



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JR MISC. CIVIL APPLICATION NO. 338 OF 2015

BETWEEN

REPUBLIC.....
APPLICANT

VERSUS

CABINET SECRETARY, MINISTRY OF LABOUR, SOCIAL SECURITY AND SERVICES.
....RESPONDENT

AND

FRANCIS ATWOLI.....1ST
INTERESTED PARTY

JACQUELINE MUGO.....2ND
INTERESTED PARTY

PATRICK ONYANGO OGOLA.....3RD
INTERESTED PARTY

LYN CHEROP MENGICH.....4TH
INTERESTED PARTY

KARIITHI MURAGE MURIMI.....5TH
INTERESTED PARTY

BOARD OF TRUSTEES, NATIONAL SOCIAL SECURITY FUND.....6TH
INTERESTED PARTY

EX PARTE: ALLAN MATHENGE NDUNG’U

JUDGEMENT

Introduction

1. Before this Court is a Notice of Motion dated 19th November, 2015, filed on 24th November, 2015 by the Applicant herein, **Allan Mathenge Ndung’u**, seeking the following orders:

a. An order of Certiorari do issue to remove into this Court and quash:

i. Gazette Notice No. 6752 of 16th September 2015, specifically the appointment of Francis Atwoli and Jacqueline Mugo as members of NSSF's Board of Trustees;

ii. Gazette Notice No. 6753 of 16th September 2015, specifically the appointment of Patrick Onyango Ogola & Lyn Cherop Mengich, as members of NSSF's Board of Trustees;

iii. Gazette Notice No. 6754 of 16th September 2015, specifically the appointment of Kariithi Murage Murimi as a member of NSSF's Board of Trustees;

b. An order of mandamus do issue, directed at the Cabinet Secretary, Ministry of Labour, Social Security and Services, to reconstitute the NSSF Board such that it complies with the law and through a process that meets the national values of good governance and threshold of a lawful, fair, reasonable and procedurally fair administrative action.

c. An order of Prohibition do issue prohibiting the NSSF Board of Trustees from exercising any of its powers and functions under sections 5 & 10 of the NSSF Act, until the Cabinet Secretary, Ministry of Labour, Social Security and Services reconstitutes the NSSF Board as required by law.

d. Costs be borne by the Respondent and the Interested Parties jointly and severally.

2. According to the Applicant, National Social Security Fund (NSSF) was established in 1965 through an Act of Parliament Cap 258 of the Laws of Kenya and was initially operated as a Department of the Ministry of Labour until 1987 when the *National Social Security Fund Act* (hereinafter referred to as "the Act") was amended transforming the Fund into a State Corporation under the Management of a Board of Trustees hence the Fund is subject to the *State Corporations Act*.

3. It was averred that the Fund was established as a mandatory national scheme whose main objective was to provide basic financial security benefits to Kenyan upon retirement. The Fund was set up as a Provident Fund providing benefits in the form of a lump sum. It was disclosed that The *National Social Security Fund (NSSF) Act*, No.45 of 2013 was assented to on 24th December, 2013 and commenced on 10th January, 2014 thereby transforming NSSF from a Provident Fund to a Pension Scheme to which every Kenyan with an income shall contribute a percentage of his/her gross earnings so as to be guaranteed basic compensation in case of permanent disability, basic assistance to needy dependants in case of death and a monthly life pension upon retirement. Its objectives as provided under section 4 of the Act and Mission statement, is to provide social security to members through enhanced coverage, efficient registration and collections, prudent fund management, competitive benefits and exemplary governance, and in this regard, the Fund is managed by a Board of Trustees who are vested with statutory authority under Sections 5 & 10 of the Act to manage and direct the fund. In terms of composition under section 6 of the Act.

4. It was deposed that critical to the issue of good governance and decision making in exercise of the powers of appointment and revocation of members to NSSF's Board, are the following :-

a. Section 7 of the Act provides a list of persons ineligible for appointment to be Trustees; and

b. Under section 6(2) of the *State Corporations Act*, the law makes it mandatory that every appointment to the Board of a State Corporation was subject to a term limit of only 1 renewable term similar to that of the original appointment, and upon serving 2 terms, a person is, by law, precluded from appointment to the same Board;

c. Section 6(3) of the *State Corporations Act* provides that no person whose membership of a

Board has ceased in accordance with paragraphs (b), (c) or (e) of subsection (2) shall be eligible for appointment to any Board thereafter.

