



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.370 OF 2014

BETWEEN

FEDERATION OF KENYA EMPLOYERS.....1ST PETITIONER

JACQUELINE MUGO.....2ND PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE CABINET SECRETARY FOR LABOUR, SOCIAL

SECURITY AND SERVICES.....2ND RESPONDENT

JUDGMENT

Introduction

1. On 18th July 2014 the 2nd Respondent, exercising powers conferred on him by **Section 8(3)** of the **National Social Security Fund Act, No.5 of 2013**, revoked the appointment of the 2nd Petitioner as a member of the National Social Security Fund (NSSF) Board of Trustees.
2. In the Petition dated 24th July 2014, the Petitioners challenge the constitutionality and legality of the said revocation and claim that **Articles 27, 32, 33, 47 and 50** of the **Constitution** were thereby violated.
3. They now seek the following orders;

“(a) The Honourable Court be pleased to declare that the 2nd Respondent’s revocation of the appointment of the 2nd Petitioner as a representative of the 1st Petitioner in the New Board is in breach of the Petitioners’ constitutional rights under Articles 47(1), 50(1), 27, 32(1) and 33(1)(a) an therefore null and void ab initio.

(b) A declaration that Gazette Notice No.4880 dated 9th July 2014 and published in the Kenya Gazette of 18th July 2014 is null and void ab initio.

(c) An order removing to the Honorable Court and quashing the publication contained in Gazette Notice No.4880 dated 9th July 2014 and published in the Kenya Gazette of 18th July

2014.

- (d) An order reinstating the 2nd Petitioner forthwith to her position as a member of New Board representing the interests of employers.*
- (e) Compensation by way of payment of damages to the 1st and 2nd Petitioners.*
- (f) Such other orders as the Honourable Court may deem just.*
- (g) Costs of and incidental to the Petition.”*

Petitioner’s case

4. The Petitioners rely on the Supporting Affidavit sworn on 24th July 2014 by Jacqueline Mugo, the 1st Petitioner, as well as submissions and authorities filed on 26th February 2015 by Mr. Obura, Learned Counsel for the said Petitioners.
5. It is their case firstly, that their Petition is uncontested as none of the Respondents ever deemed it necessary to file any responses to it.
6. Secondly, that Gazette Notice No.4880 of 9th July 2014 was issued without prior notice to them and no opportunity was given for them to make representations on the subject matter and yet under **Section 8(3)** of the **NSSF Act** which was invoked as the basis for the revocation, none of the grounds for revocation set out therein could properly be applied to the 2nd Petitioner.
7. Thirdly, that although she had been vocal in opposing certain projects undertaken by NSSF and principally, the Tassia Housing Project, that fact alone was not a ground for revocation of her appointment.
8. Fourthly, and for the above reasons, that the right to fair administrative action under **Article 47(1)** and **(2)** of the **Constitution** was violated. Similarly the right to non-discrimination under **Article 27**, right to an opinion under **Article 32**, right to free expression under **Article 33** and right to a fair hearing were all allegedly violated hence the Petition.

Respondent’s case

9. From the record, both Respondents were served but filed no responses to the Petition. I note however that one Ms. Muchiri appeared for them when directions were to be given on 11th September 2014 but did not appear again.
10. There is therefore no answer to the Petition and I will determine it on its merits based on the evidence before me and in that context.

Determination

11. I have read Gazette Notice No.4880 of 9th July 2014. It invoked **Section 8(3)** of the **NSSF Act** as the basis for the revocation of the 2nd Petitioner’s appointment as a member of NSSF’s Board of Trustees. **Section 8(1) (2)** and **(3)** of the **NSSF Act** provides as follows;

“(1) A Trustee appointed under Section 6(d)(i), (ii) and (iii), shall hold office for a term of three years and shall be eligible for re-appointment for one further and final term.

(2) The Cabinet Secretary shall appoint one third of the members of the board under Section 6(d) (i), (ii) and (iii) in a staggered manner separated by two months so that the respective expiry dates of their terms shall fall at a different time.

(3) Notwithstanding subsection (1) of this Section, the chairperson or a Trustee appointed under Section 6(d)(i), (ii) and (ii) may;

(a) at any time resign from office by notice in writing to the Cabinet Secretary or otherwise cease to represent the interests of the nominating body; or

(b) be removed from office by the Cabinet Secretary if the Trustee –

(i) has been absent from three consecutive meetings of the Board without the permission of the chairperson and is unable or has neglected to furnish any plausible reason for his absence;

(ii) is adjudged bankrupt or enters into a composition or arrangement with his creditors;

(iii) is disqualified under any provision of the Constitution or any other written law from holding a public office;

(iv) is convicted of a criminal offence, which brings to question his capacity or integrity to serve as a Trustee, and sentenced to imprisonment for a term of six months or more;

(v) is incapacitated by prolonged physical or mental illness; or

(vi) is otherwise unable to unfit to discharge his responsibilities under Section 10(3) of this Act.

12. From the evidence before me, is there any reason to find that the 2nd Petitioner was removed for any of the above reasons save (vi) above? My answer is a resounding NO. **Section 10(3)** of the **Act** referred to in (vi) above provides as follows;

“(3) The Board shall be responsible for-

a. Ensuring that every Trustee-

i. Observes the provisions of the Constitution in the performance of his duties under this Act;

ii. Acts in the best interests of the Fund and avoids any form of conflict of interest;

iii. Acts in good faith and with integrity at all times; and

iv. Exercises care and skill, due diligence in the conduct of the affairs of the Board and demonstrates commitment in serving the Board.

b. Enforcement of good corporate governance practices within the Board and senior management;

c. Formulation of strategy and policies of the Fund in accordance with this Act and best practices of good corporate governance;

d. Effective leadership of the Fund and guidance of the management in their day to day management of the fund;

e. Protection of the funds, property and assets of the Fund;

f. The effective administration and implementation of this Act; and

g. Doing all other things as are necessary to give effect to the provisions of this Act.

13. Is there reason to find that the 2nd Respondent did not fulfill her obligations as stipulated above? Again my answer is a resounding NO.

14. Regarding the statement that the 2nd Respondent was removed because of her opposition, within the NSSF Board, to certain questionable undertakings including the Tassia Housing Project by the Board, there is no evidence that her removal was triggered by those actions and I am unable to accept her speculations in that regard. The point is that no reason save the general invocation of **Section 8(3)** of the **Act** as read with **Section 10(3)** thereof have been given for the revocation of her appointment and that is all to say in that regard.

15. Having held as above, have the rights of the Petitioners under **Articles 27, 32, 33, 47 and 50** been violated? To answer that question, it must first be understood that the 2nd Petitioner is the Executive Director of the 1st Petitioner and her membership to the NSSF Board is as a nominee and representative of the 1st Petitioner by virtue of **Section 6(d)(i)** of the **NSSF Act**. None has therefore any separate claim to membership of the Board and their claims are fused as if one.

Freedom from Discrimination

16. **Article 27(1)** of the **Constitution** provide as follows;

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) ...

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

17. In Submissions, Mr. Obura argued that the appointment of the 2nd Petitioner to the NSSF Board was revoked because of her opposition to the Tassia Housing Project and the said action **“amounted to discriminating the Petitioners on the basis of their conscience and belief,”**

18. I have said that there is absolutely no evidence that her appointment was revoked for the above reason and even if it had, can it be said that her right to non-discrimination had thereby been violated?

19. In **Dost Mohamed vs Union of India 1981 Lab I.C. 1210(All.)** the Court defined **“discrimination”** as an indication of what is **“unjust”, “unreasonable”** or **“unfair”** bias in favour of one against another. This means that the act of dealing differently with persons similarly circumstanced amounts to discrimination.

20. Further, in **Peter K. Waweru vs Republic [2006]e KLR** the High Court expressed itself as regards discrimination as follows;

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons

equally where no reasonable distinction can be found between those favoured and those not favoured.”

In addition, the *United Nations Universal Declaration on Human Rights (UDHR)* provides at **Article 1** that;

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

Article 7 of the **UDHR** further states that;

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

Article 2 of the **African Charter on Human and People’s Rights** also stipulates that every individual is entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction including on grounds of race, ethnic group, colour, or sex. **Article 28** goes further to state that;

“Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.”

21. Taking the circumstances of the present Petition and reading them against the above decisions, where is the evidence that the 2nd Petitioner was treated differently from any other member of the Board of NSSF? In fact, in Gazette No.4880, one Francis Atwoli suffered the same fate as herself. Without an answer to the above question, I am unable to find any violation of **Article 27** as alleged.

Freedom of Conscience, Religion, Belief and Opinion

22. **Article 32(1)** of the **Constitution** provides as follows;

“Every person has the right to freedom of conscience, religion, thought, belief and opinion”.

23. The above provision is clear and requires no more than a literal interpretation. Elsewhere above I have held that there is no reason for me to find that the 2nd Petitioner’s appointment was revoked because of her opinion within the NSSF Board. I reiterate that finding and for that reason, I am not satisfied that **Article 32** is applicable to the circumstances of the present Petition.

Freedom of Expression

24. **Article 33(1)** of the **Constitution** provides as follows;

“(1) Every person has the right to freedom of expression, which includes—

- a. *freedom to seek, receive or impart information or ideas;*
- b. *freedom of artistic creativity; and*
- c. *academic freedom and freedom of scientific research.*

25. For the same reasons as I gave above regarding **Article 32**, **Article 33** is irrelevant to the present Petition and I so find.

Right to fair Administrative Action

26. **Article 47(1) and (2)** of the **Constitution** provides as follows;

“(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.”

27. The High Court has in a number of decisions expressed itself as to the manner in which the above right is to be enjoyed. One of the elements of that right was well expressed by Majanja J. in **Wangodu & Others vs Coffee Board of Kenya & The Minister for Agriculture [2012] eKLR** where the learned judge cited **R vs AG & Others ex parte COFEK & Others J. R. Misc. Appl. No.185 of 2011 (UR)** where he observed *inter-alia* that **“whenever a public officer exercised administrative power, he should do reasonably, rationally and within the confines of the law ...”**

28. Similarly, in **Imbogo vs Minister for Agriculture [2012] eKLR**, Korir J. in a case where the Applicant was challenging his removal as a member of the Kenya Sugar Board, held that the Minister could only remove him under certain circumstances set out in **Section 6(2)** of the **State Corporations Act**. Having found that the Minister had no lawful explanation for the removal, then he was to be penalized for his **“blatant abuse of power”**.

29. Further, one of the principles embedded in **Article 47(2)** is the rule of natural justice that one must be given notice of and reasons for any adverse action against him. That is why in **Geothermal Development Co. Ltd vs AG & Others Nai. Petition No.352 of 2012** the Court stated that;

“In many jurisdictions around the World, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such information provided in relation to administrative proceedings must be sufficiently precise to put an individual on notice of exactly what the focus of any forthcoming inquiry or action will be.”

30. I adopt the reasoning in all the above decisions and it is obvious to me that looking at **Sections 8(3) and 10(3)** of the **NSSF Act**, the 2nd Respondent acted arbitrarily, contrary to the Constitution and the statute and blatantly and inexcusably acted in violation of his powers to revoke the appointment of members of the NSSF Board. No notice and no reason was given for that action and it is not enough in Gazette Notice No.4880 to cite the Section of the Statute that empowers him to revoke the 2nd Petitioner’s appointment. He ought at the very least to have given reasons in sufficient detail for her to know her wrong-doing(s) and for his actions to be squarely within the circumstances, parameter and confines of **Section 8(3) and 10(3)** aforesaid. By not doing so, it is obvious that he violated **Article 47(1) and (2)** of the **Constitution** and the 2nd Petitioner’s complaints are therefore valid.

Right to a Fair hearing

31. **Article 50(1)** of the **Constitution** provides as follows;

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

32. In that context, the right to a hearing is different from procedural fairness. That is why in **Baker vs Canada (Minister of Citizenship) Immigration) 2S.C.R.817 6**, the Supreme Court of Canada

stated as follows regarding the latter;

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have the decision affecting their rights, interests or privileges made using fair, impartial and one process, appropriate to the statutory, institutional and social context of the decisions.”

33. **Article 47** which I have addressed above deals with “**fair**” action that is administrative. **Article 50(1)** on the other hand deals with “**fair**” hearing before “**a Court, or if appropriate another independent and impartial body.**”

34. The “**right to be heard**” is different, conceptually from “**fair hearing**”. One is a component of **Article 47** while the other is the substance of **Article 50(1)**. In that context, it has not been explained how **Article 50(1)** applies to the circumstance of this case and I will say no more on the subject save that I am not satisfied that **Article 50(1)** has been violated.

Whether the Remedies sought can be granted

35. Prayer (a) in the Petition sought a declaration that the rights in **Articles 47(1), 50(1), 27, 32(1) and 33(1)(a)** of the **Constitution** have been violated. I have only found that the right to fair administrative action in **Article 47(1)** was violated and not any other.

36. Prayer (b) sought a declaration that Gazette Notice No.4880 is null and void *ab initio*. For reasons given above, that prayer must be granted.

37. Prayer (c) is a consequence of prayer (b) and it is also granted.

38. Prayer (d) is also consequential and is granted.

39. As regards prayer (e) on compensation by way of damages to both Petitioners, it is my understanding that compensation is payable under **Article 23(3)(e)** of the **Constitution**, in appropriate cases, where there have been violation of fundamental rights.

40. Further, in **Chaudhari & Chativerdi’s Law of Fundamental rights, 4th Edition, Delhi Law House, Delhi**, the learned authors at page 906 para. 13 wrote as follows;

“A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed by the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and acknowledged remedy provided for the enforcement of a fundamental right is distinct from, and in addition to the remedy in private law for the tort resulting from the contravention of a fundamental right.”

41. It is also true that damages are awarded “**if necessary**” and “**if appropriate**” as is the language of for example, the European Convention on Human Rights and the Inter-American Convention on Human Rights. As a matter of interest however, Courts and more so, International Courts, have never awarded punitive damages and in **Damage Awards for Human Rights Violations in the European and Inter-American Courts of Human Rights, 31 Santa Clara Law Review, Barbara Foutana** explained the rationale for that situation as follows;

“... this can be attributed to the Court’s attitude that the rights exist to protect individuals, and not necessarily to punish wrongdoers as is done in a criminal system. In addition, most Countries around the world base their legal systems on civil law which does not provide for punitive damages.”

42. With that background, I have found that only **Article 47(1)** rights were violated by the 2nd Respondent. The Petitioners have had no direct benefit that they have lost for the period that the 2nd Petitioner was not on the Board of NSSF. The two in fact act for the benefit of employers and can undo what is prejudicial to them, if at all.

43. More fundamentally however, the 2nd Respondent was acting in his official capacity and to burden the tax-payer with damages would be an undue punishment to them.

44. In the circumstances, I do not see that an award of damages is necessary and/or appropriate in the present case.

45. As for Costs, the same reasoning as an award of damages would apply and so let each Party bear its own costs.

Disposition

46. This Petition was uncontested but I deliberately took time to address every issue arising in the interests of justice. Having done so, the Petition is allowed in the following terms;

(a) It is hereby declared that the 2nd Respondent's revocation of the appointment of the 2nd Petitioner as a representative of the 1st Petitioner in the New Board is in breach of the Petitioners' constitutional rights under Article 47(1) of the Constitution is therefore null and void ab initio.

(b) A declaration is hereby issued that Gazette Notice No.4880 dated 9th July 2014 and published in the Kenya Gazette of 18th July 2014 is null and void ab initio to the extent that it applies to the 2nd Petitioner.

(c) An order is hereby issued removing this Court and quashing the publication contained in Gazette Notice No.4880 dated 9th July 2014 and published in the Kenya Gazette of 18th July 2014 in as far as it relates to the 2nd Petitioner.

(d) An order is hereby issued reinstating the 2nd Petitioner forthwith to her position as a member of the NSSF Board representing the interests of employers.

(e) Each Party shall bear its own costs.

47. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF SEPTEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kazungu – Court clerk

Mr. Kuria for Respondents

No appearance for Petitioner

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE