REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E038 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: AN APPLICATION JUDICIAL REVIEW ORDERS OF MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF: ARTICLES 23(1), (2), (3)(f), 27, 47(1), 48, 165(3) OF THE CONSTITUTION OF KENYA, 2010

AND

BETWEEN

REPUBLIC.....APPLICANT

CENTRAL ORGANIZATION OF TRADE UNIONS (K)……..... EX-PARTE APPLICANT

VERSUS

THE CABINET SECRETARY, MINISTRY OF LABOUR…....RESPONDENT/APPLICANT

HON. ATTORNEY GENERAL…….…… 2ND RESPONDENT/APPLICANT

THE BOARD OF TRUSTEES OF THE NATIONAL

SOCIAL SECURITY FUND……. 3RD RESPONDENT/APPLICANT

RULING

1. The application before me for determination is filed by the Respondents. It is dated 13th January 2022 and seeks the following orders:

    i. Spent.

    ii. Service of the application be dispensed with in the first instance.

    iii. This Honourable court be pleased to vacate its orders issued on 24th December, 2021 pending the hearing and determination of the application herein.

    iv. The costs of this application be provided for.

2. The grounds in support of the application are set out on the face of the application as follows: -

    i. That this Honourable Court has the jurisdiction to set aside its orders ex-debito justiciae.

    ii. That the Honourable Court issued ex-Parte adverse orders against the Respondents/Applicants herein because of material Non-Disclosure by the

iii. Applicants/Respondents (COTU) and in a manner the Respondents/Applicants fundamental rights.

iv. That there is imminent risk of the Respondents/Applicants being denied performing their Constitutional and Statutory Mandate to the detriment of Public Interest on account of this Honourable Court's orders.

v. That in the interest of securing public funds the Court be pleased to vacate the orders barring the Respondents/Applicants herein from acquiring, controlling and/or supervising the funds and assets of the Fund in such manner that best promotes the objects for which the Fund is established as envisaged in Law.

vi. That the Fund being taxpayers' monies stands exposed to pilferage, theft, and /or mismanagement if the instant application is not allowed.

vii. That this Application will be rendered nugatory if the order of this Honourable Court issued on 24th December, 2021 is not vacated in the interim.

3. The application is further supported by the affidavit of SIMON K. CHELUGUI, the Cabinet Secretary in the Ministry of Labour, the 1st Respondent herein. In the affidavit Mr. Chelugui asserts that the orders of 24th December 2021 ought to be set aside as they were obtained in *"fragrant"* breach of the law and other reasons which he sets out in the affidavit.

4. Most of the reasons given in the affidavit are not relevant to the application. These include the reason that the nominee of the Ex Parte Applicant is from the same region as other members of the Board of Trustees and that the orders sought by the Applicant were intended to paralyse the operations of the 3rd Respondent.

5. The other reason given in the replying affidavit is that the Applicant mispresented to the Court the import of Sections 16(d)(ii), 8(2) and 11(2) of the National Social Security Fund (NSSF) Act, 2013 by stating that the affiant did not act within the law and that its rights were violated as a result.

6. The Ex Parte Applicant opposes the application through its replying affidavit of Dr. Francis Atwoli, the Secretary General of Central Organisation of Trade Unions, Kenya (COTU (K).

7. He deposes that Section 20(1)(a) and (b) of the NSSF Act recognise only two mandatory contributors to the Fund being employees and employers. That this informed Section 6(d)(i) and (ii) of the Act which provide for two representatives each for employees and employers to represent the two social partners.

8. Dr. Atwoli depones that the two social partners were deliberately given two representatives each so that their combined vote represents four out of seven votes in the Fund Board to safeguard interests of the two major contributors to the Fund.

9.Dr. Atwoli further deposes that the requirement of two nominees each to represent the interests of contributors is informed by the serious and onerous necessity to ensure safety and security of the Fund for and on behalf of the Kenyan public. That employers are currently represented by two representatives namely Dr. Anna Owuor and Mark Obuya.

10. He deposes further that Section 11(3) of the Act provides that unless a unanimous decision is taken all decisions are to be made by a simple majority of members present and voting. That this implies that right now should any issue arise employers will have two (2) votes while workers will have only one vote. That this is prejudicial to the rights/interests of workers as key decisions impacting directly or indirectly on them are being taken without their full representation on the Board. That this impacts negatively on the mischief intended to be addressed by Section 6(d)(i) and (ii)of the Act. That the significance of a single vote cannot be overemphasized.

11. Dr. Atwoli further deposes that the Ex Parte Applicant had been discriminated as the Respondents allege that its nominated representatives are from the same region, yet Isaac Mbingi Okello is from Busia while its other nominee Ms. Rose Auma Omamo comes from a different region. That in any event, the Respondents had no issue with the two nominees of employers who hail from the former Nyanza region, one from Luo land and another from Kisii land. That Nyanza region is not recognised under the constitution.

12. That the criteria for appointment under Section 16(d)(i) and (ii) being knowledge and experience has been met by the Ex parte Applicant's nominee. That the Cabinet Secretary therefore acted illegally and ultra vires by applying the wrong criteria to nominees under Section 16(d)(i) and (ii) as is evident from Exhibit *"SKC1"* attached to the supporting affidavit dated 13th January 2022. That no allegation had been made that the second nominee of the Ex Parte Applicant is not qualified under the Act.

