



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW APPLICATION NO. 467 OF 2014**

WILLIAM KIBET KIPRONO..... 1<sup>ST</sup> APPLICANT

KENYA WILDLIFE SERVICE.....2<sup>ND</sup> APPLICANT

AND

THE NATIONAL SOCIAL SECURITY FUND.....1<sup>ST</sup> RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT NAIROBI.....2<sup>ND</sup> RESPONDENT

**JUDGMENT**

1. Pursuant to leave granted by this court on 15<sup>th</sup> December, 2014, the ex-parte applicants filed a Notice of Motion dated 18<sup>th</sup> December, 2014 seeking the following orders:

a) **An order of certiorari to remove into the High Court and quash the 1<sup>st</sup> Respondent's charges against the ex-parte applicants dated 3<sup>rd</sup> November, 2014 before the 2<sup>nd</sup> Respondent in Nairobi Chief Magistrate's Court, Milimani Law Courts Criminal Case No. 289 of 2010.**

b) **An order of mandamus directed at the 1<sup>st</sup> Respondent, its officers and or any other authority acting on its instructions from prosecuting or proceeding with the prosecution of the ex-parte applicants on charges of failing to pay contributions contrary to Section 36 (A) of the NSSF Act (Cap 258) Laws of Kenya as read with the transitional provision of the NSSF Act No. 45 of 2013 in Nairobi Chief Magistrate's Court, Milimani Law Courts Criminal Case No. 289 of 2010.**

c) **An order of prohibition directed at the 2<sup>nd</sup> Respondent prohibiting the 2<sup>nd</sup> Respondent from hearing, proceeding with or in any way entertaining Nairobi Chief Magistrate's Court, Milimani Law Courts Criminal Case No. 289 of 2010 against the ex-parte applicants.**

d) **That the court be at liberty to make such further and other orders that it may deem fit to meet the ends of justice.**

e) **That the costs of this application be provided for.**

2. The application is supported by the grounds set out in the Statutory Statement dated 11<sup>th</sup> December, 2014, the verifying affidavits of WILLIAM KIBET KIPRONO and VALENTAIN KANANI sworn on

11<sup>th</sup> December, 2014 and further affidavits by VINCENT SAMOO dated 25<sup>th</sup> July, 2017 and 1<sup>st</sup> December, 2017.

(a) The Ex-parte Applicants set out the following grounds:

a) KWS was established as a State Corporation in 1989 under the Wildlife (Conservation and Management) Act, Cap 376 (now repealed) laws of Kenya (hereinafter called “**The Wildlife Act**”).

b) By virtue of **Section 3D(3)** of the Wildlife Act, the KWS Board of Trustees was required to provide a staff superannuation scheme to take care of the pensions of its employees which was duly established on **1<sup>st</sup> July, 1991**.

c) KWS superannuation scheme was declared “**Public Service**” with effect from **1<sup>st</sup> July, 1991** and was not required to contribute to NSSF.

d) The alleged offences were committed between **16<sup>th</sup> May, 1990** and **16<sup>th</sup> April, 1991** and **17<sup>th</sup> May, 1991** to **28<sup>th</sup> January, 2010**.

e) The employees in respect of whom the contributions are sought were not registered as members of NSSF and no evidence has been tendered that any employee of KWS who has not registered has claimed payments from NSSF.

f) The Ex-parte Applicant was only appointed Director of KWS with effect from **1<sup>st</sup> October, 2012** and could not have been privy or partisan to the allegations therein.

g) NSSF is unreasonable in commencing any action after failing to follow up the issue of contributions with KWS right from inception and showing up in 2006 after 15 years. The long delay will result in an unfair trial of the ex-parte Applicants.

h) The prosecution of the Ex-parte Applicants is calculated at embarrassing and arm twisting them to pay.

i) NSSF is abusing its powers to prosecute and ought to have used the alternative method of recovery as civil claim so that the ex-parte applicants can defend themselves as equal parties in a civil court without undue pressure and humiliation of appearing in a criminal court as accused persons.

j) The 1<sup>st</sup> ex-parte applicant cannot be criminally liable for offences allegedly committed before his appointment.

k) The criminal proceedings against the Ex-parte Applicants are time barred and were brought without due process of obtaining the Minister’s opinion as provided under the NSSF Act.

3. The 1<sup>st</sup> Respondent responded to the application by way of a replying affidavit sworn by HILARY MWAITA on 5<sup>th</sup> March, 2014. The 1<sup>st</sup> Respondent claims that the 2<sup>nd</sup> ex-parte applicant falls within the classification of a contributing employer under the provisions of the National Social Security Fund Act as it received its notification of registration as a contributing employer on or about 5<sup>th</sup> July, 1990.

4. The 1<sup>st</sup> Respondent avers that sometime in 2006 it discovered that the 2<sup>nd</sup> ex-parte applicant has been underpaying them. The 1<sup>st</sup> Respondent caused an inspection to be conducted on the 2<sup>nd</sup> ex-parte applicant’s premises and found that the 2<sup>nd</sup> ex-parte applicant had been remitting contributions for casual/contract employees and failing to remit those of permanent and pensionable employees. The 2<sup>nd</sup> Respondent then demanded a sum of Ksh. 100,052,720/= for the period between April 1990 and July 2006.

5. The 1<sup>st</sup> Respondent states that the 2<sup>nd</sup> ex-parte applicant claimed that it had been declared to be a “public service” for the purposes of the Pensions Act thus it was exempt under the National Social Security from remitting payments. The 1<sup>st</sup> Respondent denies this allegation by stating that the 2<sup>nd</sup> ex-parte applicant had neither sought nor was granted exemption under the National Social Security Fund Act.

6. The 1<sup>st</sup> Respondent contends that despite negotiations between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> ex-parte applicant on payment of the amount owed to the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> ex-parte applicant has not taken any action to regularize its account with the 1<sup>st</sup> Respondent leading to the preferment of the criminal charges against the ex-parte applicants in Criminal Case No. 289 of 2010.

7. The 1<sup>st</sup> Respondent claims that plea taking in Criminal Case No. 289 of 2010 has been deferred on several occasions in order to allow for negotiation between the parties but the said negotiations have not been fruitful.

8. It is the 1<sup>st</sup> Respondent’s case, that it is legally obliged to pursue any outstanding contributions owing to it from the ex-parte applicant and that if the 1<sup>st</sup> Respondent fails in pursuing the said money it would be doing a disservice to the employees of the 2<sup>nd</sup> ex-parte applicant who have their financial future secured after completing their service with the 2<sup>nd</sup> ex-parte applicant.

9. It is also the 1<sup>st</sup> Respondent’s, case that the institution of the criminal charges against the applicants is not malicious and that the said prosecution is merited under Section 37(2) of the National Social Security Fund Act which provides that if an offence is proved to have been committed with the consent or connivance of, or even to be attributable to any negligence on the part of, any director , manager, secretary or other officer of a body corporate, he as well as the body corporate shall be deemed to be guilty of an offence.

10. The 2<sup>nd</sup> Respondent did not file any response to the application by the Ex-parte applicant or participate in the proceedings. By way of a further affidavit filed on 28<sup>th</sup> July, 2017, the ex-parte applicants responded through Vincent Samoo and stated that

(a) It did not make any payments to the 1<sup>st</sup> Respondent in respect of permanent and pensionable members as the said members were not registered with NSSF.

(b) Also, the ex-parte applicants insist that 2<sup>nd</sup> applicant has its staff superannuation scheme which was declared a “public service” for its staff thus the exemption from contributing to NSSF.

(c) KWS paid NSSF contributions in respect of temporary staff and those on contract.

(d) The benefits payable under the Superannuation Scheme are far away superior and not in any way comparable to NSSF.

(e) The letter written to the Minister seeking exemption was written in error without seeking legal advice. Notwithstanding the Minister’s refusal to grant exemption KWS did not pay.

(f) The legal opinion rendered by the Attorney General was incorrect.

(g) NSSF never raised any issues with regard to non-contribution by KWS.

(h) The number of staff members reflected in the KWS application for registration included all categories of staff members and did not necessarily reflect the staff establishment.

11. The 1<sup>st</sup> Respondent responded to the further affidavit by way of a Supplementary Affidavit filed on

22<sup>nd</sup> November, 2018. The 1<sup>st</sup> Respondent claims that it is only casual workers and other exempted persons who are exempted from the obligation of registration as members of the 1<sup>st</sup> Respondent. Further, the 1<sup>st</sup> Respondent contends that the existence of the 2<sup>nd</sup> ex-parte applicant's Superannuation Scheme does not preclude the 2<sup>nd</sup> ex-parte applicant from making payments under the basic coverage of NSSF. The 2<sup>nd</sup> ex-parte applicant's Superannuation Scheme can exist concurrently with the 1<sup>st</sup> Respondent's scheme.