5. It was further averred that even more critical, and to further enhance the good management and governance of the Fund and its management:-

a. The appointees to the Board of Trustees of the Fund are there to provide service to the public and carry out their oversight functions in the national interest;

b. The Cabinet Secretary exercises ministerial responsibility over the Board of Trustees of the Fund in the national interest, and accordingly, the exercise of his powers and functions of appointment and removal of members to NSSF's Board of Trustees under sections 6,7, 8 & 9 of the Act must accord to the values and principles of good governance and public service as set out in Articles 232(1) of the Constitution.

c. In the interests of the Fund, and to avoid arbitrary exercise of authority by the Cabinet Secretary, section 8(3)(2) of the Act sets a legal threshold of grounds upon which a trustee can be removed by the Cabinet Secretary and undoubtedly, the exercise of authority under section 8(3)(b) of the Act is subject to the provisions of Article 47 of the Constitution, as now read with the ***Fair Administrative Actions Act***.

d. In the interests of the Fund, and to avoid arbitrary exercise of appointment powers by the Cabinet Secretary, Articles 232(1)(f), (g) & (i) of the 2010 Constitution provide minimal threshold standards to be followed as the basis of appointments, and these include:-

i. fair competition;

ii. merit; and

iii. affording adequate and equal opportunities for appointment, at all levels of the public service, including all State corporations;

iv. transparency and provision to the public of timely, accurate information to facilitate fair competition; and

v. accountability for administrative acts

6. The Applicant's case was that despite the clarity of the law and the Constitution, and as demonstrated below, there is an overwhelming and exceptional need for the orders of Certiorari, Mandamus & Prohibition to issue as prayed.

7. According to the Applicant, by Gazette Notice No. 4880 of 9th July 2014 (published on 18th July, 2014), the former Cabinet Secretary for Labour, Social Security and Services, the **Hon. Samwel K. Kambi**, in exercise of the powers conferred upon his office by section 8(3) of the ***National Social Security Fund Act, 2013***, revoked the appointment of Mr. **Francis Atwoli** and **Jacqueline Mugo** as members of the NSSF Board of Trustees, on grounds under paragraphs 8(3)(b)(i) & (vi) of the Act which according to the Applicant include absenteeism for at least 3 consecutive meetings of the Board without the permission of the Chair and any sufficient reason for the same, and unfitness to discharge the responsibilities of a Trustee. To the Applicant that Gazette Notice No. 4880 of 9th July 2014, has not been quashed and/or revoked, and being a state corporation subject to the provisions of the ***State Corporations Act***, section 6(3) of the ***State Corporations Act*** is abundantly clear that no person whose membership has ceased/terminated on grounds (b),(c) or (e) of section 6(2) of the ***State Corporations Act***, shall be eligible for appointment to any Board thereafter.

8. Additionally, prior to this revocation notice, **Mr. Francis Atwoli** and **Jacqueline Mugo** had previously served on the NSSF Board of Trustees for more than 2 three-year terms, and more specifically since 2001

(more than 10 years) and 2006 respectively, and was therefore ineligible for any further renewal or fresh appointments to the NSSF Board, under the principles of equity, social justice, inclusiveness, good governance and affording adequate and equal opportunities to others under Articles 10(2) and 232(1)(i) of the Constitution and Section 7(g) of the *NSSF Act*.

9. With respect to **Jacqueline Mugo** it was averred that the High Court, in Petition No. 370 of 2014, quashed the revocation of her appointment founded on grounds under Paragraphs 8(3)(b) (vi) of the *NSSF Act*, but did not address its mind to the fact that she had already served on the NSSF Board of Trustees for more than 2 three-year terms and therefore she was ineligible for any further renewal or fresh appointments to the NSSF Board of Trustees, a fact which she did not disclose to the Court.

10. The Applicant averred that despite their ineligibility to be appointed as a member to the NSSF Board or indeed any other Board from 9th July, 2014, on 16th September 2015, the acting Cabinet Secretary for Labour, Social Security and Services, **Raychelle Omamo**, proceeded to re-appoint them back to the Board of Trustees of NSSF vide Gazette Notice No. 6752 of 16th September 2015, for a term of 3 years with effect from 16th September 2015.

11. The Applicant contended that by reason of this illegality under section 6(2) & (3) of the *State Corporations Act*, Gazette Notice No. 6752 of 16th September 2015, the appointments of **Mr. Atwoli** and **Jacqueline Mugo** was not only bad in law but also void and a nullity, right from the onset.

