | - Member |
| 4. Sen. Makori Beatrice Kwamboka | - Member |
| 5. Sen. Mwangi Paul Githiomi | - Member |
| 6. Sen. Kihika Susan Wakarura | - Member |

ABSENT WITH APOLOGIES

- | | |
|------------------------------------|--------------------|
| 7. Sen. Sakaja Johnson Arthur, CBS | - Chairperson |
| 8. Sen. Mwaruma Johnes | - Vice Chairperson |
| 9. Sen. Madzayo Stewart Mwachiru | - Member |

SENATE SECRETARIAT

- | | |
|-----------------------|---------------------------|
| 1. Ms. Mwanate Shaban | - Clerk Assistant |
| 2. Ms. Merale Sande | - Senior Research Officer |
| 3. Mr. Jeremy Chabari | - Legal Counsel |
| 4. Mr. Reuben Kimosop | - SAA |
| 5. Ms. Fatma Abdi | - Audio Officer |

IN ATTENDANCE

1. Sen. (Dr.) Michael Mbito
2. Mazera Junior - Sen. Madzayo's office

MINUTE SEN/SCLSW/129/2020: PRELIMINARIES

The Chairperson called the meeting to order at 1.52 pm followed by a word of prayer.

MINUTE SEN/SCLSW/130/2020: ADOPTION OF THE AGENDA

The agenda of the meeting was adopted after being proposed by Sen. Githiomi and seconded by Sen. Shiyonga as follows –

AGENDA

1. Preliminaries Prayers;
2. Adoption of the Agenda;
3. **Confirmation of Minutes 25;**
4. **Briefing on the Petition by Pensioners under the Kenya Railways Retirement Benefits Scheme on the looming collapse of the Scheme due to mismanagement and psychological torture due to non-payment of benefits; and**
5. Any Other Business & Adjournment.

MINUTE SEN/SCLSW/131/2020: CONFIRMATION OF MINUTES 25;

The confirmation of the Minutes of the 25th Sitting which was a Zoom online meeting held on Monday 3rd August, 2020 from 10.00 am was deferred due to later date to allow the Committee consider the brief on the petition.

MINUTE SEN/SCLSW/132/2020: BRIEFING ON THE PETITION BY PENSIONERS UNDER THE KENYA RAILWAYS RETIREMENT BENEFITS SCHEME ON THE LOOMING COLLAPSE OF THE SCHEME DUE TO MISMANAGEMENT AND PSYCHOLOGICAL TORTURE DUE TO NON-PAYMENT OF BENEFITS;

The Senior Research Officer began by outlining the underlying issues as follows -

1. The petition on the looming collapse of the Kenya Railways Staff Retirement Benefit Scheme was presented to the Senate on the 21st July 2020 by Sen. Dr. Mbitio undersigned by six petitioners (*Mr. Washika, Mr. Jakaiti, Mr. Boinnett, Mr. Simiyu, Mr. Luka, Mr. Maina and Mr. Ochieng*) with the following underlying issues:
2. The petitioners, representing pensioners whose concern is psychological torture as a result of the eminent collapse of the KRSRBS following mismanagement and illegal practices.
3. That the KRSRBS was setup through a trust deed signed on 3rd May 2006 to provide pension and other retirement benefits to employees of Kenya Railways Corporation (KRC).
4. The trustees were to hold the contributions in trust for the members, paid by the sponsor (KRC) and hence members were to be paid in accordance with provisions of the trust deed and rules. The scheme holds 99 percent of its total asset in immovable property (land buildings as per legal notice no. 169 of 2006 transferred to it by the sponsor, KRC).
5. Given that Retirement Benefit Authority (RBA) allows for a maximum investment of 30 percent of scheme funds in immovable property, it was observed that the scheme did not comply with the regulations and it was envisaged that the scheme would have challenges in liquidity and hence the need to ensure it was in compliance with the RBA regulations.
6. This necessitated the selection of an expert team (Board of Trustees) to address the issues, who drafted a strategic plan with timelines to achieve these targets. However, the board of trustees was disbanded by KRC following its disapproval on being enjoined in the 'golf city project', and new trustees were installed who blundered the schemes assets including engaging in corrupt practices and abuse of office.
7. Following intervention by the RBA, the board of trustees was disbanded, and an inspection team appointed whose findings on the scheme through a report dated 14th Nov 2011 was summarised as *'the scheme was flout with corruption, breach of trust, abuse of office, fraudulent disposal of assets and other malpractices'*.
8. KRC then appointed corporate trustee rather than have members be represented through the board of trustees with Zamara (formerly Alexander Forbes Financial Services Ltd) providing actuarial services hence further mismanagement of the scheme.
9. With the foregoing the members of the scheme have made efforts to ensure the issues are addressed by relevant authorities without satisfaction and none of the issues is pending in any court of law, constitutional court or any other body.