12. The application was canvassed by way of written submissions. The ex-parte applicants filed their submissions on 21<sup>st</sup> November, 2018 while the 1<sup>st</sup> Respondent filed its submissions on 23<sup>rd</sup> November, 2018.

### **SUBMISSIONS BY EX-PARTE APPLICANTS**

13. Mr. Lutta, learned Counsel for the ex-parte applicants submitted that the Respondents acted unlawfully, maliciously and unreasonably in deciding to prefer charges against the 1<sup>st</sup> ex-parte applicant. Counsel asserted that the 1<sup>st</sup> ex-parte applicant was appointed as Director of the 2<sup>nd</sup> ex-parte applicant vide Gazette Notice No. 14348 dated 4<sup>th</sup> October, 2012 while the alleged offences brought against him were committed between 16<sup>th</sup> May, 1990 and 16<sup>th</sup> April, 1991. The 1<sup>st</sup> ex-parte applicant was therefore not privy to the alleged offences as he was not an employee of the 2<sup>nd</sup> ex-parte applicant at the time the alleged offences are alleged to have been committed.

14. Mr. Lutta submitted that the criminal proceedings are time barred under Section 37(1) of the NSSF Act which provides that proceedings for an offence under the Act must be commenced within three months from the date when the Minister has sufficient evidence to justify prosecution or when the offence comes to his knowledge or within the period of twelve months after the commission of the offence. Counsel argued that the 1<sup>st</sup> Respondent issued an inspection report dated 26<sup>th</sup> November, 2007 to the 2<sup>nd</sup> ex-parte applicant determining that it was owed Kshs. 123,977,520/= while the criminal case was instituted on 10<sup>th</sup> February, 2010 way after the expiry of the period provided for under Section 37(1) of the NSSF Act. Further, Counsel opined that the opinion of the Minister as provided for under Section 37(1) of the NSSF Act was not sought to justify the said prosecution thus the criminal proceedings are a nullity.

15. Mr. Lutta urged the court to consider that the letters dated 30<sup>th</sup> October, 1991 and 6<sup>th</sup> November, 1991 declared KWS "public service" which brought its permanent and pensionable staff under its KWS Superannuation Scheme for purposes of the Pensions Act thus the 1<sup>st</sup> Respondent could not demand any payments from the 2<sup>nd</sup> ex-parte applicant. Alternatively, Counsel argued that the 1<sup>st</sup> Respondent is only entitled to collect contributions from its members and the 2<sup>nd</sup> ex-parte applicant's permanent and pensionable staff were not members of the 1<sup>st</sup> Respondent by virtue of the definition provided for by Section 2 of the NSSF Act.

16. Mr. Lutta submitted that the 2<sup>nd</sup> ex-parte applicant's Superannuation Scheme is superior to that of the 1<sup>st</sup> Respondent as the contributions therein are greater. Further, Counsel while citing the case of **Republic v. National Social Security Fund Board of Trustees & another Ex parte Town Council of Kikuyu [2014] eKLR** contended that it was not mandatory for persons to contribute to the 1<sup>st</sup> Respondent as the scheme by the 1<sup>st</sup> Respondent was meant to ensure that vulnerable members of the society are catered for.

17. Counsel contended that the institution of the criminal charges was unreasonable as the 15 year delay in bringing the charges was unnecessarily long and as a result the 2<sup>nd</sup> ex-parte applicant could not appropriately defend itself as some of its staff who could be potential witnesses had already left the organization. Further, the 1<sup>st</sup> Respondent had not identified the specific employees of the 2<sup>nd</sup> ex-parte applicant on whose behalf the 1<sup>st</sup> Respondent is demanding contributions.

18. Mr. Lutta opined that the 1<sup>st</sup> Respondent ought to have instituted a civil suit for the recovery of the money allegedly owed as a debt as provided by Section 38 of the NSSF Act and not criminal charges against the ex-parte applicants. Counsel suggested that institution of the criminal charges was a tactic to intimidate and arm-twist the ex-parte applicants into paying the contributions sought.

### **SUBMISSIONS BY 1<sup>ST</sup> RESPONDENT**

19. Mr. Muhindi, learned Counsel for the 1<sup>st</sup> Respondent submitted that the 2<sup>nd</sup> ex-parte applicant's permanent and pensionable employees were neither exempted from the NSSF Act under paragraph 4 of the Second Schedule to the NSSF Act or paragraph 1 of the said schedule. Counsel contended that the alleged exemption granted to the 2<sup>nd</sup> Ex-parte applicant was solely for the purpose of safeguarding the accrued pension rights of employees that had transitioned from permanent and pensionable positions within ministries where they enjoyed benefits under the Pensions Act to the 2<sup>nd</sup> ex-parte applicant. Alternatively, Counsel suggested that if the 2<sup>nd</sup> ex-parte applicant had been granted exemption in 1991 it would not have sought another exemption in 2008.

20. As for whether the 1<sup>st</sup> Respondent was entitled to seek prosecution of the ex-parte applicants with regard to failure to remit the accrued contributions, Mr. Muhindi submitted that the decision to prosecute the ex-parte applicants was arrived at after considering the following:

- a) That the 2<sup>nd</sup> ex-parte applicant was well aware of its obligation to seek exemption from the Minister but its request was rejected.
- b) The 2<sup>nd</sup> ex-parte applicant sought opinion of the Attorney General who confirmed that the 2<sup>nd</sup> ex-parte applicant was liable to make contributions to the 1<sup>st</sup> Respondent under the NSSF Act.
- c) The 2<sup>nd</sup> ex-parte applicant was afforded numerous opportunities to remit the accrued contributions but it failed to do so.

21. Counsel stated that since the 2<sup>nd</sup> ex-parte applicant failed to remedy their default over the period of many years, the 1<sup>st</sup> Respondent had no option but to institute criminal charges against the ex-parte applicants.

22. With regard to whether the prosecution of the 1<sup>st</sup> ex-parte applicant was irregular, Mr. Muhindi submitted that the liability of a body corporate is appropriately linked to that of its officers through which it exercises any actions and such officers are liable for criminal actions undertaken by the company. Counsel argued that the failure to pay the accrued contributions should have been remedied under the stewardship of the 1<sup>st</sup> ex-parte applicant, the failure of the 1<sup>st</sup> ex-parte applicant to ensure payment during his tenure resulted in the institution of the charges against him.

23. With regard to the institution of the criminal charges being time barred, Mr. Muhindi submitted that the time period of three (3) months only commences when evidence sufficient to justify a prosecution comes to the knowledge of the Minister. In this case, the ex-parte applicants have not demonstrated that the Minister had sufficient evidence any longer than three months before the institution of the proceedings.

### **THE DETERMINATION**

24. I have considered the application submissions, statutory provisions and authorities cited in support thereof. The following issues arise for determination by this court:

- a) Whether the ex-parte applicants were subject to the National Social security Act (Repealed) and whether the intended prosecution of the 1<sup>st</sup> ex-parte applicant was irregular?

b) Whether the charges brought against the ex-parte applicants for failure to pay contributions contrary to Section 36(A) of the NSSF were proper, and should they be terminated?

c) Who is to bear costs?

a) **Whether the Ex-parte Applicants were subject of the National Social Security Fund Act(Repealed) and whether the prosecution of the 1<sup>st</sup> Ex-parte Applicant was irregular**

25. With regard to the first issue, the 1<sup>st</sup> ex-parte applicant contended that the charges brought against him were irregular as he was not an employee of the 2<sup>nd</sup> ex-parte applicant at the time when the offences in question were committed. The 1<sup>st</sup> ex-parte applicant claims that he was appointed as a director of the 2<sup>nd</sup> ex-parte in 2012 vide Gazette Notice No. 14348 dated 4<sup>th</sup> October, 2012 while the offences, the subject of this suit, were committed between 16<sup>th</sup> May, 1990 and 16<sup>th</sup> April, 1991. Therefore, it is the 1<sup>st</sup> ex-parte applicant's case that he was not privy to the alleged offences. The 1<sup>st</sup> Respondent on the other hand attribute the institution of the criminal charges against the 1<sup>st</sup> ex-parte applicant to the structure of a corporation. The Respondents insist that the criminal liability of a body corporate is linked to its officers through whom the corporation exercises any action. According to the Respondents, the failure to pay the contributions ought to have been remedied by the 1<sup>st</sup> ex-parte applicant in his capacity as a director of the 2<sup>nd</sup> ex-parte applicant.

26. Section 23 of the Penal Code provides as follows in regard to offences committed by corporations:

***“Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.”***

27. It is evident from the above provision that the criminality of a corporation can be attributed to the corporation's officers who act on behalf of the corporation or are in control or manage the affairs of the corporation. However, there is an exception, where the offence was committed through “no act or omission of the officer, or the officer was not aware the offence was being or about to be committed or where the officer took all reasonable steps to prevent commission of this offence”. In this instant, it is not in contention by the parties that the 1<sup>st</sup> ex-parte applicant was not a director of the 2<sup>nd</sup> ex-parte applicant at the time (1990-1991) when the alleged offence was committed. The question then becomes, Can criminal liability for the offence then be attributed to the 1<sup>st</sup> ex-parte applicant?

28. In my view, the exceptions in Section 23 of the Penal Code favour the 1<sup>st</sup> ex-parte applicant's case. The 1<sup>st</sup> ex-parte applicant by virtue of him not having been a director of the 2<sup>nd</sup> ex-parte applicant at the material time was not responsible for any act or omission on his part. Further, the 1<sup>st</sup> ex-parte applicant could not have known that the offence was being committed or intended to be committed or had been committed. As a result, the 1<sup>st</sup> ex-parte applicant could not take any reasonable steps to prevent the commission of the offence. While the charges in question were preferred at a time when the 1<sup>st</sup> ex-parte applicant was a director of the 2<sup>nd</sup> ex-parte applicant, I do not find that the 1<sup>st</sup> ex-parte applicant could have been criminally liable for acts and/or omissions committed at a time when the 1<sup>st</sup> ex-parte applicant had no relationship with the 2<sup>nd</sup> ex-parte applicant

**(b) Whether the charges brought against the ex-parte applicants for failure to pay contributions contrary to Section 36(A) of the NSSF were proper?**

29. The ex-parte applicants allege that the charges preferred against them were unlawful, malicious and

*unreasonable. Their case is that by letters dated 30<sup>th</sup> October, 1991 and 6<sup>th</sup> November, 1991, the 2<sup>nd</sup> ex-parte applicant was declared a “public service” which brought its permanent and pensionable staff under the KWS Superannuation Scheme for purposes of the Pensions Act. Further, the ex-parte applicants contend that the 1<sup>st</sup> Respondent is only entitled to collect contributions from its members while the 2<sup>nd</sup> ex-parte applicants’ permanent and pensionable employees were not members of the 1<sup>st</sup> Respondent at the material times by dint of Section 2 of the NSSF Act. In the alternative, the ex-parte applicants claim that the 2<sup>nd</sup> ex-parte applicant’s Superannuation Scheme is superior to that of the 1<sup>st</sup> Respondent hence it is not mandatory for the 2<sup>nd</sup> ex-parte applicant to make contributions to the 1<sup>st</sup> Respondent.*

30. The Respondents on their part claim that the exemption extended to the 2<sup>nd</sup> ex-parte applicant was only for the purpose of safeguarding accrued pension benefits of employees who had transitioned from other ministries, where they enjoyed benefits under the Pensions Act, to the 2<sup>nd</sup> ex-parte applicant. Also, the Respondents assert that the institution of the criminal charges was necessitated by the continuous failure by the 2<sup>nd</sup> ex-parte applicant to remedy the default in payment of the contributions.

31. The question that comes to mind is, **Was the 2<sup>nd</sup> Ex-parte Applicant exempt from remitting contributions to the 1<sup>st</sup> Respondent for its permanent and pensionable members?** Section 2 of the NSSF Act defines the term member as follows:

**“member” and member of the Fund” means a person who is registered as a member of the Fund pursuant to this Act.**

Section 2 imports the Retirement Benefits Act, 1997 to apply to the fund (No. 5 of 1997, S. 3)

32. **Sections 24 and 25 of the Retirement Benefit Act, 1997** sets standards for registration of Trustees of the Fund to run or manage the Retirement Benefits Act Scheme.

**Section 24 of the Retirement Benefit Act provides;**

(1) No scheme, other than a scheme established by a written law shall be registered under the Act unless;

(a) It is proposed to be established under an irrevocable trust; and

(b) The proposed scheme rules adequately protect the rights and interest of the spouses and member and member thereof.

(2) No scheme shall be registered under this Act unless the trustees thereof satisfy the requirement specified in Section 26.

**Section 25 provides that;**

“No applicant for registration as a manager shall be registered unless such applicant;

(a) Is a limited liability company incorporated under the companies act whose liability is limited by shares and whose main objective is to manage scheme funds has such minimum paid up share capital as may be prescribed.

(b) Is capable of meeting the obligations to members and spouses specified in the scheme rules.

(c) Has the professional capacity to manage scheme funds.

(d) Has never been involved in the management of the scheme funds of any scheme which was

deregistered due to any failure on the part of the management.

(e) Meets such additional requirement as may be prescribed.

33. The ex-parte applicants allege that at the material times, the 2<sup>nd</sup> ex-parte applicant's permanent and pensionable employees were not members of the 1<sup>st</sup> Respondent. What the 2<sup>nd</sup> ex-parte applicant is saying that its permanent and pensionable employees were not registered with the 1<sup>st</sup> Respondent at the material time. Be that as it may, the Second Schedule to the NSSF Act provides a list of persons that are exempt from making contributions to the 1<sup>st</sup> Respondent. First on the list are;

**“Persons eligible to receive any pension benefits under any scheme to which the Pensions Act applies, and persons entitled to receive pension benefits under any scheme (statutory or non-statutory) approved by the Minister in writing for the purposes of this Schedule as a scheme providing comparable benefits, being persons in the public service, local government authority or any corporation or body established for public purposes”.**

34. The 2<sup>nd</sup> ex-parte applicant stated that it had in place a Superannuation Scheme to which its permanent and pensionable members were contributing. The 1<sup>st</sup> Respondent has not in any way either contested the existence of the Superannuation Scheme or the fact that the Superannuation Scheme is more superior (in terms of contribution) to the 1<sup>st</sup> Respondent's Scheme. In my view, the permanent and pensionable members of the 2<sup>nd</sup> ex-parte applicant at the times in question were benefiting from a Social Security Fund in form of the Superannuation Scheme. The 2<sup>nd</sup> ex-parte applicant may have failed to make contributions to the 1<sup>st</sup> Respondent for the said employees but the right to social security of the said employees as expressed under Article 43 (1) (e) and (3) was still protected.

35. As I understand it, the 1<sup>st</sup> Respondent was established to ensure that every person has access to social security. Therefore, contributions towards the 1<sup>st</sup> Respondent could be termed as the bare minimum accepted form of social security. While the 1<sup>st</sup> Respondent offers the basic social security, I see no reason why an employer should be compelled to make contributions to the 1<sup>st</sup> Respondent if the employer is contributing to an established Pension Scheme, acknowledged as such under the Pensions Act or approved by the Minister, and such a Scheme is superior to that offered by the 1<sup>st</sup> Respondent. The ex-parte applicants cited with the approval of this court the case of **Republic v National Social Security Fund Board of Trustees & another ex parte Town Council of Kikuyu [2014] eKLR** where Justice Odunga observed as follows:-

**“In my view it was not the intention of the legislature in enacting section 7 of the Act that even those who had in place schemes which sufficiently catered for their social security interests would still be compelled to contribute to the 1st respondent. The purpose of the Act in my view was to cater for the vulnerable members of the society as required under Article 21(3) which provides:-**

*All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.*

**In my view to compel the very people for whom the Act was meant to protect and cushion to double contributions for substantially the same purpose would defeat the purpose for which the Act was enacted. What Article 43 requires the state to do is to ensure that there are adequate pension scheme/facilities available for its citizens and the enactment of the Act is meant to achieve this purpose. As long as this is achieved in accordance with the law, I do not agree that membership to the 1st respondent is mandatory in all circumstances. In this case I have already found that there is in place a legal instrument which exempts the applicant from the provisions of the section 5 of the Act.”**

36. I do agree with the above sentiments. I find that the 2<sup>nd</sup> ex-parte applicant was exempted from making contributions to the 1<sup>st</sup> Respondent by virtue of the Second Schedule to the NSSF Act to which the 2<sup>nd</sup> ex-parte applicant's permanent and pensionable employees fall under the first category of persons exempt from making contributions to the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> ex-parte applicant's permanent and pensionable employees were eligible to receive pension benefits under a scheme which was comparable and superior to that of the 1<sup>st</sup> Respondent. Therefore, the criminal charges instituted against the ex-parte applicants for failure to make contributions to the 1<sup>st</sup> Respondent cannot stand.

**37. Section 5, 6 and 7 of the Repealed Act provides for membership. Section 5 provides that;**

(1) Subject to this part, the Minister may, on the recommendation of the Board of Trustees, by order in the gazette;

(a) specify any class or description of employees as persons who are to be registered as members of the Fund.

(b) specify any class or description of employers as contributing employers: provided that an order shall not apply to employees who are casual workers unless the order expressly provides that it shall so apply.

(2) Any classification or description of employers or employees in an order made under subsection (1) may be made wholly or in part, by reference to the number of employees of any particular class or description in the employment of the employer.

(3) Regulations shall provide for the registration of employees who are to be registered as members of the Fund and for the registration of employers specified as contributing employers, and such regulations may require such employees or their employers, and such contributing employers, to take such steps to secure such registration as may be prescribed.

(4) Any person who fails to comply with any of the provisions of this section or with any regulation made thereunder shall be guilty of an offence.

**Section 6 states;**

(1) regulations may provide, subject to such terms and conditions as may be prescribed therein, for

(a) the voluntary registration of any class or description of employees as members of the Fund.

(b) the voluntary registration as a contributing employer of any employer.

**Section 7 provides;**

(1) Notwithstanding the foregoing provisions of this part, no person shall be registered as a member of the Fund at any time when;

(a) he is an exempt person; or

(b) he is a casual worker, unless there is in force an order made under section 5 specifying casual workers generally or casual workers of a class or description to which he belongs, as persons who are to be registered as members of the Fund.

(2) for the purposes of this Act, every person of a class or description specified in the second schedule shall be an exempt person.

(3) The minister may, on the recommendation of the Board of Trustees, by notice in the gazette, add to, delete or vary in the second schedule any class or description of except person.

It will be noted that the class of members listed under the Sections cited together with the foregoing reasons discussed hereinabove, the charges ought to be terminated without reference to the current National Social Security Fund Act as the same was not in operation at the time of the alleged offences and cannot be made to operate in retrospective so as to apply to violations of the 1990's.

38. **Section 36 of the National Social Security Fund Act (Repealed)** created offences. It provides that;

“Any person who;

(a) fails without lawful excuse to pay the Fund within the period prescribed by this Act contribution which he is liable as a contributing employer to pay under this Act; or

(b) knowingly makes any deduction form the wages of his employee in respect of any contribution which he is liable as a contributing employer to pay under this Act, other than a deduction which he is authorized to make by this Act; or

(c) for the purpose of obtaining any benefit for himself or for any other person; knowingly makes any false statement or representation, or produces or furnishes, or causes to be produced or furnished, any document or information which he knows to be false in any material particular; or

(d) fails to return to the Fund at the end of each calendar year contributions records, dockets or other documents which are required for the proper maintenance of members' accounts.

Shall be guilty of an offence, and liable to a fine not exceeding fifteen thousand shilling.

39. However, the operative part is Section 37 of the said Act which provides for the procedure to be observed before any charges are preferred. It goes;

**(1) proceedings for an offence under this Act, may, notwithstanding anything in any law to the contrary, be commenced at any time within the period of three months form the date on which evidence, sufficient in the opinion of the Minister to justify a prosecution for the offence, comes to his knowledge, or within the period of twelve months after the commission of the offence, whichever period last expires.**

**(2) Where an offence under this Act, is proved to have been committed with the consent or connivance of, or to be attributable to any negligence on the part of, any director, manager, secretary or other officer of a body corporate he as well as the body corporate shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.**

40. Section 37(2) describes the parties who should be charged and a body corporate is an automatic party. From these provisions, for officers to be liable for prosecution, it has to be established that they either consented to the offence, connived or were negligent. And all these have to be established within either ;

(i) 3 months from the date on which evidence sufficient in the opinion of the Minister to justify a prosecution of the offence comes to his knowledge;

(ii) Within 12 months from the date the offence is alleged to have been committed.

41. In both criteria, the commencement period is of essence. The provisions of Section 37(1) presupposes that the Minister must, in his opinion give reasons for charging the officers alleged to have abdicated their duties under the Act and offended the provisions of the National Social Security Fund Act. For the offences to stand in this case, after stating the offence, the facts ought to provide the reasons the Minister

has relied on to justify his actions. It is therefore upon the 1<sup>st</sup> Respondent (NSSF) to show and prove that they have complied with the provided timelines and required reasons set by law.

42. A close reading of the charges that were preferred against the Ex-parte Applicant (see pages 189 to 256 of the Ex-parte Applicant's application), show that no effort was made to implicate the Managing Director and the co-accused. It is not enough to name an officer and merely state that he was the holder of the office when the offence was committed. It has to be shown that he is culpable as provided for under sections 37(2) of the National Social Security Fund Act.

The reasons which are an integral part required to pass the "high test" set by the constitution, 2010 are lacking in the record and submissions of the Respondent.

43. Section 37(1) and (2) of the National Social Security Fund Act ought to be read together with Article 47(1)(2) and 3(a) and (b) of the constitution, 2010

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall;

a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

b) promote efficient administration.

The Fair Administrative Actions Act, 2015 provides the current law that has harmonized the Law Reform Act (Cap 26) and Order 53 of the Civil Procedure Rules for Judicial Review procedure. It has expanded the discretion of a Judge sitting as a Judicial Review court; so that the court is no longer restricted to looking at the procedure alone and not merits. Further, Article 23(3)(f) of the Constitution also gives courts the power to grant judicial review orders where a party seeks to protect threat to its right as provided for under the Bill of Rights (See Chapter 4 of the Constitution).

44. All in all, I find that the Ex-parte Applicants did not commit the charges that were preferred against them in the first place as the 1<sup>st</sup> Ex-parte Applicant wasn't a Director with the Kenya Wildlife Society and neither was the Kenya Wildlife Society a member of National Social Security as at the time they are alleged to have been committed. For the reasons discussed with the foregoing, the charges ought to be terminated without reference to the current National Social Security Fund Act as the same was not in operation at the time of the alleged offences and cannot be made to operate in retrospective so as to apply to violations of the 1990's.

45. As for the prayer for the prerogative writ of mandamus, it is trite law that an order of mandamus is issued to compel a public body or authority to do that which is within its public duty. In the celebrated case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996**, the Court of Appeal stated as follows in regard to an order of mandamus:

**"The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode**

of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way..... These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done.”

46. The Ex-parte Applicants have framed the said prayer as follows,

**An order of mandamus directed at the 1<sup>st</sup> Respondent, its officers and or any other authority acting on its instructions from prosecuting or proceeding with the prosecution of the ex-parte applicants on charges of failing to pay contributions contrary to Section 36 (A) of the NSSF Act (Cap 258) Laws of Kenya as read with the transitional provision of the NSSF Act No. 45 of 2013 in Nairobi Chief Magistrate’s Court, Milimani Law Courts Criminal Case No. 289 of 2010.**

47. In the said prayer, the order of mandamus is directed at the 1<sup>st</sup> Respondent, its officers or any other authority. According to Article 157 (6) (a) the Director of Public Prosecutions (DPP) is tasked with instituting and undertaking criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed. In my view, this prayer should have been sought as against the (DPP) and not the 1<sup>st</sup> Respondent as the 1<sup>st</sup> Respondent is not the appropriate body mandated to institute criminal proceedings in our criminal justice system. If anything, the 1<sup>st</sup> Respondent merely recommends to the DPP that charges should be instituted against a particular individual or individuals. It is within the discretion of the DPP to decide whether or not to institute criminal proceedings. For these reasons prayer no. (b) above must fail.

48. For the aforementioned reasons, orders are issued as follows:

**a) An order of certiorari to be and is hereby issued to remove into this court and quash the 1<sup>st</sup> Respondent’s charges against the ex-parte applicants dated 3<sup>rd</sup> November, 2014 before the 2<sup>nd</sup> Respondent in Nairobi Chief Magistrate’s Court, Milimani Law Courts Criminal Case No. 289 of 2010.**

**b) An order of prohibition directed at the 2<sup>nd</sup> Respondent be and is hereby issued prohibiting the 2<sup>nd</sup> Respondent from hearing, proceeding with or in any way entertaining Nairobi Chief Magistrate’s Court, Milimani Law Courts Criminal Case No. 289 of 2010 against the ex-parte applicants.**

**c) Costs of this suit to be borne by the 1<sup>st</sup> Respondent.**

**Dated, Signed and Delivered in Nairobi this 29<sup>th</sup> Day of March 2019.**

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**D. CHEPKWONY**

**JUDGE**