12. It was the Applicant's case that as a consequence thereof, the Cabinet Secretary acted illegally and ultra vires section 6(2) & (3) of the *State Corporations Act*, as well as section 7(c) of the *NSSF Act*, in making the said appointments which were contrary to the law; that the Cabinet Secretary also arrived at her decision unreasonably and without taking relevant factors into consideration, and specifically failed to also take into consideration the principles of equity, social justice, inclusiveness, and good governance under Articles 10(2) and 232(1)(i) of the Constitution and Section 7(g) of the *NSSF Act*; and that she also arrived at her decision in a manner that disregarded constitutionally enshrined principles of affording adequate and equal opportunities for appointment under Articles 232(1)(i) of the Constitution.

13. It was contended that by Gazette Notice No. 6753 of 16th September 2015, the said acting Cabinet Secretary for Labour, Social Security and Services, appointed **Patrick Onyango Ogola & Lyn Cherop Mengich**, to the Board of Trustees of NSSF up to 12th January, 2017 and by the same notice, revoked the appointments of **Andrew Gichamba Muigai** and **Veska Jepkemoi Kangogo** as published in Gazette Notice No. 188 of 13th January 2014. It was however contended that with the appointments of **Patrick Onyango Ogola & Lyn Cherop Mengich**, having been made after the enactment of the *Fair Administrative Actions Act*, there is no evidence of:-

a. Any meaningful deliberative process or fair process followed by the Cabinet Secretary for the removal of **Andrew Gichamba Muigai & Veska Jepkemoi Kangogo**, and clearly demonstrating the grounds upon which they were removed under section 8(3)(b) of the *NSSF Act*, rendering their removal, arbitrary and contrary to section 8(3)(b) of the *NSSF Act*, Article 47 of the Constitution, as well as the relevant provisions of the *Fair Administrative Actions Act*;

b. Any meaningful deliberative process or fair and publicly accountable recruitment or process followed by the Cabinet Secretary for the appointment of **Patrick Onyango Ogola & Lyn Cherop Mengich**, and demonstrating compliance with the national values of good governance set out in the Constitution, or their qualifications that make them most suitable for the job as opposed to other members of the public who were not given a similar opportunity to submit their qualifications, rendering their appointment an unlawful and gross abuse of statutory power under section 6 of the *NSSF Act*, as well as being void for want of compliance with the provisions of Articles 10 & 232(1)(g) & (i) of the Constitution.

14. It was therefore contended that Gazette Notice No. 6753 of 16th September 2015, is a nullity in law for want of compliance with section 8(3)(b) of the *NSSF Act*, Articles 10 & 47 of the Constitution, and

an unlawful and gross abuse of statutory power under section 6 of the *NSSF Act*, which must be immediately quashed, as:-

a. The Cabinet Secretary acted illegally and ultra vires Section 8(3)(b) of the *NSSF Act*, in revoking the appointments of **Andrew Gichamba Muigai & Veska Jepkemoi Kangogo** as published in Gazette Notice No. 188 of 13th January 2014, as:-

a. The decision was arrived at in a manner that was manifestly procedurally unfair and in breach of all basic rules of natural justice as embodied under Article 47 of the Constitution and section 4(3) of the *Fair Administrative Actions Act*;

b. The action or decision was irreparably vitiated by manifest illegality/ irreparable error of law, more so failure to comply with the *Fair Administrative Actions Act* as well as disregard of the grounds under section 8(3)(b) of the *NSSF Act* which must exist as a mandatory condition precedent to exercising her powers of removal under section 8(3)(b) of the *NSSF Act*;

c. The decision in issue was taken with an ulterior motive without any, let alone, a good reason, and was not rationally connected to the purpose of the empowering provisions of sections 8(3)(b) of the *NSSF Act*;

d. The decision is irrational, unjustified and/or unreasonable, to the extent that no legal or factual foundation for the same has been identified or is merited as guided by sections 7 & 8 of the *NSSF Act*.

e. The decision violates the incumbents' legitimate expectation that the powers under section 8(3)(b) of the *NSSF Act* would not be used arbitrarily and/or abused by the Cabinet Secretary in a manner prejudicial to the Applicant's inherent dignity, professional and personal reputation;

f. The decision was unreasonable and made in bad faith, contrary to the public interest in the good and proper functioning of the NSSF Board of Trustees and in breach of all fundamental tenets of good governance and good faith exercise of state power, contrary to the requirements of Articles 2(2), 3, 10(1), 28, 47, 73, 153(4)(a) 236(b) of the Constitution of Kenya;

b. The Cabinet Secretary acted arbitrarily, in a discriminatory manner and therefore abused his authority under section 6(d) of the *NSSF Act*, contrary to the constitutional requirements of Articles 2(2), 3, 10(1) & 232(1)(g) & (i) of the Constitution as stated hereinabove.

c. Further, the appointment of **Lyn Cherop Mengich**, under section 6, paragraph 6(d) (iii) of the *NSSF Act* was a nullity, as she is a human resources personnel, and lacks knowledge and experience in matters relating to administration of scheme funds, actuarial science, insurance, accounting and auditing or law.