She then listed the petitioners' prayers to the Senate as underlined -

1. That the Senate compels the RBA to implement the item number 67 of the high court ruling in 2012;
2. That the Senate intervenes and helps the vulnerable petitioners who have not received their pensions for the last 12 months and are now experiencing both financial and psychological torture especially during this pandemic;
3. That the Senate makes any other recommendations that it may deem necessary on this matter.

She noted that the KRSRBS issues have been trending in several media outlets with claims, counter claims and allegations.

She stated gave a brief history of the Scheme as follows –

1. That the Kenya Railways Staff Retirement Benefit Scheme, KRSRBS (“Scheme”) was established in July 2006, prior to these the Kenya Railways Corporation (“the KRC”) operated and unfunded pension plan governed under regulations made under the Kenya Railways Corporation Act;
2. This was followed by concessions to transfer property assets previously held by KRC to form a portfolio of property based assets for purposes of funding the new scheme;
3. Since its inception, the scheme has operated as a closed scheme, with no active contributing members. As at 31st January 2015 the scheme had a total of 10,097 members (8,767 main pensioners, 1,330 dependents and deferred members);
4. The deferred members are employed by KRC and Rift Valley Railways (RVR) who upon retirement from the service receive a one off lump sum benefit from the scheme and subsequently admitted into a monthly pension payroll of the scheme; and
5. The scheme also provides relief to the dependents of the deceased pensioners for a period of five years.

She mentioned that the contribution of retirement benefit assets as a percentage of GDP stood at 13.4 percent in 2017 out of the overall contribution of services sector to GDP at 42.33 percent.

She mentioned that the KRSBS operated a **Defined Benefit Schemes** which is an employer sponsored pension plan, an employer or sponsor promises a specified pension payment, lump sum or combination thereof on retirement. The payment is predetermined by a formula based on employee earnings history, tenure of service and age rather than depending on an individual investment returns.

She stated that most of these plans, the employer is the only contributor with the funding expenses accruing to the employer hence costly to them. Employees do not have individual accounts as their rights is not an account but a stream of payments. However, there are exceptions (though few) where the employee also contributes to the plan.

She further explained that majority of these plans are not transferable to another employer and most of the amounts of defined plans are rarely enough to allow one to live a comfortable life on retirement and that, the other downside of this plan is that

the employer/ sponsor is responsible for making most of the decisions including investment and managing the plans thereby assuming all the risks.

She mentioned that this type of retirement scheme was common with many government and public bodies.

She concluded by outlining the implications for KRSBS as follows –

1. The Choice of the Scheme -For the KRSRBS, defined benefit scheme meant that the benefits were defined ahead of time based on each employee's tenure and salary for life and as provided for in the scheme rules. It also meant that funding expenses were accruing entirely to KRC (in this case the sponsors) since the employees were not expected to contribute to the plan. The implication for these is that the employees do not have individual accounts hence they have no rights to an account but to a stream of payments.
2. Registration of the KRSRBS - KRSRBS was setup through a trust deed signed on 3rd May 2006 to provide pension and other retirement benefits to employees of KRC. The scheme held 99 percent of its total asset in immovable property (land buildings as per legal notice no. 169 of 2006 transferred to it by the sponsor, KRC). This is despite the RBA guidelines which allow for a maximum investment of 30 percent of scheme funds in immovable property hence from the initial point of registration the scheme did not comply with the regulations.
3. RBA's Regulatory and Supervisory Role on the KRSRBS - Section 5 of the Retirement Benefit Act, 1997 provide for the role of the authority as to *(a) regulate and supervise the establishment and management of retirement benefits schemes; (b) protect the interests of members and sponsors of retirement benefits sector.* Section 5B empowers the Authority to investigate - *Subsection (1) where the Authority has reasonable cause to believe, either on its own motion or as a result of a complaint received from any person, that— (a) an offence has been committed under this Act; or (b) a manager, custodian, trustee or an administrator may have engaged in embezzlement, fraud, misfeasance or other misconduct in connection with its regulated activity; or (c) the manner in which a manager, custodian, trustee or an administrator has engaged or is engaging in the regulated activity is not in the interest of the person's clients or in the public interest.*

The Legal Counsel briefed the Members on the regulatory framework that is the laws governing retirement benefits schemes in Kenya. He mentioned that Article 43 (1) (e) of the Constitution on economic and social rights states that every person has the right to social security.

He added that the ***Retirement Benefits Act*** is the principal law on the regulation, supervision and promotion of retirement benefits schemes and the development of the retirement benefits sector in Kenya. He took the Committee through some relevant sections of the Act and observed the following-

- (a) the Retirement Benefits Act governs the retirement benefits schemes in the country;
- (b) the Retirement Benefits Authority is responsible for the regulation and supervision of retirement benefits schemes in the country;

- (c) the Retirement Benefits Authority is responsible for the registration of retirement benefits schemes, managers, custodians and administrators in the country.
- (d) the Retirement Benefits Authority is mandated to ensure that the retirement benefits schemes, managers, custodians, trustees and administrators meet the suitability criteria prescribed by law;
- (e) the Retirement Benefits Authority is responsible for investigating embezzlement, fraud, misfeasance or other misconduct in connection with retirement benefits schemes.
- (f) the Retirement Benefits Authority can carry out investigations on the conduct of any retirement benefits scheme;
- (g) the Retirement Benefit Authority can cause an actuarial audit to be conducted on any retirement benefits schemes;
- (h) every scheme is mandated to have a prudent investment policy on the investment of the funds of the scheme so as to maintain the capital funds of the scheme and generally to secure market rates of return on such investment;
- (i) unsafe and unsound practices by trustees are prohibited by the Retirement Benefits Act;
- (j) a trustee, manager, custodian or administrator of a scheme is mandated to ensure that the scheme fund is at all times managed in accordance with the Retirement Benefits Act and take reasonable care to ensure that the management of the scheme is carried out in the best interests of the members and sponsors of the scheme; and
- (k) an interim administrator may be appointed by the Retirement Benefits Authority if trustees fail to submit annual accounts or if they submit false annual accounts.

The legal Counsel took the Committee through the regulatory framework in which the petition falls under and this included Article 43 (1) (e) of the Constitution on economic and social rights states that every person has the right to social security; and the Retirement Benefits Act is the principal law on the regulation, supervision and promotion of retirement benefits schemes and the development of the retirement benefits sector in Kenya.

He concluded by observing the following –

- (1) the Retirement Benefits Act governs the retirement benefits schemes in the country;
- (2) the Retirement Benefits Authority is responsible for the regulation and supervision of retirement benefits schemes in the country;
- (3) the Retirement Benefits Authority is responsible for the registration of retirement benefits schemes, managers, custodians and administrators in the country.
- (4) the Retirement Benefits Authority is mandated to ensure that the retirement benefits schemes, managers, custodians, trustees and administrators meet the suitability criteria prescribed by law;
- (5) the Retirement Benefits Authority is responsible for investigating embezzlement, fraud, misfeasance or other misconduct in connection with retirement benefits schemes.
- (6) the Retirement Benefits Authority can carry out investigations on the conduct of any retirement benefits scheme;
- (7) the Retirement Benefit Authority can cause an actuarial audit to be conducted on any retirement benefits schemes;

- (8) every scheme is mandated to have a prudent investment policy on the investment of the funds of the scheme so as to maintain the capital funds of the scheme and generally to secure market rates of return on such investment;
- (9) unsafe and unsound practices by trustees are prohibited by the Retirement Benefits Act;
- (10) a trustee, manager, custodian or administrator of a scheme is mandated to ensure that the scheme fund is at all times managed in accordance with the Retirement Benefits Act and take reasonable care to ensure that the management of the scheme is carried out in the best interests of the members and sponsors of the scheme; and
- (11) an interim administrator may be appointed by the Retirement Benefits Authority if trustees fail to submit annual accounts or if they submit false annual accounts.

Members intervention

1. Sen. (Dr.) Mbiti informed the Committee that he had had a long 4-hour meeting with the pensioners. He stated that though their pensions are meagre amounts of Kshs. 3,000 to 4,000, they have not been receiving the payments;
2. He also stated that the RBA had failed in its mandate to regulate the industry;
3. He added that though Kenya Railways Corporation had transferred the property to the pensioners, they had not let go of the property.
4. He added that there was a conflict of interest since the CEO had appointed the Board of Trustees who many were employees of the KRC.

Way Forward

1. The Committee noted that it was meeting the petitioners in the next meeting that was to begin at 2.30 pm to get further clarifications on the petition;
2. The Committee resolved that in order to understand and appreciate the underlying issues be-devilling the KRSRBS, to also invite the following stakeholders for additional information and engagements-
 - a) Kenya Railways Corporation and its parent Ministry;
 - b) Retirement Benefits Authority and its Parent Ministry; and
 - c) Ministry of Labour and Social Protection.

SEN/SCLSW/133/2020: ANY OTHER BUSINESS AND ADJOURNMENT

There being no other business, the Chairperson thanked the Members, the meeting was adjourned at 2.50 pm in readiness for the next meeting.



SIGNATURE.....

For: (CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS)

DATE: 3rd September, 2020

REPORT ON THE PETITION BY PENSIONERS UNDER THE KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME ON THE LOOMING COLLAPSE OF THE SCHEME DUE TO MISMANAGEMENT AND PSYCHOLOGICAL TORTURE ARISING FROM NON PAYMENT OF BENEFITS

Mr. Speaker Sir,

The Petition by Pensioners under the Kenya Railways Staff Retirement Benefits Scheme on the looming collapse of the Scheme due to mismanagement and psychological torture arising from non-payment of benefits was presented to the Senate on the 21st July 2020 by Sen. (Dr.) Mbiti, MP, the Senator for Trans Nzoia County. The Speaker of the Senate then directed that the petition be dealt by the Standing Committee on Labour and Social Welfare.

Mr. Speaker Sir,

The Committee held eight (8) Sittings on the matter, including a follow-up meeting which took place yesterday Monday, 9th November, 2020.

The Committee noted that, as of August 2020, the Pensioners had not been paid 12 months pension and Kenya Railways Corporation as the Sponsor had not effected the mandatory annual pension increase of 3% p a accrued with effect from 1st January 2014 to date.

The Committee in their meetings with the petitioners and stakeholders, made the following observations and recommendations in line with the Petitioners' prayers—

On the First Prayer that the Senate compels the RBA to implement the item number 67 of the high court ruling in 2012, Item 67 of the high court ruling in 2012 was as follows (*"It is apparent, however that there are concerns regarding the management of the KRSRBS, and from pleadings before me, such disagreements within the Scheme are apt to have negative impact on the lives and livelihoods of hundreds of*

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pensioners. It is therefore incumbent on the RBA, in exercise of its statutory mandate, to address the concerns of the petitioners in the spirit of the constitution and the wider interests of the pensioners”).

Mr. Speaker Sir,

1. The Committee observed that RBA has been facilitating continuous consultative engagements with all stakeholders of the scheme to ensure information flow and full compliance by the scheme and has committed to continue the facilitation.
2. The Committee recommends that RBA continues with the facilitation and reports to the Committee on a monthly basis on the progress in line with section 5 of the Retirement Benefits Act which provides for the object and functions of the Authority to include—
 - a) regulate and supervise the establishment and management of retirement benefits schemes;
 - b) protect the interests of members and sponsors of retirement benefits sector;
 - c) approve trustees' remuneration approved by members during the annual general meeting after every three years; and
 - d) promote the development of the retirement benefits sector.
3. **Mr. Speaker Sir, on the Second Prayer that the Senate intervenes and helps the vulnerable petitioners who have not received their pensions for the last 12 months and are now experiencing both financial and psychological torture especially during this pandemic,** the Committee has held various meetings with the stakeholders and up to the date of writing this report, the petitioners, through the Committee's efforts have been paid six out of twelve months' arrears.
4. **Honourable Speaker,** it is the duty of the Committee to ensure that –
 - a) All pension arrears are paid;

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- b) The Sponsor implements the pension increments as per the Government's directives and pays all the arrears due on this; and
- c) The Pensioners start receiving timely monthly payments.

We shall follow up on this matter to its logical conclusion.

5. **Mr. Speaker Sir**, the Committee held a follow-up meeting with Stakeholders including the Petitioners yesterday on Monday, 9th November 2020 and was informed that the Sponsor was waiting for clearance of a loan facility from KCB of 325 Million so that it may be able to clear at least 5 months of the arrears.
6. The Committee is concerned with the sustainability of the Scheme and has therefore committed to hold bi-monthly meetings with the relevant stakeholders to monitor the progress of implementation towards making the scheme successful and sustainable. The Committee has noted that the Sponsor is implementing some various programmes which include debt recovery and sale of some targeted assets to keep the Scheme afloat.

Mr. Speaker Sir, the Committee has requested the Sponsors to submit an Investment Policy and Action Plan on the Scheme.

7. **Mr. Speaker Sir, on the last prayer that the Senate makes any other recommendations that it may deem necessary on this matter**, the Committee observes that there are various Governance issues and fiduciary gaps that almost led to the near collapse of the Scheme and resolved –
8. That the Retirement Benefits Authority (RBA) instigates a special forensic audit on the Scheme operations, since its inception with particular reference to -
 - a) The World Bank grant funds that were given to the Scheme to kick-start its operations;

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- b) The Rent moneys that the Scheme has been receiving and its usage; since its inception;
- c) The debts owed to the Scheme, including debts by Kenya Railways Corporation; and
- d) The status of the land that Rahimtullah towers sits in regards to the assets owed by the Scheme.

On this **Mr. Speaker Sir**, the RBA should report to the Committee within 2 months.

9. **Honorable Speaker**, the RBA should review the structure and the Composition of the Board of Trustees so as to ensure compliance with Regulation 8 (c) (i) of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000; and that any existing or potential conflicts of interest are resolved.
10. The Auditor General shall conduct an independent special audit on the management of the Scheme and report to the Committee within three (3) months; including but not limited to –
- a) The World Bank grant funds that were given to the Scheme to kick-start its operations;
 - b) The Rent moneys that the Scheme has been receiving and its usage; since its inception;
 - c) The debts owed to the Scheme, including debts by Kenya Railways Corporation, as claimed by the Petitioners; and
 - d) The status of the land that Rahimtullah towers sits in regards to the assets owed by the Scheme.
11. **Mr. Speaker, Sir**, the Committee here is very Specific that on the above issues, it wants the report from RBA as the Regulator and also an independent Report from the Auditor General.

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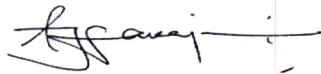
12. That the RBA ensures that all public retirement pension schemes in the country adhere to the registration requirements under the Retirement Benefits Act.

13. That the National Treasury as the body in charge of Pensions to ensure that Kenya Railways Corporation fulfils its obligations as the Sponsor of the Scheme.

Mr. Speaker Sir,

It is now my pleasant duty, pursuant to Standing Order 232 to table the report of the Standing Committees of Labour and Social Welfare in relation to the Petition by Pensioners under the Kenya Railways Staff Retirement Benefits Scheme on the looming collapse of the Scheme due to mismanagement and psychological torture arising from non-payment of benefits.

Thank you.



SIGNATURE.....

**(CHAIRPERSON: SEN. JOHNSON SAKAJA, CBS)
STANDING COMMITTEE ON LABOUR AND SOCIAL WELFARE**

DATE: Tuesday, 10th November, 2020