REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISCELLANEOUS APPLICATION NO. 103 OF 2010

COUNTY COUNCIL OF NYERI...APPLICANT

VERSUS

BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND......................RESPONDENT

RULING

The County Council of Nyeri, hereinafter referred to as the applicant, took out the motion dated 8th July 2010 in which he sought for the following orders:

(a) ***AN ORDER OF CERTIORARI to remove into the High Court for the purposes of its being quashed, the decisions(s) of the Respondent, its officers and/or agents made on unknown dates and conveyed to the Applicant through the letter(s) dated 4th December 2009 and 29th June 2010 under the hand of the Respondent's Manager Nyeri Branch with effect of making a demand for "penalties" for the late payment/remittance amounting to Kshs. 26,927,358.15 and/or any other communication by/or on behalf of the Respondent in the same regard, whether present or future, in exercise of its statutory duty under the National Social Security Fund Act, Cap 258, Laws of Kenya.***

(b) ***AN ORDER OF PROHIBITION directed to the Respondent, prohibiting the Respondent whether directly or indirectly, by/or through its officers and/or its agents, restraining the Respondent from demanding the sum of Kshs. 26,927,358.15 or any part thereof in purported penalties constituting the demand communicated to the Applicant in the letter(s) dated 4th December 2009 and 29th June 2010 or any other demand whether present or future, in the same regard.***

(c) ***THE COSTS of this application be provided for.***

The motion is supported and verified by the affidavit of Sammy K. Njuguna. When served with the motion, the Board of Trustees, National Social Security Fund (N.S.S.F.) hereinafter referred to as the Respondent, filed the replying affidavit of Kennedy Ongari, to oppose the same. When the application came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the same determined by written submissions.

I have considered the grounds set out on the face of the motion and the statement of fact plus the averments in the affidavits filed for and against the motion. It is convenient at this stage to set out in brief the history leading to the filing of the motion. On the 4th day of December 2009, the Respondent wrote to the Applicant demanding payment of Kshs. 26,927,358/15 in respect of penalties for late payments of the applicant's employee's contribution to N.S.S.F. covering the period between 1992 and 2009. The Applicant indicated in the aforesaid demand notice that the aforesaid sum was the balance of the amount due after deducting a sum of Kshs. 3,346,184/80. The letter further referred to two meetings held by the Applicant and the Respondent on 1st and 2nd December 2009. When the Applicant received the aforesaid demand notice, it protested in its letter of 9th January 2010 claiming they had no outstanding debt due to the Respondent. Apparently the Applicant's letter was copied to the Permanent Secretary, Office of the Deputy Prime Minister and Ministry of Local Government. It is said that as a result of the Respondent's demand notice, the P.S., Ministry of Local Government wrote to the Applicant the letter dated 25th February 2010, informing it that due to alleged arrears of Kshs. 26,927,358/15, no amount would be disbursed to the Applicant unless the demanded sum would be cleared before 30th June 2010. The P.S cited regulation 19 of the Local Authority Transfer Fund Act no. 8 of 1998(LATIF). This turn of events prompted the Applicant to file the current proceedings to have the demand notice quashed and to prohibit the Respondent from further demanding for payment of the sum demanded or any part thereof. The Respondent opposed the applicant's motion stating that it was simply performing its statutory function hence it cannot be hindered from doing so. It is alleged that the Applicant is bound surrender to the Respondent the contributions it collects from its employees under sections 10 and 14 of the National Social Security Fund Act (Cap 258 L.O.K.)

Having given in brief, the history behind this motion, let me now determine the merits or otherwise of the motion. It is the submission of the Applicant that the Respondent act of demanding from the Applicant payment of penalty charges for late remittances of statutory dues unilaterally and without hearing the Applicant, amounts to the breach of the rules of natural justice. It is also alleged that the amount demanded is not founded on fact since the Applicant hand settled all outstanding debts due to the Respondent. The Applicant further submitted that the Respondent is estopped from making demanding any payments after signing an agreement for debt balance confirmation with the Respondent on 6th March 2006. It is the applicant's submission that the outstanding debt from it in penalties inclusive of interest thereon as at 30th June 2005 was Kshs. 3,346,184/-. The Applicant further complained that the mode of timing of the demand and the method of communication of the contents of the Respondent's letter(s) dated 4th December 2009 and 29th June 2010 informing the Applicant that it owes the Respondent Kshs. 26,927,358/15 was in spite, unfair and unconscionable. It is alleged that the Respondent was aware that the effect of the information given would be to impress upon the P.S. Ministry of Local Government to deny the Applicant access to its allocation of Local Authority Transfer Fund because it had not settled the outstanding debt with N.S.S.F. In reply the Respondent alleged that the Applicant has not disputed that it did not remit any contributions to the Respondent between the year 1992 and 2000. The Respondent gave in detail the schedule of payments made by the Applicant to it when it became obvious that the Respondent would take legal steps to recover the debt. It was pointed out that the payments made by the Applicant did not include penalties, hence the penalties are due and payable. The Respondent further argued that the principle of estoppel cannot be used to override the provisions of the statute.

Let me start by dealing with each ground individually. The first ground argued by the Applicant is that the Respondent made it to believe that the outstanding debt was that contained in the debt balances confirmation Form signed on 6th March 2006 by both parties. It is said that pursuant to the aforesaid agreement the Applicant proceeded to settle the debt and the Respondent continuously and consistently issued clearance certificates in the year 2006, 2007, 2008, and 2009. The Respondent is of the contrary view. It is of the view that the debt balances confirmation form related to the period between August 1998 and February 2000 only. I have critically looked at the evidence tendered. The debt balances confirmation form dated 6th March 2005 appear to be unambiguous in its contents. In fact it states in part as follows:

"***This is to state and confirm that as at 30th June 2005, the County Council of Nyeri (L.A.) owed a total amount (penalty and interest inclusive) of Kshs.3,346,184 .... to National Social Security Fund (statutory institution) being debts outstanding balances.***
Please note that the stated amount shall not be subjective to any variation whatsoever. Ensure that all calculations are correctly done to avoid any future dispute that may arise in relation to the debt areas."