14. It was further contended that by Gazette Notice No. 6754 of 16th September 2015, the same acting Cabinet Secretary for Labour, Social Security and Services, appointed **Kariithi Murage Murimi**, to the Board of Trustees of NSSF with effect from 16th September 2015 until 1st February 2018 and by the same notice, revoked the appointments of **Charity Seleina Kisotu** as published in Gazette Notice No. 725 of 2ND February, 2015. The Applicant challenged this appointment on the same grounds as those which were relied upon to challenge the appointments of **Andrew Gichamba Muigai & Veska Jepkemoi Kangogo**.

16. According to the Applicant, under section 10(4) of the *NSSF Act*, the Board of Trustees shall be accountable to members of the Fund, and one of the key responsibilities imposed by section 10(3) of the

Act, is that the Board of Trustees shall, collectively, be responsible: -

- a. To ensure that every Trustee observes the provisions of the Constitution and the law in the performance of his duties under this Act;
- b. To secure the effective administration and implementation of this Act; and
- c. To ensure that every Trustee acts in the best interests of the Fund and avoids any form of conflict of interest, whether factually or legally;
- d. To ensure that every Trustee acts in good faith and with integrity at all times.

17. Further by virtue of section 10(4) of the *NSSF Act*, the Board of Trustees are accountable to members of the Fund, and not the Cabinet Secretary. Accordingly, the Board of Trustees, having failed to notify or take any steps to ensure that the Cabinet Secretary follows or complies with the law, the Board, as presently constituted, is not acting in the nation's interest or interest of contributors, and is indeed acting ultra vires sections 5(1), 6,7,8,9 & 10(3) of the *NSSF Act* if they purport to exercise any of their powers.

18. The Applicant therefore asserted that there is a clear and overriding need for this Court to protect the funds and assets of the Fund in such manner that best promotes the objects for which the Fund is established, and this can only be done through securing the public interest in the good and proper functioning of the NSSF Board of Trustees, through the grant of the prayers sought.

Respondent's Case

19. In response to the application, the Respondent, the Cabinet Secretary for Labour, Social Security and Services, **Raychelle Omamo** averred that there are several cases pending in various courts challenging the legality of the appointment of the members of the board of the NSSF whose appointment she had have revoked which led to the filing of the present application. It was disclosed that before the appointment of the current chairperson and members whose appointments are being challenged the operations of the NSSF Board had been disrupted for a long time and the board was unable to transact business as a result of various restraining orders from the courts.

20. The Respondent confirmed that she appointed **Francis Atwoli** and **Jacqueline Mugo** as members of the NSSF Board of Trustees vide Gazette Notice No. 6752 of 16th September, 2015 under section 6 (d) (ii) and Section 6(d)(i) respectively while **Patrick Onyango Ogola** and **Lyn Mengich** were appointed under vide Gazette Notice No. 6753 of the same date under Section 6(d)(iii) and were to intended to replace **Andrew Gichamba Muigai** and **Veska Jepkemboi Kangogo** whose appointment to the Board vide Gazette No. 188 of 15th January, 2014 had been challenged in court for having been done irregularly as **Andrew Gichamba Muigai** was already holding a public office in the Karura Water Services Board while **Veska Kangogo** was serving on the Nairobi County Public Services Board contrary to section 6(d) (iii) of the *National Social Security Fund Act, 2013* which provides that a member should not be a holder of a public office. It was disclosed that the appointment of **Veska Kangogo** had been challenged in Cause No. 339 of 2015 at the Employment and Labour Relations Court, Nairobi- **Charles Omanga vs. CS for Labour, Social Security and Services and the Board of Trustees of the National Social Security Fund** - and an order was issued on 10th March 2015 suspending the operation of Gazette Notice No. 188 of 2014 pending determination of the matter.

21. The Respondent also confirmed that she appointed **Kariithi Murage Murimi** as the Chairperson of the NSSF Board of Trustees under section 6(a) and (d)(iii) vide Gazette Notice No. 6754 to replace **Charity Kisotu** whose appointment as the chairperson vide Gazette No. 725 of 6th February 2015 had been challenged in court in Cause No. 242 of 2015 at the Employment and Labour Relations Court, Nairobi- **Antony Kinyua Muga vs. CS for Labour, Social secretary and Services and the Board of Trustees of the National Social Security Fund.**

22. These cases 339 of 2015 and 242 of 2015 were consolidated with Petition No. 24 of 2014 at the Employment and Labour Relations Court, Nairobi - **Geoffrey Oriaro vs. CS Ministry of Labour Social Security and Services & 4 Others** where the appointment of **Andrew Gichamba Muigai** and **Veska Jepkemboi Kangogo** to the NSSF Board was also challenged. According to the Respondent, in Nairobi HC Judicial Review Application Misc. No. 311 of 2015 - **Charity Kisotu vs CS Ministry of Labour, Social Security and Services - Ms Charity Kisotu** challenged the recent appointment of members of the NSSF Board of Trustees and the revocation of her appointment which had been made irregularly as she was holding a public office contrary to section 6(d)(iii) of the ***National Social Security Fund Act*** and since she had been appointed to replace the previous chairperson of the NSSF Board of Trustees, **Adan Mohamed**, whose three year term had not expired by the time she was appointed as shown in Gazette No. 2440. It was averred that the Court had made an order in Nairobi Cause No 2013 of 2014 - **Central Organization of Trade Unions vs CS Ministry of Labour, Social Security and Services and Another** - suspending Gazette Notice No. 4880 of 18th July, 2014 that had revoked the appointment of **Mr. Atwoli** to NSSF Board of Trustees meaning that he was required to continue serving as a member of the board.

23. In the Respondent's view, she acted within the law when she revoked the appointment of **Andrew Gichamba Muigai, Veska Jepkemboi Kangogo** and **Charity Kisotu** which had been done irregularly and appointed **Francis Atwoli, Jacqueline Mugo, Patrick Ogola, Lyn Mengich** and **Kariithi Murimi** to serve on the Board and this is further supported by the fact that the Court delivered a judgment on 11th September, 2015 reinstating **Jacqueline Mugo** to her position as a member of the NSSF Board.

24. In the Respondent's view, the principle of legitimate expectation cannot apply to persons whose initial appointment as members of the NSSF Board was illegal.

1st Interested Party's Case

25. The application was similarly opposed by the 1st Interested Party, **Francis Atwoli**, who averred that he was appointed as a member of the board on the 6th interested party in terms of section 6(d)(ii) of the ***National Social Security Act, 2013*** and by virtue of his said appointment he is the representative of the employees in the Board of the 6th interested party.

26. It was his view that section 6(2) of the ***State Corporations Act***, does not apply to his appointment to the Board of the 6th Interested Party and as such is irrelevant. He therefore associated himself with the averments made by the 3rd and 6th Interested Parties and prayed that the application be dismissed with costs.

2nd Interested Party's Case

27. On her part the 2nd interested party while similarly associating herself with the averments made by the 3rd and 6th interested parties filed the following grounds of opposition:

1. That the 2nd interested party's appointed (sic) vide Gazette Notice No. 6752 dated 16/9/25 was full compliance (sic) with Section 6 (d)(i) of the National Social Security Fund Act, 2013.

2. That the 2nd interested party's appointed (sic) vide Gazette Notice No. 6752 dated 16/9/2015 was effected pursuant to the judgment in High Court Constitutional and Human Rights Petition No. 370 of 2014 - Federation of Kenya Employers and Jacqueline Mugo vs. The AG and CS for Labour, Social Security and Service - delivered on 11/9/2015.

3. That there has been no appeal to the Court of Appeal and or any application for review challenging the judgment in High Court Constitutional and Human Rights Petition No. 370 of 2014 - Federation of Kenya Employers and Jacqueline Mugo vs The AG and CS for Labour, Social Security and Services - delivered on 11/9/2015.

4. That the proceeding (sic) with respect to the appointment of 2nd interested party are res judicata having been fully determined in High Court Constitutional and Human Rights Petition No. 370 of 2014.

5. That the 2nd Interested party has not served 2 three years terms as provided for under the National Social Security Fund Act, 2013 to bar her from appointment to the 6th interested party's board of trustees.