13. Dr. Atwoli deposes that Section 8(2) of the Act providing for staggering only allows for two months staggering, yet by the time the Ex Parte Applicant filed the instant suit four months had elapsed since the appointment of its other nominee.

14. Dr. Atwoli prays that the application be dismissed.

15. Parties disposed of the application by way of written submissions.

Analysis and Determination

16. The only issue arising for determination is whether there are valid grounds for setting aside the orders of this Court made on 24th December 2021.

17. In their submissions the Respondents/Applicants submit that the Ex Parte Applicant obtained the orders by way of material nondisclosure that the NSSF Board as currently constituted is prejudicial to the interests of the Ex Parte Applicant. The Respondents rely on the provisions of the Finance Act, 2014 under Section 41 which amended Section 51 of the NSSF Act as follows –

> **"The National Social Security Fund Act ,2013 is amended in Section II by deleting subsection (2) and substituting therefore the following new subsection –**
>
> **"The quorum for the conduct of meetings of the Board shall be two-thirds of the trustees, of whom one shall be a representative of employees and one a representative of employers "**

18.It is submitted that the assertion by the Ex Parte Applicant that its interests will not be catered for is therefore misleading.

19. The Respondents/Applicants rely on the Court of Appeal decision [quoting Gili Robert Golf L.F - as he then was, in the Adria (Vasso) 1 QB 477 AT 477] in **Owners of the Motor Vessel "Lillian" v Caltex Oil (Kenya) Ltd [1989] eKLR**:

> "It is axiomatic that in ex-parte proceedings there should be full and frank disclosure to the court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the ex-parte application, even though the facts were such that, with full disclosure, an order would have been justified."

20. The Applicants/Respondents further submit that the orders granted were final in nature contrary to Article 50(1) of the Constitution and that the same ought to have been determined on the merit.

21. The Applicants/Respondents further submit that the decision of 24th December 2021 prejudices public interest relying on the decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** where the court stated: *"Conservatory Orders" bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions linked to such private-party issues on the "prospects of irreparable harm occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest, the Constitutional values and the proportionate magnitudes, and priority levels attributable to."*

22. The Applicants/Respondents submit that the impugned orders are injurious to the governance and smooth functioning of the 3rd Respondent/Applicant which is mandated to oversight the Fund worth approximately Kshs.285 billion of taxpayers' money. Further, that the NSSF is a sensitive national security and public safety organisation whose operations must not be curtailed at the expense of an individual.

23. In response, the Ex Parte Applicant submits that the Applicant's completely misread and therefore misunderstood the contents and import of the Ex Parte Applicant's application that led to the grant of the impugned orders.

24. The Ex Parte Applicant explains that its application was for leave to commence judicial review proceedings for orders of mandamus and prohibition.

25. That the second limb of the application was that such leave operates as a stay restraining the 1st and 3rd Respondents from convening any board meetings to transact any business pending the appointment of its nominee.

26. It is submitted that the Ex Parte Applicant's application was made under Order 53, Rule 1 of the Civil Procedure Rules which provides that no application for an order of *mandamus*, prohibition or *certiorari* shall be made unless leave thereof has been granted in accordance to Rule 27. That under Rule 4 thereof, such orders once made operate until the application is determined, or until the Judge otherwise orders.

27. The Ex Parte Applicant thus submits that the present application, having not been made under Order 53 Rule 4, is not properly before this Court.

28. It is further the Ex Parte Applicant's submission that although the Court has jurisdiction to set aside orders made under Order 53, the power of setting aside or stay of such orders is very sparingly exercised. It relies on the decision in **Aga Khan Education Service Kenya v Republic Ex Parte Ali Seif & 3 Others [2004] eKLR**.

29. That the principles upon which such orders may be made were set out in the case of **Republic v Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare [2018] eKLR** where at paragraph 27 the Court stated:

> "I will not attempt to re-invent the wheel regarding the issue of setting aside stay orders issued when leave has been granted to operate as stay. I say so because a host of judicial decisions have now settled the position that setting such stay orders would only be merited if: -
>
> a) There is non-disclosure of material facts
>
> b) Concealment of material documents
>
> c) Misrepresentation"

30. The Ex Parte Applicant submits that the Applicants/Respondents have not disclosed what they allege the Applicant failed to disclose to the Court as a result of which the Court granted the impugned orders.

31. That the Applicants/Respondents attempted to do so at paragraph 20 of the affidavit of Simon K. Chelungui where it is alleged that the Applicant **misrepresented** the import of Sections 6(d)(ii), 8(2) and 11(2) of the NSSF Act.

32. It submits that an alleged misrepresentation of the law is totally different from allegations of material nondisclosure. That there is therefore no proof of alleged nondisclosure.

33. That even in the Applicants/Respondents' submissions there is no demonstration of alleged material facts that the Ex Parte Applicant failed to disclosure. That there is therefore no proof of alleged non-disclosure.

