Town Council of Kikuyu v National Social Security Fund Board of Trustee & another (Judicial Review 81 of 2013) [2014] KEHC 7540 (KLR) (Judicial Review) (20 January 2014) (Judgment)

Republic v National Social Security Fund Board of Trustees & another ex parte Town Council of Kikuyu [2014] eKLR

Neutral citation: [2014] KEHC 7540 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW 81 OF 2013

GV ODUNGA, J

JANUARY 20, 2014

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF SEC 8 & 9 OF THE LAW REFORM ACT (CAP 265)

IN THE MATTER OF THE LOCAL AUTHORITIES PENSION TRUST RULES (2007)

AND

IN THE MATTER OF SEC 60 OF THE PUBLIC SERVICE SUPERANNUATION SCHEME NO. 8 OF 2012

BETWEEN

TOWN COUNCIL OF KIKUYU ..... APPLICANT

AND

THE NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEE ..... 1ST RESPONDENT

THE BOARD OF TRUSTEES LOCAL AUTHORITIES PENSION TRUST FUND ..... 2ND RESPONDENT

Members of a Parallel Social Security Scheme which Sufficiently Caters For Their Social Security Interests Cannot Be Compelled to Contribute to the National Social Security Fund (NSSF)

Reported by Nelson K. Tunoi

Judicial Review *- certiorari, mandamus and prohibition - application seeking judicial review orders against the respondent - whether an application for judicial review orders where the applicant had filed a "supporting affidavit" instead of a "verifying affidavit" was incompetent and procedurally irregular - whether or not an*

affidavit used in support of the application for leave could be used to support the substantive judicial review application - whether the applicant was obligated to contribute to NSSF where it was a member of another statutorily recognized social security provider-whether the application had merit- Civil Procedure Rules (cap 21 Sub Leg), order 53 : National Social Security Funds Act (cap 256), sections 2, 5, 7; Pensions Act (cap 189); National Social Security Fund (Registration) Order, rules 2 & 3; Local Authorities Pensions Trust Rules, 2007, rule 8.

Brief facts

The Town Council of Kikuyu (applicant) sought judicial review orders of prohibition stopping the National Social Security Fund (1st respondent) from demanding contributions from the Applicant in respect of its employees who were members and contributors of the Local Authorities Pension Trust Fund (2nd Respondent); certiorari to quash the notices of demand issued by the 1st Respondent; and order of *mandamus* to compel the 2nd Respondent to seek a refund from the 1st Respondent of all the monies contributed to it since 1963 when the Pension Act was enacted. It was the Applicant's case that its employees were registered members of Local Authorities Pension Trust (LAPTRUST), a social security provider statutorily registered and that they should be exempted from remitting statutory contributions to the 1st respondent on the sole basis that its employees remitted their contributions to Local Authorities Provident Fund. It was the 1st Respondent's case that it was not merely a pension scheme but the first pillar social security scheme that provided mandatory cover for all workers except the expressly exempted employers and it did not matter that an employee not exempt was contributing to other schemes.

Issues

i. Whether an application for judicial review orders where the applicant had filed a "supporting affidavit" instead of a "verifying affidavit" was incompetent and procedurally irregular in the circumstances?

ii. Whether or not an affidavit used in support of the application for leave could be used to support the substantive judicial review application.

iii. Whether the Town Council of Kikuyu (applicant) was obligated to contribute to NSSF yet it was a member of another statutorily recognized social security provider.

iv. Whether the Board of Trustees Local Authorities Pension Trust Fund (2nd respondent) fell within the schemes to which Pensions Act applied as mandatorily required in the Second Schedule to the Pensions Act (cap 189).

Held

1. Although the filing of the "supporting affidavit" instead of "verifying affidavit" was an irregularity, this was the kind of irregularity that was contemplated by article 159(2)(d) of the Constitution. Therefore, in the circumstances of this case, it could not be said that the *ex parte* applicant's case was not supported by any factual averments.

2. Once leave to apply for judicial review was granted under order 53 rule 1 of the Civil Procedure Rules, the applicant was expected to make the application by way of notice of motion within 21 days of the grant of leave. Under order 53 rule 4(1) and (2), once leave to apply for judicial review was granted, the applicant was expected to only rely on the statement and the verifying affidavit filed in support of the application for leave which affidavit ought to contain all the evidence intended to be relied upon by the Applicant. Therefore, unless leave of the Court was sought and granted no further affidavit was permissible in support of the substantive motion. [See: Republic v Land Disputes Tribunal Court Central Division and another ex parte Nzioka [2006] 1 EA 321 - Nyamu, J]

3. Under order 53 rule 4(1) of the Civil Procedure Rules, 2010, the applicant was only entitled to the reliefs which were expressed in the statement. However, whereas the applicant was only entitled to be granted the reliefs indicated in the statement, there was nothing wrong in the Applicant abandoning some of the reliefs expressed in the statement in his notice of motion.

4. In judicial review applications, the applicant was always the Republic rather than the person aggrieved by the decision sought to be impugned. [See: Farmers Bus Service & others v Transport Licensing Appeal Tribunal [1959] EA 779].

5. Whereas the failure by a party to properly intitule the proceedings could lead to denial of costs in the event that the party in default succeeded in the application or even being penalized in costs, that blunder was not incurably defective and ought not on its own be the basis upon which an otherwise competent application was to be dismissed. With respect to the grounds relied upon, the requirement that the Applicant set out the grounds upon which the application was to be based in the statement was meant to put the other parties on notice in order to enable them address the issues which the Applicant intended to rely on. Where the grounds, though not clear enough were sufficient to bring the matter within the purview of judicial review and where there was no prejudice occasioned by the failure to plead the grounds with clarity, it would be stretching the requirement too far to disallow the application solely on that ground.

6. A legal opinion by the Attorney General was like any opinion of an expert, and was entitled to the highest possible regard. However, the Court was not bound to accept and follow it as it should form its own independent opinion based on the entire evidence before it but like other expert evidence, the said opinion must not be rejected except on firm grounds. Such opinion evidence, like all opinion evidence would be considered by the Court and acted upon if the Court was satisfied that it could be but true on consideration of the surrounding circumstances. [See Juliet Karisa v Joseph Barawa & another Civil Appeal No 108 of 1988; Maina Kiama v Peter Kiama Mutahi Civil Application No Nai 25 of 2001; John Cancio De SA v VN Amin (1934) 7 EACA 13 at 15].

