



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 21 OF 2014**

**IN THE MATTER OF AN APPLICATION BY CENTRAL ORGANIZATION OF TRADE  
UNIONS (K)**

**AND**

**IN THE MATTER OF THE CABINET SECRETARY MINISTRY OF LABOUR SOCIAL  
SECURITY AND SERVICES**

**AND**

**IN THE MATTER OF THE NATIONAL SOCIAL SECURITY FUND**

**BETWEEN**

**CENTRAL ORGANIZATION OF TRADE UNIONS (K).....APPLICANT**

**-VERSUS-**

**CABINET SECRETARY MINISTRY OF**

**LABOUR SECURITY AND SERVICES.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**AND**

**THE NATIONAL SOCIAL SECURITY FUND BOARD**

**OF TRUSTEES .....PROPOSED INTERESTED PARTY/APPLICANT**

**RULING**

1. On 17<sup>th</sup> January, 2014, I directed that the leave granted in these proceedings do operate as a stay of convention of any meeting of the interested party herein pending the hearing and determination of the substantive Motion or until further orders of the Court.
2. Subsequently, on 24<sup>th</sup> January, 2014 by consent of the parties, the said direction was varied to the limited extent that the interested party was permitted to convene the Special Meeting to discuss the budget for the year 2014/2015 as well as the then impending strike by the interested party's unionised workers. The interested party was however barred from approving disbursement of funds in respect of the Tassia II Settlement Scheme Development Project.

3. By an application dated 12<sup>th</sup> February, 2014, the interested party herein now seeks the following orders:

**1. THAT this Honourable Court be pleased to certify this Application urgent in the first instance.**

**2. THAT this Application be heard *ex parte* and service be dispensed with in the first instance for reasons of urgency.**

**3. THAT this Honourable Court be pleased to set aside and/or vary Order Number 4 of the orders issued by this Honourable Court on 17<sup>th</sup> January 2014 to the extent of allowing proposed meeting without the discussion of any matters that this Honourable Court may direct.**

**4. THAT this Honourable Court be pleased to make any such order as may be fit and just in the interest of justice.**

**5. THAT the costs of this Application be provided for.**

4. The application is based on the following grounds:

**1. THAT on 17<sup>th</sup> January 2014 and 24<sup>th</sup> January 2014, Honourable Justice Odunga, J issued orders directed to the Applicant yet it was not a party to the suit.**

**2. THAT the orders granted directly affect the Applicant as they direct what will be discussed in the meetings the Applicant will convene.**

**3. THAT National Social Security Fund Board of Trustees is therefore a proper and necessary Interested Party to the suit herein.**

**4. THAT in order to enable this Honourable Court to effectively and completely adjudicate upon all matters arising in the suit, National Social Security Fund Board of Trustees ought to be joined as Interested Party to the suit herein.**

**5. THAT it is in the interest of justice that this Application be allowed.**

5. The application was supported by an affidavit sworn by **Richard Lang'at**, the acting Chief Executive Officer/Managing Trustee of the interested party herein on 12<sup>th</sup> February, 2014.

6. According to the deponent, the Interested Party is established under the ***National Social Security Fund Act***, 2013 (hereinafter "the Act") and is vested with the mandate to operate and manage the National Social Security Fund (hereinafter "the Fund"). According to him, Section 5 of the Act establishes the National Social Security Fund Board of Trustees whose mandate is to direct and manage the Fund and the management of the Fund is carried out through decisions of the Board of Trustees taken at properly constituted meetings. Pursuant to Section 12 of the Act, the Board of Trustees has established several Board Committees for the performance of its functions and in the foregoing regard the Finance, Investments and Social Security Committee is established with the following Terms of Reference:

i) Customer care, marketing and registration

ii) Benefit payment

iii) Product development

iv) Credit management and debt collection

- v) Investment Policy of the Fund
- vi) Review and approval of budgets
- vii) Oversight of periodic performance of the Fund
- viii) Review and guidance of the IT strategy

7. The Audit and Risk Committee is established with the following Terms of Reference:

- i) Review of financial statements
- ii) Review of the effectiveness of internal controls
- iii) Assessment and review of the adequacy of risk management
- iv) Liaison and guidance to internal and external auditors
- v) Review of Annual Procurement Plan
- vi) Oversight role on tenders

8. The Human Resource, Legal & Strategy committee is established with the following Terms of Reference:

- i) Review and guidance of HR policy
- ii) Review and guidance on Legal Cases
- iii) Monitoring on strategic changes in the Fund
- iv) Oversight on good corporate governance

9. It was further deposed that the Board also approved the Board Calendar for July 2013 to June 2014 and there are now several meetings of the Risk and Audit Committee and the full Board scheduled for 20<sup>th</sup> February 2014 and 6<sup>th</sup> March 2014 respectively which cannot take place as a result of the orders granted herein.

10. It was further deposed that the Fund has also established a Project Implementation Road Map for the Act to ensure a smooth and effective transition to the new legislation. It was contended that the said orders substantially affect the ability of the Board of Trustees to make policy directions regarding the Fund and to implement the new legislation despite the fact that the Fund administers billions of shillings which are now at risk as the Board of Trustees is unable to discharge its powers and responsibilities under the Act.

11. According to the deponent the Board of Trustees as currently constituted consists of one representative from the Central Organization of Trade Unions (Kenya), the applicant herein and as such, the applicant does not suffer any prejudice as they are represented on the Board of Trustees hence it is in the interest of justice that this Application be allowed and the Board undertakes not to discuss any contentious issues or any other matters directed by this Honourable Court and as such, no prejudice will be caused to the applicant and/or to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

12. To the interested party, it is in the interests of justice that the corporate business of the Fund continues in operation so that the Fund continues as a going concern and given the foregoing, it is only fair and just that the Board of Trustees be permitted to discharge its obligations pending the hearing and determination of the substantive motion on 10<sup>th</sup> March 2014.

13. In response to the application, the ex parte applicant filed a replying affidavit sworn by **Francis L Atwoli**, its Secretary General on 14<sup>th</sup> February, 2014.

14. According to him, the purpose and /or intention of the Interested Party seeking to be enjoined in this matter was to try and secure orders which it had tried unsuccessfully to obtain through the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Application dated 22<sup>nd</sup> January, 2014. To him, the fixing of the hearing date of the instant matter for 10<sup>th</sup> March, 2014 was arrived at after the Respondents requested the Honourable Court for time to file their papers which has not been done to date. In his view, the holding of the Interested Party's Board meetings and/or Committee meetings should be held by a lawfully constituted team of members which the Interested Party is trying to pass by as the total number of statutory nominees by, the Employers and the Employees are not in place so as to secure the business of the meeting through tyranny of numbers at the sitting yet the Interested Party is expected to effectively execute its mandate if lawfully and constitutionally constituted as required by Section 6 of the Act.
15. It was averred that the Interested Party's operations are fully funded by Employees and Employers contributions and as such their presence in the Board of the Fund and its Committees is a statutory requirement that should not be overlooked and or underplayed. In his view, the Interested Party cannot allow a nominee of the nominating party to sit in its Board or committees and insist on keeping a Board member whose nomination has been withdrawn and allow him to continue sitting in the Board of Trustees and its committee is a violation of section 6 of the Act as well as a disregard of the nomination of his name by the Applicant Organization hence there is no justification in the refusal of the 1<sup>st</sup> Respondent to gazette the applicant's nominee whose right to sit in the Board of Trustees is being violated and the Court should not to allow this to happen.
16. According to the deponent, the Board as constituted has only one lawful nominee instead of two members as required by Section 6 of the Act and as a result, the appointment of the Applicant's second nominee to the Board will indeed solve the stalemate and also provide for effective and adequate representation of the Applicant. It was therefore his view that the Interested Party should not be allowed to hold any meetings until they have complied with the requirements of nominating the Applicant's second representative by the administrative body of the fund in collusion with the 1<sup>st</sup> Respondent.
17. To him, the ex parte Applicant stands to suffer irreparable damage should the fund be allowed to continue with its business as usual without allowing the second nominee of the Applicant to take her place in the Board and Committee as communicated to the 1<sup>st</sup> Respondent in July, 2013
18. It was therefore deposed that in the above premises the Interested Party's application should be dismissed with costs for being not only frivolous, an afterthought but a second bite at a cherry.

### **Determinations**

19. I have considered the application herein.
20. That the decision whether or not to direct that the grant of leave operates as a stay is an exercise of discretion is not in doubt. It is a judicial power – a power beyond whim and caprice; a power beyond benevolence and sympathy. It is to be exercised selectively. Therefore the discretion ought to be exercised reasonably and fairly and that the discretion ought not to be used whimsically, unreasonably and arbitrarily or against the tenets of natural justice.
21. Therefore in considering whether or not to exercise the discretion the Court ought to consider all the circumstances of the case in order to ensure that the decision arrived at is just. In **Republic vs. Independent Boundaries and Electoral Commission and Others ex parte Avante International Technology Inc Judicial Review Application No. 451 of 2012** I expressed myself as follows:

***“As is stated in Black’s Law Dictionary, 9<sup>th</sup> Edn. “public interest” is the general welfare of the public that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution while under Article 1(3)(c) sovereign power under this Constitution is delegated *inter alia* to the Judiciary and independent tribunals. Dealing with a similar provision in Rwanyarare & Others vs. Attorney General [2003] 2 EA 664, it was held with respect to Uganda that Judicial power is***

derived from the sovereign people of Uganda and is to be administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in Konway vs. Limmer (supra) that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it...It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination....  
....As stated in *Halsbury's Laws of England 4<sup>th</sup> Edition Vol. II page 805 paragraph 1508*, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. Sound legal principles would dictate that where to grant the orders of judicial review even if merited is likely to affect the general elections in such a magnitude that it is likely to substantially and materially and adversely affect the electoral process, the Court would be reluctant to accede to the applicant's prayers."

22. In the present application it is contended that the orders granted by this Court are likely to bring the operations of the interested party to a standstill to the detriment of the contributors to the Fund. It is further submitted that the Fund is operating under a new legislation whose implementation requires that the Board deliberates on important policy matters in terms of commitment and more so with respect to audit and risk management involving Billions of Shillings belonging to Kenyans and non-Kenyans alike and not just the applicants. In addition the Act enjoins the Board to hold a minimum number of meetings at least 4 every financial year to ensure the Fund is properly managed though due to the transition the Board needs to hold more meetings.
23. On the part of the ex parte applicant it was submitted that without the participation of a representative of the ex parte applicant in the Board decisions are likely to be taken which would be detrimental to the interests of the members of the ex parte applicant.
24. I have considered the respective positions taken by the parties herein. In granting conditional stay under Order 53, the Court takes into account the overriding objective that when confronted with such circumstances it has a duty to consider the twin principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice and hence the Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.
25. In my view the interests of the ex parte applicant ought to be balanced as against the interest of the public at large. To fail to do so, in my view, would be a wrong exercise of judicial discretion. To grant orders whose effect are to bring to a halt the operations of the interested party which manages funds contributed to by persons other than the ex parte applicants in my view would be detrimental to the very basis upon which the proceedings were instituted, that is proper management of the Fund. Therefore it is my view that the Fund ought to be permitted to carry out its core mandate with minimal exposure of the ex parte applicants to a risk of their interests being adversely affected.
26. When the application for leave was argued before me the urgency was due to the fact that the

interested party was about to hold a meeting in which the Tassia issue would be discussed. In varying the orders, it was clear that one of the pertinent issues was the risk of the disbursement of the funds by the interested party towards the said project.

27. Accordingly balancing the interest of the ex parte applicant as well as the interest of the public some of whom are not members of the applicant, I vary the orders directing that the grant of leave herein operates as a stay to the extent that the interested party is restrained from disbursing any funds towards the Tassia II Settlement Scheme Infrastructure until the hearing and determination of these proceedings or until further orders of the Court. In other words save as hereinabove stated the order restraining the interested party from conducting the affairs the affairs of the Fund is hereby vacated.

28. The Costs of the instant application to be in the cause.

**Dated at Nairobi this 27<sup>th</sup> Day of February 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Ndegwa for Mr Sisule for the interested party**

**Mr Wamwayi for Mrs Guserwa for the ex parte applicant**