6. That the applicant's application is frivolous, vexatious and an abuse of the due process of Court as the Applicant has not demonstrated his interest in the appointment of the 6th interested party's board

The 3rd, 4th, 5th and 6th Interested Parties' Case

28. According to the 3rd, 4th, 5th and 6th Interested Parties, the Board of Trustees, National Social Security Fund is established under section 5 of the *National Social Security Fund Act, 2013* and is vested with the mandate to operate and manage the Fund and its membership is provided under section 6 of the *NSSF Act* which provides as hereunder:

The Board shall comprise—

a. the Chairperson appointed by the Cabinet Secretary from amongst the Trustees appointed under paragraph (d) (iii);

b. the Principal Secretary responsible for matters relating to finance;

c. the Principal Secretary in the Ministry for the time being responsible for matters relating to social security;

d. seven persons appointed by the Cabinet Secretary as follows—

i. two persons, one of whom shall be of opposite gender, nominated by the most representative employers' organization with knowledge and experience in matters relating to employers to represent employers in Kenya;

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;

iii. three persons one of whom shall be of opposite gender, not being public officers nor employees or directors of any public company, appointed by the Cabinet Secretary by virtue of their knowledge and experience in matters relating to administration of scheme funds, actuarial science, insurance, accounting and auditing or law;

iv. the Managing Trustee as ex officio member.

29. It was averred that by virtue of the above stated statutory provision the mandate to appoint the members of the Board to the Fund lies with the Cabinet Secretary for the time being responsible for matters relating to social security, the Cabinet Secretary, Ministry of Labour Social Security & Services, the Respondent herein and vide Gazette Notices 6752, 6753 and 6754 all of 16th September 2015 the Respondent herein appointed **Francis Atwoli** under section 6(d)(i) of the Act, **Jaqueline Mugo** under section 6(d)(ii) of the Act, and **Patrick Onyango Ogola, Lyn Cherop Mengich** as well as **Kariithi Murage Murimi** under section 6(d)(iii) of the Act to the Board of the Fund. These appointments, it was averred had the effect of revoking the appointments of **Andrew Gichamba Muigai, Veska Jepkemoi Kangongo** and **Charity Seleina Kisotu** who had previously been appointed to the Board in various

capacities.

30. It was contended that prior to the said appointments there were numerous cases challenging the appointments of the said **Andrew Gichamba Muigai, Veska Jepkemoi Kangongo** and **Charity Seleina Kisotu** under section 6(d)(iii) to the Board of the fund on various grounds *inter alia*:-

a. The appointment of **Andrew Gichamba Muigai** was the subject of challenge in Nairobi Employment and Labour Relations Cause No. 339 of 2015: **Charles Omanga vs. The Cabinet Secretary Labour, Social Security And Services & Board Of Trustees National Social Security Fund** for illegality on the basis that the said appointee was a public officer already appointed to the Karuri Water and Sanitation Company: and

b. The appointment of **Veska Jepkemoi Kangongo** and **Charity Seleina Kisotu** was the subject of challenge in Nairobi Cause Number 242 of 2015; **Anthony Kinyua Muga vs. Cabinet Secretary Labour Social Security And Services And Board Of Trustees National Social Security Fund** for illegality on the basis that the said appointees were already holding public office in the Nairobi County Service Board, a fact which the said interested parties contended was confirmed vide the relevant Gazette Notices.

31. According to the foregoing the said interested parties averred that the Board was unable to carry out its mandate in the manner provided by law since there were stay orders granted in Nairobi Petition No. 24 of 2015: **Geoffrey Oriaro vs. The Cabinet Secretary Ministry Of Labour Social Security and Services & 4 Others** as consolidated with and causes no. 242 and 339 of 2015. In addition, the said appointments caused a lot of controversy occasioning the then Cabinet Secretary, Ministry of Labour Social Security & Services to step aside for the purpose of investigations by the Ethics and Anti-Corruption Commission which investigations are to date on-going.

32. It was disclosed that there are in fact Court orders in the Employment and Labour Relations Court in Nairobi Cause No. 2013 of 2014: **Central Organisation of Trade Unions & Another vs. Cabinet Secretary Ministry Of Labour Social Security and Services & Another** relating to and requiring that the 1st Interested Party continues to serve on the Board of the Fund and in Constitutional Petition 370 of 2014 - **Federation of Kenya Employers & Jacqueline Mugo vs. The Attorney General and the Cabinet Secretary for Labour, Social Security and Services** revoking a previous Gazette Notice to remove the 2nd Interested Party from the Board on grounds similar to the ones cited in the present application.

33. It was therefore contended that in light of the foregoing, the public interest requires that the Board is in a position to carry out its mandate in the manner provided by law and thus the Respondent rightly revoked the appointment of the said **Andrew Gichamba Muigai, Veska Jepkemoi Kangongo** and **Charity Seleina Kisotu** as they were not qualified to be appointed under section 6(d)(iii) being public officers and/or directors of public companies. As a result of the foregoing, **Charity Seleina Kisotu** instituted JR Miscellaneous no. 311 of 2015: **Republic vs. Cabinet Secretary Ministry of Labour Social Security and Services Ex Parte Charity Seleina Kisotu** which was later withdrawn by the *ex parte* Applicant. With respect to **Andrew Gichamba Muigai** and **Veska Jepkemoi Kangongo**, it was contended that no suits were instituted a fact the said interested parties attributed to their awareness of the cases challenging their appointments and their understanding of the requirements of section 6(d)(iii). The interested parties asserted that no facts have been placed before the Court to demonstrate that they were not given an opportunity to be heard or that the reasons for the revocation of their appointments were not explained to them.

34. It was contended that with respect to **Mr Atwoli** and **Ms Mugo**, both were ineligible to serve as members of the Board having previously served thereon for more than 2 three-year terms. It was therefore contended that the Respondent acted illegally and *ultra vires* in making the said appointments and her decision was unreasonable and failed to take into account relevant factors.

35. With respect to the appointments of **Patrick Onyango Ogola, Lyn Cherop Mengich** and **Kariithi**

Murage Murimi, it was contended that there was no meaningful process or fair process of the removal of the incumbents hence their removal was arbitrary and contrary to the Act. The said action it was contended was arbitrary and was exercised in a discriminatory manner hence amounted to abuse of authority. It was further contended that the said action violated legitimate expectation.

36. On the part of the respondents and interested parties it was contended that the said appointments were done in accordance with the law and that they were informed by the fact that due to numerous legal challenges to the members of the Board, the Board was unable to effectively carry out its duties hence the necessity to reconstitute the same in the interest of the public.

Determinations

37. I have considered the issues raised herein.

38. The decision whether or not to grant judicial review reliefs is no doubt exercise of discretion. As is stated in *Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270:

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’ [Emphasis added].

39. This position was reiterated by this Court in **Jocinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** where it was held that:

“... it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance.”

40. The Applicant in this application seeks orders quashing the appointment of the 1st and 2nd interested

parties, **Francis Atwoli** and **Jacqueline Mugo**. According to the Applicant, by Gazette Notice No. 4880 of 9th July 2014 (published on 18th July, 2014), the former Cabinet Secretary for Labour, Social Security and Services, the **Hon. Samwel K. Kambi**, in exercise of the powers conferred upon his office by section 8(3) of the *National Social Security Fund Act, 2013*, revoked the appointment of **Francis Atwoli** and **Jacqueline Mugo** as members of the NSSF Board of Trustees. However, the Respondent has exhibited a copy of the Judgement of **Lenaola, J** in High Court Constitutional and Human Rights Petition No. 370 of 2014 - **Federation of Kenya Employers and Jacqueline Mugo vs. The AG and CS for Labour, Social Security and Service** - delivered on 11th September, 2015, in which the learned Judge declared that the decision of the Cabinet Secretary made vide Gazette Notice No. 4880 revoking the appointment of **Jacqueline Mugo** as a representative of the Federation of Kenya Employers in the Board violated the rights of the said **Jacqueline Mugo** and the said Federation and was null and void. The Court proceeded to quash the said publication and reinstated **Jacqueline Mugo** to her position in the Board.

41. As regards the 1st Interested Party, **Francis Atwoli**, it was contended that the Court had made an order in Nairobi Cause No 2013 of 2014 - **Central Organization of Trade Unions vs CS Ministry of Labour, Social Security and Services and Another** - suspending Gazette Notice No. 4880 of 18th July, 2014 that had revoked his appointment to NSSF Board of Trustees with the effect that he was required to continue serving as a member of the board. Although the said order was not exhibited, in the ruling delivered in the said matter on 16th September, 2014, it was indicated that the interim orders were to remain in force. It is however noteworthy that the Applicant did not challenge the contention that such orders were in fact issued.

42. From the foregoing it is clear that with respect to the decision of the former Cabinet Secretary, the same cannot be the basis upon which these orders can be granted since with respect to the 1st and 2nd interested parties, the said decision was either suspended or nullified altogether.