7. It was clear that if the applicants were members of a scheme (statutory or non-statutory) approved by the Minister in writing for the purposes of providing comparable benefits, being persons in the public service, local government authority or any corporation or body established for public purposes, the members of the Applicant who had subscribed to the 2nd Respondent would be exempt from contributing to the Fund since section 7(3) of the NSSF Act under which a Gazette Notice was required only applied to situations where the Minister intended to add to, delete from or vary any class or description of exempt person in the Second Schedule. Where the Second Schedule had already provided that a certain class of persons were exempted, then it was not necessary for the already exempted persons be Gazetted.

8. The 2nd Respondent was one of the schemes contemplated under Second Schedule to the Pensions Act (cap 189) pursuant to the Legal Notice No 313 of 1963 hence its members, unless they opted otherwise, were exempted from being contributors to the 1st Respondent.

9. It was not the intention of the Legislature in enacting section 7 of the NSSF 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 NSSF Act was to cater for the vulnerable members of the society as required under article 21(3) of the Constitution of Kenya, 2010.

10. To compel the very people for whom the NSSF 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 of the Constitution, 2010 required the State to do was to ensure that there were adequate pension scheme sor facilities available for its citizens and the enactment of the Act was meant to achieve this purpose. As long as this was achieved in accordance with the law, then membership to the 1st Respondent was not mandatory in all circumstances. There was in place a legal instrument which exempts the applicant from the provisions of the section 5 of the NSSF Act.

11. Apart from the legality of the Laptrust Scheme, the principle of legitimate expectation emanating from the long practice of not demanding contributions from the Applicant's members barred the 1st Respondent from compelling the Applicant's members to contribute to the 1st Applicant's fund.

12. With respect to the order of mandamus sought, as a general rule, the law required a demand by the applicant for action and refusal as a prerequisite to the granting of such an order. Of course there would be exceptions

to the general rule but it was upon the applicant to satisfy the court that in the circumstances of the case the exception applied. Thus, without evidence that a demand to that effect was made and without any material before court on the basis upon which it could invoke the exception, the remedy was not available to the Applicant.

Application allowed.

Orders

i. *order of certiorari issued to quash the notices of demand issued by the 1st Respondent, and prohibition orders against the 1st Respondent from demanding payments from the applicants in respect of the Applicant's employees who are members and contributors of the 2nd Respondent pensions fund*

ii. *no order as to costs.*

Citations

East Africa

1. *Commissioner General, Kenya Revenue Authority Thro' Republic v Silvano Anema Owaki t/a Marenga Filing Station* Civil Appeal No 45 of2000 - (Explained)

2. *District Commissioner, Kiambu v R & others ex parte Ethan Njau* [1960] EA 109 - (Mentioned)

3. *Farmers Bus Service & others v Transport Licensing Appeal Tribunal* [1959] EA 779 - (Mentioned)

4. *John Cancio De SA v VN Amin* (1934) 7 EACA 13 - (Mentioned)

5. *Karisa, Juliet v Joseph Barawa & another* Civil Appeal No 108 of 1988 - (Mentioned)

6. *Keroche Industries Limited v Kenya Revenue Authority & 5 others* [2007] 2 KLR 240 - (Explained)

7. *Maina, Kiama v Peter Kiama Mutahi* Civil Application No 25 of 2001 - (Mentioned)

8. *Mohamed Ahmed v Republic* [1957] EA 523 - (Explained)

9. *Republic v Kasamani t/a Kasamani & Co Advocates & another ex parte Minister for Finance & another* Civil Appeal (Application) No 281 of 2005 - (Explained)

10. *Republic v Commissioner of Lands ex parte Lake Flowers Limited* Miscellaneous Application No 1235 of 1998 - (Explained)

11. *Republic v Kenya National Examinations Council ex parte Gathenji & 3 others* Civil Appeal No 266 of 1996 - (Explained)

12. *Republic v Land Disputes Tribunal Court Central Division & another ex parte Nzioka* [2006] 1 EA 321 - (Mentioned)

13. *Republic v Public Procurement Administrative Review Board & another ex parte Selex Sistemi Integrati* [2008] KLR 728 - (Explained)

United Kingdom

14. *R v Wandsworth London Borough Council exparte Beckwith* [1996] 1 All ER 129 - (Explained)

15. *R v Brecknock and Abergavenny Canal Co* (1835) 111 ER 395; (1835) 3 Ad & E 217 - (Mentioned) - Mentioned)

16. *R v Bristol and Exeter Railway Co* (1886) 114 ER 859 - (Mentioned)

Statutes

East Africa

1. Civil Procedure Rules Rule, 2010 (cap 21 Sub Leg) order 53 rules 1(2); 4(2) - (Interpreted)

2. Constitution of Kenya, 2010 articles 21(3); 43(1)(e); 50(2)(n); 157(6)(9)(12); 159(2)(d) - (Interpreted)

3. Constitution of Kenya, 2010 Sixth Schedule section 31(5) - (Interpreted)

4. Interpretation and General provisions Act (cap 2) section 31(b) - (Interpreted)

5. Local Government (Local Authorities Pensions Trust) Rules, 2007 (cap 265 Sub Leg) rule 8 - (Interpreted)

6. Kenya (Local Government) (Pension) Regulations, 1963 (cap 265 Sub Leg) regulation 8 - (Interpreted)

7. National Social Security Fund (Registration) Order (cap 256 Sub Leg) rules 2, 3 - (Interpreted)
8. National Social Security Funds Act (cap 256) sections 2, 5, 7(1)(a) (b)(3); 36; 37(b) - (Interpreted)
9. Pensions Act (cap 189) sections 2, 4, 5(1); 8(1)(g) - (Interpreted)

Texts & Journals;

1. Jacob, IH., (Ed) (1976) *The Supreme Court Practice* London: Butterworth's Vol 1 para 53/1/7

JUDGMENT

Introduction

1. By a Notice of Motion dated 10th May, 2013 filed on 16th May, 2013, the Applicant herein, Town Council of Kikuyu, seeks the following orders:

    1. An Order of certiorari to have the High Court quash the notices of demand dated 15/10/2012 issued by the 1st Respondent.

    2. An Order of prohibition to stop the 1st Respondent from demanding any contribution from the Applicant in respect of its employees who are members and contributors of the 2nd Respondent pensions fund.

    3. An Order of mandamus to compel the 2nd Respondent to seek for refund from the 1st Respondent all monies contributed to it by the Applicant since 30th April 1963, when the Pension Act was enacted.

    4. A further Order prohibiting the 1st Respondent from demanding any dues based on any undertaking given by the Applicant in any form whatsoever.

    5. Stay of enforcement of the notices and the purported undertakings dated 27/2/2013 be effected pending the hearing and determination of the substantive Application for the Judicial Review or pending further Orders of this Court.

Ex Parte Applicant's Case

2. The Application is based on the Statutory Statement filed on 28th February, 2013 and a Supporting Affidavit sworn by JR Wanyoike, the *ex parte* Applicant's Town Clerk on 27th February, 2013.

3. According to the Deponent, the Applicant's employees are duly registered members of Local Authorities Pension Trust (hereinafter referred to as "Laptrust") which is a Social Security provider registered under the Laws of Kenya to provide social security to employees of local authority. While conceding that there has been lack of remitting of contributions on the part of the Applicant to the National Social Security Fund (hereinafter referred to as NSSF), he however contends this has been necessitated by the fact that there are now two Social Security Fund providers catering for local authority employees and the Applicant's employees are duly registered members of the said Laptrust. According to him, the applicant's employees being members of the said Laptrust have instructed the applicant's offices to remit their contributions to the Laptrust fund.

    In his view, there seems to be rivalry and competition between NSSF and Laptrust as a result of which competition the applicant sought clarification from the Retirement Benefits Authority which responded vide a letter dated 16th July, 2012.

4. Despite that on the 15th October 2012 the Applicant received a letter from the NSSF instructing the Applicant to remit Social Security contributions to themselves. On 30th July 2012 the deponent wrote a letter to the Permanent Secretary Ministry of Local Government seeking exemption from any further contributions until the issue is clearly resolved and on 30th July, 2012 the said Permanent Secretary Ministry of Local Government wrote to the deponent a letter stating the position with regard to contributions to the NSSF clearly advising the deponent not to remit any contributions to the afore stated body. Thereafter on 15th November, 2012 the deponent wrote a letter to the NSSF withdrawing their contributions and undertakings entered into earlier on. After exhausting all avenues the applicant wrote to the Attorney General's office to direct it on the way forward. The Attorney General responded with a report dated 23rd October, 2012.

5. As a result of his lack of clarity the Applicant continue to suffer as a council, and indeed the deponent and the Applicant's treasurer are facing criminal charges.

1st Respondent's Response

6. In opposition to the Application the 1st Respondent filed a Replying Affidavit on 9th July, 2013 sworn by Austin Ouko, the 1st Respondent's Legal Manager on 8th July 2013.

7. According to him, the entire Application herein is fatally defective and ought to be struck out with costs for failing to comply with the mandatory provisions of order 53 of the *Civil Procedure Rules* and that Paragraphs 9, 10, 11, 14 and 15, of the Replying Affidavit of the 2nd Respondent offends the express provisions of order 53 of the *Civil Procedure Rules* and ought to be struck out. Apart from that the prayers sought by the ex parte Applicant herein offend the mandatory provisions of order 53 of the *Civil Procedure Rules*. He therefore put the Applicant on notice that at the opportune moment it would raise a Preliminary Objection and seek the entire proceedings herein be struck out with costs to the 1st Respondent.

8. In his view, the overall gist of the *ex parte* Applicant's case is simply that the ex parte Applicant is exempted form remitting statutory contributions to the 1st Respondent on the single basis that the said employees remits their contributions to Local Authorities Provident Fund.

9. In the Deponent's view, the only ground sought to be relied upon by the Applicant which ground is based on the opinion of Attorney General in the letter dated 31st October, 2012 herein in support of the orders sought is on an allegations that the 1st Respondent has no jurisdiction to claim the payment of outstanding contributions and penalties. However, based on the Applicant's advisers, the deponent, believes that the said opinion was given in total disregard of the law and is not binding on this Court at all hence the Court ought to re-assess the law and make its own independent findings. According to him, the 1st Respondent is a mandatory public provident fund established under the *National Social Security Funds Act*, cap 256 Laws of Kenya (hereinafter "the Act" or "the *Act*") and Section 5 of the said *Act* provides for compulsory registration of employers and failure to so register is an offence under the said Act.

   Vide a Gazette Notice issued by the Minister responsible for Social Security (hereinafter referred to as the Minister) on 1st April 1967, all Local Authorities were classified as class or description of employers that must be registered with the 1st Respondent and although the Applicant avers they are Exempt Persons, an express or implied reading of the Second Schedule to the Act, reveals that no Local Authority including the ex parte Applicant has in the history of the Republic of Kenya, ever been exempted and all Local Authorities have been registered.

10. It is deposed that pursuant to rule 2 and 3 of the *National Social Security Fund (Registration) Order*, made pursuant to section 5 of the *Act*, an employer is defined to include a public body and unless exempt, all employers are declared registrable as members and as contribution employers and pursuant to section 7 of the Act, the only persons who are not to be registered with the 1st Respondent are exempt persons and casual workers. Exempt person is defined in Section 2 of the *Act* to mean any person of a class or description specified in the Second Schedule. According to the deponent, the Act proceeds to specify the manner of exemption, being either the categories of employers specified in the Second Schedule pursuant to section 7 of the *Act* or persons exempted, on recommendation by the Board, by the minister by a notice in the gazette. Since the ex parte Applicant is not expressly exempted vide the Second Schedule to section 7 of the *Act*, it follows that only a Gazette Notice published by the Minister wherein the 2nd Schedule was amended to include the ex-parte Applicant in the list of exempt persons will suffice and anything short of the express statutory provision cannot obviously suffice. The same applies to the 2nd Respondent herein as per the aforesaid Section in light of the fact that the ex-parte Applicant has not produced and showed this Court the said Gazette Notice of express exemption or a letter from the Minister approving exemption of the Interested Party as a Pension body with comparable benefits and failure to so produce, the proceedings herein cannot proceed as they are without any merit.

11. According to the deponent, the Kenya Local Government Superannuation Fund was established pursuant to subsidiary legislation made by the Minister for Local Government Pursuant to Regulation Number 8 of the *Kenya Local Government (Pension) Regulations*, 1963 and hence is a body created pursuant to a subsidiary legislation. A further Legal Notice No 50 of 2007 by the Minister of Local Government revoked the earlier Legal Notice of 1963 by creating Laptrust which is expressed to be a Successor to the Local Government Superannuation Fund and it is also clear that the said Laptrust has also been created pursuant to a subsidiary legislation. The 1st Respondent on the other hand, is a creature of a statute, the Act, and provides for compulsory registration of employers and section 7 of the said *Act* is the only Section that addresses exemptions and not any other provisions of law. No other Act of parliament supersedes this provision and provides for other means of exemption not contemplated by section 7(3) of the *Act* as stated herein. It specifically follows that the only way of addition of any exempt person or body is through a procedure provided for under section 7(3) of the *Act* by the Minister of Labour, upon the recommendation of the Board of the 1st Respondent and importantly, by notice in the Gazette. It is however the case of the 1st Respondent and the opinion by the Attorney General sought to be relied upon herein that the minister for Local Government has in exercise of his powers, created subsidiary legislation wherein it specifies a manner of automatic exemption different from that contemplated in the said section 7(3) of the is incorrect since section 31 (b) of the *Interpretation and General provisions Act*, cap 2 of the Laws of Kenya provides that 'no subsidiary legislation shall be inconsistent with the provisions of an Act.'

12. It is contended that since no Local Authority has ever been included as among the persons to be exempted vide section 7 of the *Act* and the Minister has not exempted the Interested Party, it is not open to the Minister or Local Government or other functionaries to proceed under a subsidiary legislation to contradict, annul, derogate or conflict a substantive Act of Parliament by granting an alternative mode of exemption since to hold otherwise would have the effect of granting power to a minister to nullify a provision of an Act of parliament through a Gazette Notice, a very absurd situation. It is trite law, according to him, that where rules made are repugnant to any provision of a substantive Act and hence outside the authority of the body promulgating the said rules, the same are ultra vires and hence null and void as ministers and other functionaries cannot usurp the primacy of an Act of parliament.

13. In the deponent's view, the opinion given by the Attorney General, which is based on Paragraph 1 of the 2nd Schedule to the *NSSF Act* that provides in part;

> 'Persons eligible to receive any benefits under any scheme to which the *Pensions Act* applies ', can be faulted in that as it heavily relied on the provisions of Part III of the First Schedule to the *Pensions Act* to make a determination that members contributing to the 2nd Respondent are all exempted from contributing to the 1st Respondent in the following manner:
>
> i) The Kenya Local Authorities Superannuation Fund is mentioned only once in the definition of the term 'Scheduled Government' which term only applies to Part III and Part IV of the Schedule to the *Pensions Act* only and the mention therein must be constructed in the contextual manner and correctly construed, it cannot be said to be a scheme to which *Pensions Act* applies;
>
> ii) Part III thereof exclusively deals with 'Transferred Officers' and Part IV specifically deals with 'qualifying service and pension service';
>
> iii) Part III of the Schedule where the 2nd Respondent is mentioned applies and is correctly titled 'Transferred Officers' and its interpretation cannot be overstretched to mean a blanket application as both the Honourable Attorney General and the 2nd Respondent intends to have this Court believe. In fact, rule 7 of the Schedule is emphatic: 'This part shall only apply in the case of an officer transferred to or from the service of the Government from or to other public service';
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> iv) In the part referred to herein, there is a mere mention of the 2nd Respondent but no local authority has been mentioned and this is important given that not only members of the Local Authority are exclusive sponsors or members of the 2nd Respondent;
>
> v) Hence, a person in the public service and not necessarily a Local Authority can be a member of the 2nd Respondent receiving also benefits from the 2nd Respondent and hence when it comes to apportioning his pensions under the *Pensions Act*, the fact of the membership is taken into account and the definition thereon cannot be overstretched to uniformly apply to all employees of the Local Authority who are members of the 1st and 2nd Respondents;
>
> vi) Hence, the transferred officers contemplated in the Part are officers in the Public Service transferred as stipulated;
>
> (vii) Part III is only used to apportion the Pension to be granted to a transferred public officer and nothing more, but none of the employees of the ex parte Applicant who are members of the 1st Respondent and whose contributions are demanded are Public Officers or offices within the Public Service as per section 2 of the *Pensions Act*;
>
> viii) Section 2 of the *Pensions Act* defines 'Public Service' and nowhere in that definition is service in a Local Authority considered a Public Service to enable an officer be pensionable under the *Pensions Act*;
>
> ix) This court has not been particularly informed by the ex parte Applicant, which employees are properly 'transferred officers' as per the *Pensions Act* to

which exemption can apply ad whose contributions are demanded by the 1st Respondent since not event the *Pensions Act* nor the *Act* contemplates blanket exemptions;

x) At page 9 of the opinion of the Honourable Attorney General, he correctly captures that *Pensions Act* applies to Transferred Officers but had he gone ahead and defined what is meant by the term 'Transferred Officers' as per the very said Act, he could have arrived at a different conclusion and we invite this Honourable Court to be guided by law and not the said opinion.

14. It is therefore averred that in the circumstances, a mere mention of the 2nd Respondent in the First Schedule to the *Pensions Act* which contextually meant to describe how pensions of transferred offices ought to be computed cannot by any stretch of imagination be taken to mean that the 2nd Respondent is a scheme to which *pensions Act* applies as mandatorily required in the 2nd Schedule to the *Pensions Act*. Therefore, for the 2nd Respondent to even allege that it is a scheme established pursuant to the *Pensions Act* is absurd as Pension Act only provides guidelines for receipt of Pension benefits by government officers, and any scheme established under the *Pensions Act* must only be established by the very said Government to pay pensions on their behalf and not to be governed by a separate independent body. According to him, his position is buttressed by the very provisions of section 4 of the *Pensions Act* that provides as follows; and 'All Pensions, gratuities or other allowances granted under this Act shall be a charge on the consolidated Fund' and Further, section 5(1) of the *Pensions Act* provides; 'Every officer shall have an absolute right to pension and gratuity'

15. It is the deponent's view the 2nd Respondent cannot be heard to claim to be a scheme established or recognized under the *Pensions Act* at all since the said contention is contradicted by their very own constitutive instruments annexed as Exhibit 3 of the 2nd Respondent's Replying Affidavit in that;

i) *Pensions Act* properly construed, does not contemplate payment or remission of contributions by the relevant government or public officers before being entitled to payment of Pension and Gratuity as Pensions paid are directly charged on Consolidated Fund and it is an absolute right, the 2nd Respondent on the other hand demands that members make specific contributions before entitlement to pensions;

ii) The 2nd Respondent does not receive any funds form the Consolidated Fund for the purpose of direct benefit payments to the Public Offices covered under the *Pensions Act* but relies on contributions of sponsors and other persons;

iii) For the mere fact that the 2nd Respondent receives contributions from the sponsors and other persons not contemplated under the *Pensions Act* and only grants benefits to the said contributors out of the contributed sum, they obviously cannot be a scheme established or recognized under the *Pensions Act*;

iv) *Pensions Act* is an Act of Parliament that fully outlines the procedures for payment of Pensions to specific officers out of the consolidated Fund and any scheme established under it must fully comply with the entire guidelines thereof, the Interested Party on the other hand is guided by entirely different rules and Board of Trustees not contemplated under the *Pensions Act*.

16. It is deposed that it cannot obviously be the intention of parliament to create a separate and completely independent scheme for purposes of effecting the provisions or objectives of the *Pensions Act* and more importantly, under a different Act of Parliament and the 2nd Respondent and the ex-parte Applicant cannot divert the attention or explain away the failure to avail to this Honourable Court a Gazette

Notice from the Minister of Labour expressly granting them exemptions from making contributions to the 1st Respondent in strict compliance with s 7 of the *Act*.

17. In response to the allegation that the 1st Respondent must first obtain the consent of the Cabinet Secretary or the Director of Public Prosecution before instituting proceedings, the deponent avers that

    i) section 37(b) of the *Act* the Interested Party seeks to rely upon merely addresses the issue of time within which proceedings of an offence may be commenced and nothing more can be read from the said Section at all and that is why the Section ends by the words '...whichever period expires last'

    ii) Institution and conduct of proceedings are governed by section 39 of the said *Act* which empowers the Enforcement Offices to institute proceedings in a magistrate's court and if it was the intention of parliament that the said institution be made only upon approval by the minister, nothing would prevent Parliament from enacting such express provision;

    iii) The Prosecution herein has been instituted pursuant to Section 39 of the *Act* and not any other provision of law and there is no requirement under the said *Act* that the opinion of the Director of Public Prosecution must be had for the said prosecution to have a legal validity;

    iv) Article 157 of *Constitution* of the Republic of Kenya alluded to in support of their contention outlines the powers of the Director of Public Prosecution but none provides that an opinion of the Director of Public Prosecution be had before instituting any prosecution even those authorized by different statutes;

    v) In fact, the prosecution herein has been recognized and authorized by the very said Constitution when it provides under article 157(12) that; 'Parliament may enact legislation conferring power of prosecution on authorities other than the Director of Public Prosecutions';

    vi) As alluded to herein, the prosecution herein is not being carried out by the Director of Public Prosecution but the 1st Respondent under authority of an Act of Parliament;

    vii) Even then, pursuant to Legal Notice No 11905 issued on 8th October 2010, the Attorney General had already gazetted 26 persons to be prosecutors for the purposes of cases arising under ht National Social Security Fund pursuant to section 31(5) of the 6th Schedule to the *Constitution* of Kenya, 2010).

18. It is therefore contended that in light of the foregoing, the only other mode open for the 2nd Respondent is that, the Minister must approve the said exemption in writing as per rule 1 of the Second Schedule to section 7 of the *Act* and the consideration for exemption by the minister is the scheme must be proved to provide comparable benefits hence it follows that there cannot be a blanket exemption at all as averred by the 2nd Respondent but on a case by-case basis by the Minister in Charge of Social Services and the burden of proof is on the person alleging that indeed the minister responsible for Social Services has granted he said person express exemption, since exemption cannot be implied at all, the minister herein, being defined in section 2 of the *Act* to mean the minister for the time being responsible for social security.

19. In the deponent's view, the 1st Respondent draws its mandate form section 43(1)(e) of the *Constitution* of the Republic of Kenya that provides that every person has a right to social security and hence it follows that:

i) The 1st Respondent is the first pillar Social Security Scheme that provides mandatory cover of all workers except the expressly exempted employers and it does not matter that an employee not exempt is contributing to other schemes; it is not merely a pension scheme;

ii) Even by a casual reading of Legal Notice N 50 of 2007 which contains 'The Local Authorities Pension trust rules, 2007' shows that the 2nd Respondent's Scheme is merely an occupational pension scheme and cannot offer comparable benefits as that offered by the 1st Respondent to warrant exemption by the minister under section 7 of the *Act* and to do so, would only be denying the employees under the Applicant to enjoy their rights to social security by being members of a complete and holistically social security pillar scheme that the 1st Respondent offers;

iii) As opposed to the 2nd Respondent, the 1st Respondent's scheme is wider and provides income security in the event of invalidity, death and old age while the 2nd Respondent only offers pension benefit and thus the 1st Respondent is a 'Social security safety net' to all workers including the ones contributing to other schemes;

iv) The Ex parte Applicant cannot arbitrarily shield the employees under it from contributing to the 1st Respondent and hence offer complete social security as envisages under the *Constitution*.

20. To him, the Mandamus prayer No 3 and 4 is untenable, for the following brief reasons:

i) The Ex-parte Applicant has not stated the statute that compels the 1st Respondent to either raise any issue as regards the contributions with the 2nd Respondent or refund of monies paid which public duty is compellable by an order of Mandamus;

ii) The Ex-parte Applicant seeks an order of Mandamus to compel refund of pension benefits that are unknown and in respect of unknown contributories;

iii) No public duty is demonstrated that the 1st Respondent has failed to perform and compellable by an order of Mandamus.

2nd Respondent's Response

21. On the part of the 2nd Respondent, a replying affidavit sworn on 25th June 2013 by Hosea Kili, its Managing Director, was filed on 26th June 2013.

22. According to the deponent, the issue of whether members of the Laptrust are exempted from registering as members of the NSSF has been referred to the Attorney General for his legal opinion in his capacity as the chief Government Advisor who after meeting all the stakeholders and considering their respective submissions has since given his opinion that members of the Laptrust are exempt from registering as members of NSSF Further, NSSF has through the office of the Director of Public Prosecutions preferred many criminal proceedings against sponsors of Laptrust for alleged failure to make or remit contributions under the *Act*. However, it is deposed that

a) Laptrust is the successor to the Kenya Local Government Officers' Superannuation Fund, a pension scheme for local government officers established vide Legal Notice No 313 of 1963;

b) as is evident, the Laptrust was established long before the enactment of the *Act* and the establishment of the NSSF;

c) the Kenya Local Government Officers' Superannuation Fund was the successor to even earlier pension schemes for local government officers established under the Nairobi Municipality (Superannuation Fund) rules, 1950; and the Municipalities Ordinance, 1928.

23. It is deposed that the applicant has made arrangements for pension and other retirement benefits for its employees and in particular, the Town Council of Kikuyu is a sponsor of the Laptrust within the meaning of rule 8 of the Local Authorities Pensions Trust Rules, 2007 as read with the 1st Schedule thereof besides the Town Council of Kikuyu, there are 175 other local authorities each of which is a sponsor of Laptrust within the meaning of rule 8 thereof as read with the 1st Schedule thereof.

24. According to his legal advice the Pension Scheme is expressly recognized under the provisions of section 8(1)(g) of the *Pensions Act* and in particular

a) it has never been the intention of Parliament to make employees registered with the Laptrust, or indeed the members of any other pension scheme recognized under the *Pensions Act*, to be compulsory members of NSSF;

b) if Parliament had intended to make pensionable employees of local authorities compulsory members of the NSSF; it would have abolished the Kenya Local Government Officers' Superannuation Fund (by repealing Legal Notice No 313 of 1963) when it enacted the *Act* in 1965 or the *Pensions Act* in 1942; and

c) accordingly, the Town Council of Kikuyu and its employees, to the extent that they are sponsors and members of the Laptrust, are "exempt persons" within the meaning of the provisions of section 7(1)(a) and (2) of the *Act* as read with paragraph 1 of the Second Schedule to the *Act*.

25. According to his legal advice the deponent believes that a) article 50(2)(n) of the *Constitution* of Kenya, 2010 gives every accused person the right -

"not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under international law";

b) since Kikuyu Town Council and its employees are "exempt persons" within the meaning of the provisions of section 7(1)(a) and (2) of the *Act*, the offence that its officer is charged with does not exist and is unknown to the laws of Kenya;

c) under section 37(1) of the *Act*, Criminal proceedings for any alleged non-remittance of contributions can only be commenced if there is evidence "sufficient in the opinion of the Cabinet Secretary to justify a prosecution for the offence...";

d) Accordingly NSSF cannot institute criminal proceedings under section 36 of the *Act* without first consulting the Cabinet Secretary responsible for matters relating to labour and social security;

e) under article 157(6) of the *Constitution* of Kenya 2010, the Director of Public Prosecutions is the repository of the state powers of prosecution;

f) under article 157(9) of the *Constitution* of Kenya, 2010, all other prosecutors, including the prosecutors in criminal proceedings outlined under paragraph

3 above of this affidavit exercise their prosecutorial powers either as delegates, subordinates or agents of the Director of Public Prosecutions; and

f) all criminal proceedings in Kenya must be founded on either general or specific instructions of the Director of Public Prosecutions.

Accordingly, every subordinate prosecutor must first seek the opinion of the Director of Public Prosecutions before instituting criminal proceedings such as the ones outlined under paragraph 3 above of this affidavit. As far as he is concerned, NSSF did not seek either the opinion of the Cabinet Secretary before instituting criminal proceedings outlined under paragraph 3 above of his affidavit or the consent or opinion of the Director of Public Prosecutions before instituting the said criminal proceedings hence the institution of criminal proceedings is ultra vires the provisions of article 157(6) and (9) of the *Constitution* of Kenya, 2010 and section 37(1) of the *Act*.

26. Apart from that NSSF has for many years treated the Town Council of Kikuyu and its employees as "exempt persons" within the meaning of section 7(1)(a) and (2) of the *National Social Security fund Act* and the deponent states that he is personally aware that the issue of whether criminal proceedings under section 36 of the *Act* can be sustained against a local authority that is a sponsor to Laptrust has been referred to the Director of Public Prosecutions for directions in a separate but similar dispute to the one currently before the court. And as far as he knows, the Director of Public Prosecutions has not yet given any general or specific directions on the question of whether criminal proceedings under section 36 of the *NSSF Act* can be instituted against a local authority that is a sponsor of Laptrust. In the circumstances, I honestly believe it is an abuse of the court process for NSSF to demand contributions and institute or continue criminal proceedings against the Officers of Laptrust sponsors. In view of the foregoing in is averred that NSSF's impugned decision (namely demand for contributions and the institution of criminal proceedings against the officer of Laptrust sponsors) is unlawful, irrational, unreasonable and oppressive; offend the immutable principle of natural justice; and offends the principle of legitimate expectation.

Applicant's Rejoinder

27. By way of a rejoinder, the Applicant on 26th September, 2013 filed a further affidavit sworn by Stephen Thenya Mwangi, the Applicant's Sub-County Administrator on 18th September, 2013.

28. According to the deponent, he associated himself with the entire contents of the 2nd Respondent's Replying Affidavit. While denying existence of any defects of procedural lapses, he nevertheless deposed that the same is merely technical and does not affect the substance of the application hence it ought to be disregarded and the Court do consider the key issues as regards the subject matter herein. He conceded that the Applicant's employees have been making contributions to the 2nd Respondent as early as 1963 prior to establishment of the 1st Respondent (NSSF) in 1965 and as such its quite clear both from past practice and the law that the correct position is that the members/contributors to the Laptrust are duly exempted from making any contributions to the 1st Respondent otherwise it would be unfair and unjust to compel them to do so as the 1st Respondent would wish them to make double contributions. To him, the employees of Sub-County of Kikuyu are members/contributors to the 2nd Respondent and have been doing so for several years and compelling them to become members of the 1st Respondent would be an infringement of their rights and fundamental freedoms enshrined in Chapter Four of the *Constitution* which Constitution is superior to NSSF statute. It is deposed that registration of local authorities per se by the 1st Respondent does not disentitle them their right and freedom to continue with their past practice for several years whereby they have always contributed to

the 2nd Respondent inspite of the fact that the 1st Respondent has been making attempts to compel them to be their contributor hence the several suits both criminal and Judicial reviews pending in our Courts of Law between the 1st Respondent and several local authorities

29. The deponent avers that the issues raised by the 1st Respondent are clearly the same issues raised and submitted on 10th September. 2012 by the 1st and 2nd Respondent in presence of the Honourable the Attorney General resulting in his findings as contained in the said letter dated 23rd October, 2013. According to him, the appointment of prosecutor per se was not for purposes of prosecuting members of Laptrust the 2nd Respondent herein who have declined to double contribute by making some other contribution to the 1st Respondent but it was for purposes of enabling the 1st Respondent directly deal with their matters that required prosecution for purposes of expeditious disposal of the same. To him, the correct position is vide letter written by the Honourable the Attorney General as it would not only be unfair and unjust but very oppressive to compel employees of local authority to make similar contributions to two parallel bodies for similar objectives and as such the 1st Respondent be restrained from compelling the members of the 2nd Respondent to make further contributions to it. It is further his view that article 43(i)(e) guarantee every person the right to social security as it reads quote "Every person has the right to social security" and its sub article (3) reads quote "The state shall provide appropriate social security to persons who are unable to support themselves and their dependents." The said proviso does not envisage a situation whereby the state would force/compel its persons to join more than one social security fund but guarantees a right to a social security. Indeed it imposes a duty/ obligation on the state to ensure pension scheme/facilities are available for its citizens.

Determinations

30. The foregoing issues largely formed the issues which were submitted upon by the parties to these proceedings.

31. I have considered the Application herein together with the supporting affidavits and rivalling submissions. The first issue for determination is the competency of the Application. In *Commissioner General, Kenya Revenue Authority Through Republic v Silvano Anema Owaki T/A Marenga Filing Station* Civil Appeal No 45 of 2000, the Court of Appeal expressed itself as follows:

> " We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of the products containing the chemical used only in the products meant for export. That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol 1 at paragraph 53/1/7:
>
> > 'The Application for leave "By a statement" - The facts relied on should be stated in the affidavit (see *R v Wandsworth JJ ex p Read* [1942] 1 KB 281). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.'

At page 283 of the report of the case of *R v Wandsworth Justices*, Viscount Caldecote CJ said:

> 'The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the Court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.' "

32. It is true that the verifying affidavit sworn by the ex parte applicant was a five paragraph affidavit which was very thin in the facts relied upon by the applicant. If that was the only affidavit sworn in support of the ex parte applicant's case, I would have had no hesitation in finding that there were no factual averments on the basis of which the court could make a determination in favour of the ex parte applicant. However, the ex parte Applicant also filed a supporting affidavit with the Chamber Summons for leave. Although the filing of the "supporting affidavit" instead of "verifying affidavit" was an irregularity, it is my view that that is the kind of irregularity which was contemplated by article 159(2)(d) of the *Constitution*. It is therefore my view that in the circumstances of this case, it cannot be said that the ex parte applicant's case was not supported by any factual averments.

33. The other issue raised was that the Chamber Summons was spent after the leave was granted and hence the affidavit used in support of the application for leave could not be used to support the substantive application. With due respect the 1st Respondent's stand on this point cannot be correct. In my view, once leave to apply for judicial review is granted under order 53 rule 1 of the *Civil Procedure Rules*, the Applicant is expected to make the application by way of Notice of Motion within 21 days of the grant of leave. Under rule 4(1) of order 53 copies of the statement accompanying the application for leave are to be served with the Notice of Motion, and copies of any affidavits accompanying the Application for leave are required to be supplied on demand and no grounds are, subject to the rule, to be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement. However, under sub rule (2) thereof the Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the Application. In other words once leave to apply for judicial review is granted, the Applicant is expected to only rely on the statement and the verifying affidavit filed in support of the application for leave which affidavit ought to contain all the evidence intended to be relied upon by the Applicant. In other words, unless leave of the Court is sought and granted no further affidavit is permissible in support of the substantive motion.

13. Mine, however, is not a lone voice shouting in the wilderness. This position was restated in *Republic v Land Disputes Tribunal Court Central Division & another Ex Parte Nzioka* [2006] 1 EA 321 where Nyamu, J (as he then was) expressed himself as follows:

> " There is no legal requirement that the statement and verifying affidavit or any other Supporting Affidavits and documents relied on by the Applicant be filed together with the Notice of Motion and indeed there is no requirement that the motion be filed simultaneously with any other document. Order 53, rule 4 requires that the Motion be served together with the documents filed at the application or (leave stage) stage and the grounds to be relied on in support of the motion are those set out in the statement filed at leave stage and the facts are as set out in the affidavit verifying the statement. This means that no other documents need be filed with the Motion and the Motion is supported by the statement and the affidavits accompanying the application for leave. However under

order 53, rule 4(2) the Applicant can file other or further affidavits, apart from those accompanying the application for leave, in reply to any affidavits filed by the other parties (where they introduce a new matter arising out of the affidavits) and the Applicant can do so after sending out a notice to the parties and the procedure for this is clearly outlined in the rules. Where the other parties have not filed any affidavits the Applicant would under order 53 have no legal basis for filing another or further affidavits. To this extent the Applicant's case is complete at leave stage and practicing advocates are cautioned that the Civil Division Procedure of filing many affidavits to counter the opponent's case is a hangover, which is not acceptable under the Judicial Review jurisdiction."

34. It is also contended that since the reliefs indicated in the statement are different from those sought in the Notice of Motion, that renders the entire Motion defective. It is correct that under order 53 rule 4(1) of the *Civil Procedure Rules*, the ex parte Applicant is only entitled to the reliefs which were expressed in the statement. However, this does not mean that the applicant cannot seek only some of the reliefs which were indicated in the statement. In other words, whereas the Applicant is only entitled to be granted the reliefs indicated in the statement, there is nothing wrong in the Applicant abandoning some of the reliefs expressed in the statement in his Notice of Motion.

35. It is further contended that the Application is defective in that the applicant in the Notice of Motion is indicated as the ex parte applicant rather than the Republic. That the Application is wrongly intituled is not in doubt. In judicial review applications, the Applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See *Farmers Bus Service & others v Transport Licensing Appeal Tribunal* [1959] EA 779.

36. The rationale for this was given in *Mohamed Ahmed v R* [1957] EA 523 where it was held:

> " This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".

37. However in *Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers v Charles Lutta Kasamani T/A Kasamani & Co Advocate & another* Civil Appeal (Application) No Nai 281 of 2005 the Court of Appeal stated:

> " Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the Appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".

38. It is therefore my view that whereas the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the Application or even being penalised in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed. With respect to the grounds relied upon, it is my view the requirement that the Applicant sets out the grounds upon which the Application is to be based in the statement is meant to put the other parties on notice in order to enable them address the

issues which the applicant intend to rely on. Where the grounds though not clear enough are sufficient to bring the matter within the purview of judicial review and where there is no prejudice occasioned by the failure to plead the grounds with clarity it would be stretching the requirement too far to disallow the Application solely on that ground.

39. In my view the main issue boils down to whether the Applicant is obliged to contribute to the 1st Respondent.

40. Before I proceed to the merits of the matter, it is important to put the opinion of the Attorney General its rightful perspective. That opinion is a legal opinion and like any opinion of an expert, it is entitled to the highest possible regard. However, the Court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it but like other expert evidence, the said opinion must not be rejected except on firm grounds. Such opinion evidence, like all opinion evidence will be considered by the Court and acted upon if the Court is satisfied that it cannot be but true on consideration of the surrounding circumstances. See *Juliet Karisa v Joseph Barawa & another* Civil Appeal No 108 of 1988; *Maina Kiama v Peter Kiama Mutahi* Civil Application No Nai 25 of 2001; *John Cancio De SA v V N Amin* (1934) 7 EACA 13 at 15.

41. Section 7 of the *Act* provides as follows:

    (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 or 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 regulations made thereunder shall be guilty of an offence

42. It is clear that under the foregoing provisions the Minister is empowered based on the recommendations of the 1st Respondent's Board by an order in the Gazette to specify the class of employees and employers as contributing members of the Fund and employers respectively. Unless the Minister makes a specification under the said provisions, it would follow that persons who are not so specified would not be compelled to the fund.

43. In this case, it is contended by the 1st Respondent that vide a Gazette Notice issued by the Minister responsible for Social Security on 1st April 1967, all Local Authorities were classified as class or description of employers that must be registered with the 1st Respondent. It is therefore contended by the 1st Respondent that it is upon the applicant to prove that it was exempt and that exemption is either by falling in the categories of employers specified in the Second Schedule pursuant to section 7 of the

Act or by the Minister by a Gazette notice on a recommendation of the Board. It is the 1st Respondent's position that the Applicant does not fall under the category of the employers who are exempted and that there is no Gazette notice by the Minister exempting the Applicant from contributing to the fund.

44. Section 7 of the *Act* 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 from or vary in the Second Schedule any class or description of exempt person.

45. The Second Schedule to the *Act* sets out the list of persons who are exempt from being registered as members of the Fund and one of the class of persons exempted from the Fund 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.

46. It is therefore clear that 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 are exempt from contributing to the 1st Respondent's fund.

47. The Applicant's case as supported by the 2nd Respondent is that the Applicant's employees have been making contributions to the 2nd Respondent as early as 1963 prior to establishment of the NSSF in 1965 and as such, from past practice and the law, the members/ contributors to the 2nd Respondent. According to them, the 2nd Respondent is the successor to the Kenya Local Government Officers' Superannuation Fund, a pension scheme for local government officers established vide Legal Notice No 313 of 1963. The 2nd Respondent was established long before the enactment of the *Act* and the establishment of the NSSF.

48. It is clear that if the Applicants are members of a scheme (statutory or non-statutory) approved by the Minister in writing for the purposes of providing comparable benefits, being persons in the public service, local government authority or any corporation or body established for public purposes, the members of the applicant who subscribe to the 2nd Respondent would be exempt from contributing to the Fund since section 7(3) under which a Gazette notice is required only applies to situations where the Minister intends to add to, delete from or vary any class or description of exempt person in the Second Schedule. Where the second schedule has already provided that a certain class of persons are exempt, it is my view, that it is nolonger necessary that the already exempted persons be Gazetted.

49. The next issue is whether the 2nd respondent falls within the schemes specified in second schedule. It is contended that the 2nd Respondent is the successor to the Kenya Local Government Officers' Superannuation Fund, a pension scheme for local government officers established vide Legal Notice No 313 of 1963. This position is not seriously contested by the 1st Respondent. It is further contended that the benefits accruing to the contributors/ members of the 2nd Respondent scheme outweigh those which accrue to the members of the 1st Respondent. It is my view and I so hold that the 2nd Respondent is one of the schemes contemplated under Second Schedule to the *Act* pursuant to the Legal Notice No 313 of 1963 hence its members, unless they opt otherwise are exempted from being contributors to the 1st the Respondent.

50. As correctly submitted on behalf of the 1st Respondent, article 43(1)(e) of the *Constitution* of the Republic of Kenya that provides that every person has a right to social security. The said provision guarantee every person the right to social security and provides that "Every person has the right to social security" while sub article (3) thereof provides that "The state shall provide appropriate social security to persons who are unable to support themselves and their dependents."

51. Dealing with the principles of statutory interpretation it was held in *Republic v Public Procurement Administrative Review Board & another ex parte Selex Sistemi Integrati* Nairobi HCMA No 1260 of 2007 [2008] KLR 728 that:

> " The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach." In all cases now in the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision ... It is no longer necessary for the judges to wring their hands and say: "There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy ... by reading words in, if necessary - so as to do what Parliament would have done, had they had the situation in mind The defect that appears in a statute cannot be ignored by the judge, he must set out to work on the constructive task of finding the intention of the Parliament. The judge should not only consider the language of the statute but also the social conditions which gave rise to it, and supplement the written word so as to give "force and life" to the intention of the legislature."

52. In my view it was not the intention ofthe legislature in enacting section? 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 ofthe *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.

53. 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*.

54. It is also contended that the Applicant's members have for several years contributed to the 2nd Respondent. In effect it is contended that the members of the applicant have acquired a legitimate expectation that as long as they continue making contributions to the 2nd respondent they would not be required to contribute to the 1st respondent. It is now trite that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by Nyamu, J (as he then was) in *Republic vThe Commissioner cf Lands ex parte Lake Flowers Limited* Nairobi HC MISC Application No 1235 of 1998:

> "Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality The Court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis The Court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."

55. The judicial ground of legitimate expectation was the subject of *Keroche Industries Limited v Kenya Revenue Authority & 5 others* Nairobi HCMA No 743 of 2006 [2007] KLR 240 where the Court expressed itself as follows:

> "legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised Thus I hold that the frustration of the Applicants' legitimate expectation based on the Application of tariff amounts to abuse of power."

56. It is therefore my view that apart from the legality ofthe Laptrust Scheme, the principle of legitimate expectation emanating from the long practice of not demanding contributions from the Applicant's

members bars the 1st Respondent from compelling the Applicant's members to contribute to the 1st Applicant's fund.

57. That now brings me to the remedies that this Court ought to grant.

Prayer 3 of the Motion seeks an order of mandamus compelling the 2nd Respondent to seek refund from the 1st Respondent all monies contributed to it by the Applicant since 30th April 1963, when the *Pensions Act* was enacted. First and foremost, with respect to the prayer for mandamus, the law, as a general rule, requires a demand by the applicant for action and refusal as a prerequisite to the granting of such an order. Of course there may be exceptions to the general rule but it is upon the applicant to satisfy the Court that in the circumstances of the case the exception applies. See *The District Commissioner Kiambu, v R and others ex parte Ethan Njau* Civil Appeal No 2 of 1960 [1960] EA 109; *R v The Brecknock and Abergavenny Canal Co* 111 ER 395; and *R v The Bristol and Exeter Railway Co* 114 ER 859.

58. Without evidence that a demand to that effect was made and without any material before me on the basis upon which I can invoke the exception, I am afraid this remedy is not available to the Applicant.

59. Apart from that the parameters of the remedy of mandamus was set out by the Court of Appeal in *Republic v Kenya National Examinations Council ex parte Gathenji & others* Civil Appeal No 266 of 1996 as follows:

> " 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 ie 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."

60. In this case, the Court was not addressed on the nature of the duty placed upon the 2nd Respondent to seek the said refund from the 1st Respondent. In the premises, I hold that this prayer is not merited and is disallowed.

61. It is also my view that prayer 4 of the Motion is too vague to be granted. The same is accordingly declined.

Order

62. Accordingly, I grant the following orders:

1. An Order of *certiorari* is hereby issued bringing into this Court for the purposes of being quashed the notices of demand dated 15/10/2012 issued by the 1st Respondent which notices are hereby quashed.

2. An Order is hereby issued prohibiting the 1st Respondent from demanding any contribution from the Applicant in respect of the applicant's employees who are members and contributors of the 2nd Respondent pensions fund.

3. Due to the irregularities noted hereinabove on the part of the ex parte Applicant, there will be no order as to costs.

DATED AT NAIROBI THIS 20TH DAY OF JANUARY 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ogembo for 1st Respondent

Mr Karanja for 2nd respondent