34. That even in the Applicants/Respondents submissions there is no determination of alleged material facts that the Ex Parte Applicant failed to disclose.

35. That there is further no allegation or proof of any material documents that were not disclosed, or any alleged misrepresentation of law. That the other grounds in the submissions are not advanced in the motion before the Court.

36. On the allegation of misrepresentation of the law, the Ex Parte Applicant submits that the Applicants/Respondents relied on Section 6(d)(ii) and 11(3) of the NSSF Act which provides that:

> **Section 6(d)(ii) two persons, one of whom shall be of opposite gender, nominated by the most representative workers organization by virtue of their knowledge and experience in matters relating to employees to represent employees in Kenya;**
>
> **Section 11(3)**
>
> **Unless a unanimous decision is reached, a decision on any matter before the Board shall be by a simple majority of the votes of the members present and voting, and in the case of an equality of votes the Chairperson or person presiding in that capacity shall have a casting vote.**

37. It submits that the Applicants/Respondents did not demonstrate how the Ex parte Application misrepresented the law as there is no contest that out of two representatives in the Board the Minister appointed only one under Section 6(d)(ii). Further that the decisions of the Board, unless unanimous, are made by simple majority vote.

38. In the application before the Court, the Respondents/Applicants set out the grounds in support of the application. These are that the Court has jurisdiction to make such orders; that there was nondisclosure by the Ex Parte Applicant in a manner that contravened the law and the Respondents/Applicants fundamental rights, that there is imminent risk of the Respondents/Applicants being denied performing their constitutional and statutory mandate to the detriment of public interest on account of the Court's orders and that taxpayers' money are exposed to pilferage, theft and/or mismanagement.

39. None of these grounds are supported or expounded in the supporting affidavit of SIMON K. CHELUGUI which on the contrary, refers to the reasons why it refused to approve the Ex Parte Applicant's second nominee to the Board, referring to ethnic diversity, to how the orders have paralysed the operations of the Fund and to the qualifications of nominees, but without stating whether or how the nominee who is the subject to the instant suit failed to meet the criteria for appointment under the Act.

40. There is mention of misrepresentation of Sections 6(d)(ii), 8(2) and 11(2) of the NSSF Act, 2013 but no explanation of the nature of the misrepresentation.

41. Order 53 Rule 1(4) provides as follows:

> **(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:**
>
> **Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.**

42. A Court thus has jurisdiction to order that leave operates as stay. The circumstances under which such order may be varied or vacated have been the subject of several decisions of the courts as demonstrated in the decision in **Aga Khan Education Service Kenya v Republic Ex Parte Ali Seif & 3 Others [2004] eKLR** where the Court stated:

> " **…** Of course in England the position is now different and leave or permission is granted inter partes but in Kenya, the leave stage is still ex parte. We would, however, caution practitioners that even though leave granted ex parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is

> an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."

43. The basis for such decision was explained in **R v Secretary of State for the Home Department, ex p. BEGUM (1989) 1 Admin LR 110, 112F** (McGowan J) as quoted in the Aga Khan Education Service Kenya case where he stated:

> "this is a jurisdiction that should be very sparingly exercised"; **R V Crown Prosecution Service ex p. Hogg (1994) 6 Admin LR 778, T81E-782A; R V Secretary of State for the Home Department ex p. Chinnoy (1992) 4 Admin LR 457, 462 D-F; R V Customs & Excise Commissioners, ex p. Eurotunnel Plc [1957] CLC 392, 399 F** ("it is obvious that the whole purpose of the [permission] stage would be vitiated if the grant of [permission] were to be regularly followed by an application to set it aside"); **R V Environment Agency, ex p. Leam [1998] Env LR D1,** transcript (Law J,: "It may very well be that [the claimants] will face great, perhaps insuperable, difficulties when the case is finally heard, but in my judgment this was never a case for an application to set aside [permission]". "It cannot be emphasised too strongly that such an application is not to be brought merely on the footing that a [defendant] has a very powerful, even overwhelming case".

44. In the instant application, as already observed above, no good reason has been set out either in the application or in the grounds in support thereof to justify the setting aside of the impugned orders.

45. As was stated in the case of **Republic v Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare (supra)** the grounds of setting aside such orders are non-disclosure of material facts (not law), concealment of material documents or misrepresentation. None of these have been demonstrated in the instant application.

46. The foregoing however does not mean that the Court does not understand the impact of the orders on the operations of NSSF. Indeed, in recognition of this, the Court directed the parties to meet and agree on how the proceedings of the NSSF Board could go on while the parties prosecute this case but the parties were unable to agree.

47. I would also fault the Respondents for bringing the instant application in the circumstances of this case instead of proceeding with hearing of the main motion in this suit. Had the motion been argued instead, I would have been delivering the final judgment today instead of a ruling.

48. It is unfortunate that the Respondents have not even filed their response to the main motion.

49. In the final analysis, I find no merit in the Respondents/Applicants' application dated 13th January 2022 and dismiss the same. Costs shall be in the cause.

50. Directions shall be given for disposal of the main motion at the time of delivery of this ruling to ensure quick disposal of this matter.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF APRIL, 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE