



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 & SERVICES

AND

IN THE MATTER OF: THE NATIONAL SOCIAL SECURITY FUND

BETWEEN

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

VERSUS

THE CABINET SECRETARY, MINISTRY OF LABOUR SOCIAL SECURITY & SERVICES..... 1ST RESPONDENT

THE HON. ATTORNEY

**GENERAL..... 2ND
RESPONDENT**

THE NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES..... INTERESTED PARTY

JUDGEMENT

1. By a Notice of Motion dated 20th January, 2014, the *ex parte* applicant herein, **Central Organization of Trade Unions (K)**, seeks the following orders:
 1. **That the Honourable Court be pleased to grant the applicant Central Organization of Trade Unions (KENYA) an Order of Mandamus directed to the 1st respondent to appoint and gazette the applicant’s nominee to the Board of Trustees NSSF forthwith in compliance with the provisions of Section 6 of the NSSF Act Cap 258 of the Laws of Kenya.**
 2. **That the Honourable Court be pleased to grant the applicant Central Organization Of Trade Unions (KENYA) an order of prohibition directed to the 1st respondent to stop and/or**

restrain the 1st respondent by himself or through his authorized servants or agents namely the NSSF Board of Trustees from convening any board meeting pending the appointment of the applicant's nominee to the board.

3. That costs of this application to be paid by the respondents.

Ex Parte Applicant's Case

2. The said application is supported by a verifying affidavit sworn by **Francis Atwoli**, the National General Secretary of the Applicant on 17th January, 2014.
3. According to the deponent, the applicant Union has been in existence since 1965 and is one of the three key Social partners to the National Social Security Fund by virtue of which it has been given statutory representation in the Board of Trustees of the fund vide Section 6 of the current *NSSF Act* No. 45 of 2013 (although previously through the 1st Schedule of the now repealed *NSSF Act* of 1989).
4. He deposed that on the 23rd day of July, 2013, he wrote on behalf of the applicant to the 1st respondent drawing his attention to the need to appoint one **Damaris Wanjiru Muhika** as their nominee to the NSSF Board. The 1st respondent however did not respond nor take action prompting the applicant to dispatch a reminder on the 17th day of October, 2013 to which there was similarly no action.
5. On 14th January, 2014 the applicant's lawyers on record wrote to the 1st respondent urging him to effect the appointment and gazettment but the 1st respondent proceeded to ignore the request and gazetted 3 new members of the NSSF excluding the applicant's nominee.
6. It was contended that the 1st respondent appointed 3 members to the NSSF Board on the 13th day of January 2014 and gazetted them on 17th January 2014 excluding the COTU (K) nominee which is a clear indication that the 1st respondent is bent on denying and frustrating the applicant's representation on the NSSF Board of Trustees. In the deponent's view, the current officials of the Board of the NSSF are likely to transact business without COTU (K) representative input which will definitely be highly prejudicial.
7. According to him, if the respondent and/or his authorized servants or agents are allowed to convene any board meeting and transact business it will be highly prejudicial to the applicant who has already brought to light the misapplication of funds at the NSSF. In his view, the 1st respondent is indeed sidelining the Applicant's nominee for appointment against the provisions of the law and should not be allowed to frustrate a legal right conferred to the workers body.

Interested Party's Case

8. On behalf of the interested party the following grounds of opposition were filed:

1. **The application does not disclose any grounds in law upon which the remedy of Judicial Review can be sought from this Honourable Court.**
2. **No particulars are provided on the alleged breach of the ex parte applicant's constitutional rights and as such, the application does not meet the test established in *Anarita Karimi Njeru - V - The Republic (1976 - 1980) KLR*.**
3. **In the absence of such particulars of the alleged violations being provided by the exparte applicant, this Honourable Court lacks the requisite tools to make an assessment as to whether there has been any breach of the ex parte applicant's constitutional rights.**
4. **Section 6 of the National Social Security Fund Act, 2013 does not make express provision for a nominee of the ex parte applicant to be appointed as a member of the Board of Trustees of the National Social Security Fund.**
5. **The present application lacks merit.**

Applicant's Submissions

9. On behalf of the applicant, it was submitted by **Mrs Guserwa**, learned counsel for the applicant that since the Respondents have not filed any replying affidavit the applicant's application is unopposed as the averments made by the applicant remain uncontroverted. According to learned counsel what the applicant seeks is that the Respondent be ordered to enforce the statutory duty imposed on him.
10. It was submitted that the applicant has the right to nominate a person to protect its interests and therefore it is in bad faith for the Respondent to contend that the ex parte applicant has no role in the matter.

Respondent's Case

11. Although the Respondent did not file any documents in opposition to the application, it was submitted by **Mr Odhiambo**, its learned counsel that section 8(a) of the **National Social Security Fund Act** (the NSSF Act) empowers the Cabinet Secretary to appoint one third of the membership of the Board in a staggered manner separated by two months so that irrespective of their tenure the appointments must fall at different times.
12. He submitted that whereas it is true that the applicant nominated **Damaris Wanjiku** to represent it as such the Cabinet Secretary has not specifically refused to go ahead with the gazette and the appointment but the Cabinet Secretary is guided by provisions of the Act and has exercised his discretion and has chosen to stagger the appointment in line with the said Act.
13. It was further submitted that the applicant will not be prejudiced if the interested party transacts business since the applicant is represented in the Board and as such the application has no merit and ought not to be allowed.

Interested Party's Submissions

14. On behalf of the interested party, it was submitted by **Mr Sisule** that there are no legal grounds in the motion justifying the grant of the orders sought. Relying on **Republic vs. Disciplinary Committee & 2 Others & Another ex parte William Ochanda Onguru [2013] eKLR** and **Seventh Day Adventist Church (EA) Limited vs. P S Ministry of Nairobi Metropolitan Development & Another [2014] KLR** it was submitted that the grounds for the grant of judicial review are illegality, irrationality and procedural impropriety. In this case, it was submitted the closest ground is that of illegality though it has not been demonstrated that the Cabinet Secretary acted illegally.
15. It was submitted that section 6 of the NSSF Act seeks to ensure the representation of employees of the Fund to have two nominees and there is a broad range of employees beyond the membership of the ex parte applicant hence the description in section 6 does not necessarily require that the representation be from the applicant.
16. With respect to the constitutional issues it was submitted based on **in Anarita Karimi Njeru vs The Republic (1976 – 1980) KLR** that the breaches ought to be precisely indicated which the applicant has not done in this case. On this submission the interested party also relied on **Mumo Matemo vs. Trusted Society f Human Rights Alliance & 5 Other [2013] eKLR** and **John Githinji Wang'onde & 7 Others vs. Coffee Board of Kenya & Another [2012] eKLR**.

Applicant's Reply to the Submissions

17. In her reply, **Mrs Guserwa** submitted that the applicant would have had no objection if the applicant's nominee had been considered. However from July 2013 the Respondent had been asked to Gazette the nominee and failed to do so. With respect to the prejudice, it was submitted that there is a good reason why the applicant has two members so as to take care of the practice of tyranny of numbers in the Board. With respect to **Anarita Karimi Case**, it was submitted that the Court has been moved on judicial review ground of illegality since the Minister has failed to comply with the law which amounts to both illegality and procedural impropriety.

Determinations

18. I have considered the foregoing.
19. It is clear that the factual averments by the Applicant have not been controverted since the Respondents and the interested party have chosen not to swear replying affidavits in opposition to this application.
20. With respect to the need to state with precision the provision of the Constitution alleged to have been breached, it is my view that the case of **Anarita Karimi** though still relevant ought to be read with the provisions of the current Constitution in mind. Under Article 22(3) of the Constitution, the Chief Justice is enjoined to make rules providing for the court proceedings relating to the Bill of Rights which Rules are required to satisfy *inter alia* the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation.
21. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the later ought to prevail over the former.
22. Section 6(d)(ii) of the Act enjoins the Cabinet Secretary to appoint as members of the Board *inter alia* two persons, one of whom shall be of opposite gender, nominated by the most representative workers organization by virtue of their knowledge and experience in matters relating to employees to represent employees in Kenya.
23. In **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** it was held *inter alia* 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 i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done.....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

24. An order of *mandamus* can therefore issue to compel the Respondent to perform the duty imposed him by section 6(d)(ii) aforesaid where the Respondent has failed to perform the duty to the detriment of the applicant if the applicant shows that it has a legal right to expect the duty to be performed.
25. In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**, the Court expressed itself as follows:

“The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law.....Orders made must comply with the Act, and if they do not so comply in important aspects, they will be null and void.....The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority.....An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not misdirect himself in fact or law....”

26. In **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006**, the Court held:

“Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law..... It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.”

27. Under the current Constitution Article 10 provides *inter alia* that the national values and principles of governance in the said Article bind all State organs, State officers, public officers and all persons whenever any of them enacts, applies or interprets any law and the said national values and principles of governance include equality, human rights, non-discrimination, good governance, integrity, transparency and accountability. It is trite concept that the Constitution is the supreme law and its provisions ought to be interpreted broadly or liberally and not in a pedantic way i.e. restrictive way – Constitutional provisions must be read to give values and aspirations of the people and the Court must appreciate throughout that the Constitution, of necessity has principles and values embodied in it, that a Constitution is a living piece of legislation. It is a living document. See **Crispus Karanja Njogu vs. A G HCC Criminal Appeal. No. 39 of 2000**.

28. In this case, the Respondent’s position is that the appointment to the Board needs to be staggered. As rightly submitted on behalf of the applicant the Respondent has had more than enough time to stagger the said appointments and appoint the said nominee to the Board. The Respondent does not have the luxury of an unlimited period in making such appointments and in my view the delay in effecting the said appointment is unreasonable. Where Parliament clearly vests the exercise of discretion on a person or authority it would be wrong in the Court’s view to intervene in the merits of the decision. The Court can however intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of Nyamu, J (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323**.

29. In this case it is clear that the Cabinet Secretary has taken unnecessarily and unjustifiable long period to appoint the applicant’s nominee to the Board. The failure by the Cabinet Secretary to

- carry out a statutory obligation placed on him warrants interference by this Court.
30. It was alluded to the fact that it is not only the applicant's nominee that ought to be appointed to the Board. However, no other persons have come before the Court to claim the right to make the appointment. Section 6 of the said Act talks of "***the most representative workers organization***". It is not for this Court to determine the most representative workers organization. However the Respondent has not contended that the applicant is not the right body to nominate a member to the Board.
31. Having considered the material before me I am satisfied that the Notice of Motion dated dated 20th January, 2014 is merited.

Order

32. Accordingly the order which commends itself to me and which I hereby grant is an order of mandamus directed to the 1st respondent compelling him to appoint and gazette the applicant's nominee to the Board of Trustees NSSF forthwith in compliance with the provisions of Section 6 of the *NSSF Act* Cap 258 of the Laws of Kenya. The applicant will have the costs of this application.

Dated at Nairobi this 8th day of April 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Thanji for Mr Sisule for Interested party

Mr Githinji for Mrs Guserwa for the applicants