43. That leaves the issue whether the said parties were eligible to serve as members of the Board. According to the Applicant, the said interested parties had served for more than 2 three-year terms. This averment was disputed by the interested parties. Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the *Civil Procedure Act* does not apply. It is governed by the provisions of Article 47 of the Constitution as read with the provisions of the *Fair Administrative Action Act, 2015* and sections 8 and 9 of the *Law Reform Act* being the substantive law and Order 53 of the *Civil Procedure Rules* being the procedural law. Judicial review is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. It follows therefore that where the determination of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. In such cases, parties may well be advised to institute their claims in ordinary civil courts or where appropriate before the Employment and Labour Relations Court where as in this case the dispute partly revolves around the terms and conditions of appointment and its termination.

44. It is for the same reason that this Court cannot make a finding that **Lyn Cherop Mengich** is a human resources personnel, and lacks knowledge and experience in matters relating to administration of scheme funds, actuarial science, insurance, accounting and auditing or law.

45. With respect to the appointments of **Patrick Onyango Ogola, Lyn Cherop Mengich** and **Kariithi Murage Murimi**, it was contended that there was no meaningful process or fair process of the removal of the incumbents hence their removal was arbitrary and contrary to the Act. The said action it was contended was arbitrary and was exercised in a discriminatory manner hence amounted to abuse of authority. It was further contended that the said action violated legitimate expectation.

46. On the part of the Respondent and the interested parties it was contended that the Respondent rightly revoked the appointment of the said **Andrew Gichamba Muigai, Veska Jepkemoi Kangongo** and **Charity Seleina Kisotu** as they were not qualified to be appointed under section 6(d)(iii) being public officers and/or directors of public companies and that though **Charity Seleina Kisotu** challenged the decision revoking her appointment, the suit was withdrawn while **Andrew Gichamba Muigai** and **Veska**

Jepkemoi Kangongo did not challenge the decision, a fact which the Respondent attributed to their awareness of the cases challenging their appointments and their understanding of the requirements of the relevant law.

47. The Respondent also exhibited an order issued 10th March 2015 in Cause No. 339 of 2015 at the Employment and Labour Relations Court, Nairobi- **Charles Omanga vs. CS for Labour, Social Security and Services and the Board of Trustees of the National Social Security Fund** – in which the operation of Gazette Notice No. 188 of 2014 was suspended. It was through this Gazette Notice that **Andrew Gichamba Muigai** and **Veska Jepkemoi Kangongo** were appointed to the Board. The effect of the suspension of the said Gazette Notice was clearly that the said persons were no longer members of the Board.

48. This Court has taken into account the fact that several suits were instituted challenging the appointments to the Board. The fate of the said suits have not been disclosed by the parties to these proceedings. Accordingly the chances of the orders sought herein being in conflict with the decisions which might be granted in those matters cannot be ruled out. In my view that scenario ought to be avoided at all costs as it would turn judicial process into a circus. This Court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In **John Muritu Kigwe & Another vs. The Attorney General Nairobi HCCC No. 223 of 2000** the Court expressed itself as hereunder:

“There is no doubt that the High Court has inherent power to see that its processes are fairly used by all and to preserve public confidence in their ability by preventing its process being used to oppress the people.”

49. In judicial review proceedings where the Court exercises discretionary jurisdiction, the need to preserve public confidence in the judicial process occupies an even higher level due to the recognition that judicial review remedies are remedies of last resort and the provisions and procedure relating thereto do occupy the apex of the judicial hierarchy of values.

50. Therefore as recognised hereinabove, account of demands of good public administration leads me to the conclusion that the pending suits ought to be expedited so that the management of the Fund can be determined once and for all. Accordingly, I am satisfied that this is a matter in which the Court ought to *“allow contemporary’ decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders”*.

51. Therefore in the exercise of my discretionary jurisdiction and without making findings which may prejudice the said pending matters, I decline to grant the orders sought herein.

52. In the result, the Notice of Motion dated 19th November, 2015 is disallowed but as the substance of the dispute remains unresolved, there will be no order as to costs.

53. Orders accordingly.

Dated at Nairobi this 15th day of August, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mureithi for the ex parte applicant

Mr Okwe Achiando for the 1st interested party

Mr Ouma for the 2nd interested party

Miss Oyomba for Mr Sisule for the 3rd, 4th, 5th and 6th interested parties

Cc Mwangi