The picture will become clearer when the aforesaid agreement is viewed together with the Respondent's letter dated 20th April 2005 attached to the verifying affidavit of Sammy K. Njuguna as "S.K.N 1" and the one dated 9th June 2006 attached to the replying affidavit of Kennedy Ongari as "K.O8".

In the aforesaid letters it is clear that the sum of Kshs. 3,346,184/= is in respect of the period between August 1998 and February 2000. In the demand notice dated 4th December 2009, the Respondent acknowledged receipt of Kshs. 3,346,184/80 and demanded for settlement of the outstanding sum of Kshs. 26,927,358/15.

It is therefore obvious that the Respondent's demand related some outstanding remittances which do not relate to the period covered by the payment of Kshs. 3,346,184/-. The Respondent is mandated by law under S. 14 of the National Social Security fund Act to recover the remittances plus penalties of employees from their employer. The demand by the Respondent for payment of Kshs. 26,927,358/- was done in accordance with the provisions of the statute. Having come to the conclusion that the penalties are due for payment, then the principle of promissory estoppel does not apply here. In my estimation it would appear that the Applicant is saying that it was misled into believing that the signing of the debt balances confirmation form meant that the figure stated therein settled the entire outstanding debt. I have already shown that it was clear from the beginning that the Applicant was made aware that what it signed only related to the period between August 1998 and February 2000. The Applicant was not therefore mislead. Even if it was true that it was misled into executing the agreement releasing it from its duty of remitting the penalties, I doubt whether that could have been used to release the Applicant from meeting its statutory obligation to pay penalties for late remittances. In short, the doctrine of promissory estoppel cannot override express provisions of the statute. The law prohibited the respondent, being a Public body, to represent or make a promise not authorized by the statute.

The other issue which was ably argued by the Applicant is that the Respondent issued its demand ostensibly to block it from receiving the LATIF funds. Those funds are normally paid to those local authorities which have settled all statutory charges of the relevant period. It is argued that penalties do not form part of the amounts payable or debts due, hence it cannot be used to disqualify the Applicant from accessing the LATIF funds. The Applicant has accused the Respondent of passing the information of the Applicant's indebtedness to it to the Ministry of Local Government. As a result, the Applicant was named as one of those local authorities owing statutory dues. In a nutshell the Applicant stated that the Respondent acted in an unconscionable manner and oppressively.

I have looked at the material placed before me and I am unable to find any evidence of unfairness, unreasonableness nor malice on the part of the Respondent. The affidavit evidence tendered shows that the Respondent determined the penalties in accordance with the law, specifically under S.14 of the National Social Security Fund.

Another critical ground raised and argued by the Applicant is that the Respondent had further mislead the Applicant by issuing clearance certificates, thus setting up the application of the principle of promissory estoppel against the Respondent. In other words it is alleged that the Respondent was estoppel from claiming that any debt is due and payable to it from the Applicant. A cursory look at the clearance

certificates of 11th July 2008 and 15th July 2009 will reveal that they relate to payments of contributions and not penalties. Contribution is defined under S. 2 of the National Social Security Fund to exclude penalties. The clearance letter dated 14th January 2008 at foot note indicates that the letter should only be used to report the payments paid by the Local Authority based on the information contained in the Debt Reduction Plan (DRP). It further states that the form does not refer to the amount that the Local Authority should be paying on an annual basis for the relevant fiscal year. Again, the clearance certificates cannot be said to have created estoppel against recovery of penalties due to the above mentioned lapses.

Finally, the Applicant has argued that it was not heard by the Respondent prior to the issuance of the demand for payment of penalties. The Applicant further claimed that it was not provided with any material showing notice concerning any contemplated penalties outside the amount of Kshs. 3,346,184 contained in the debt balances confirmation form. It is also argued that considering the nature of the effect of the penalty demand notice, which would effectively impair the applicant's access to LATIF funds, thus incapacitating the applicant's ability to discharge its functions under the Local Government Act, the rules of natural justice ought to be followed before issuing the notice. The Respondent on its part avers that it was not bound to hear the Applicant. I have considered the rival submissions over this. The Penalty demand notice dated 4th December 2009 shows that before the demand notice was issued the two bodies i.e. the applicant's and the Respondent's representatives met in two occasions i.e. On 1st December 2009 and on 2nd December 2000 to discuss the same. It is therefore quite obvious that the Respondent cannot be accused of breaching the rules of natural justice. In fact the letter is quite categorical that the Applicant's representative, a Mr. Mbutu had requested to be given the penalty demand notice. Though the wording of S.14 does not expressly state that a party must be heard before issuing a penalty notice, it behoves a body or person exercising a statutory authority to give a chance to the other to be heard before issuing a penalty notice involving money going into millions of shillings. In this case I am glad the Respondent met and discussed with the Applicant prior to issuing the notice.

In the final analysis and on the basis of the above reasons, I see no merit in the motion dated 8th July 2010. The motions is ordered dismissed with costs to the Respondent.

Dated and delivered this 8th day of April 2011.

J.K. SERGON

JUDGE

In open court in the presence of Gitibi h/b Mugambi for the Applicant N/A Okoth & Kiplagat for the Respondent.
Court: A copy of the ruling and proceedings to be supplied upon payment of copying charges.

J.K. SERGON

JUDGE