



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

Misc Civ Appli 880 of 2004

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF PENSIONS ACT (CAP 189) AND NATIONAL SOCIAL SECURITY FUND ACT (CAP.258) LAWS OF KENYA

AND

IN THE MATTER OF THE RETIREMENT BENEFITS ACT NO.3 OF 1997

BETWEEN

KENYATTA NATIONAL HOSPITAL

BOARD:.....APPLICANT

VERSUS

**THE MINISTER FOR LABOUR AND HUMAN RESOURCE DEVELOPMENT.....1ST
RESPONDENT**

**NATIONAL SOCIAL SECURITY FUND.....2ND
RESPONDENT**

**THE ATTORNEY GENERAL.....3RD
RESPONDENT**

**THE CHIEF MAGISTRATE’S COURT MILIMANI NAIROBI.....4TH
RESPONDENT**

JUDGEMENT

This is an application filed on 19th July,2004 by the Applicant, the Kenyatta National Hospital Board under the provisions of Order 53, Rules 3 and 4 of the Civil Procedure Rules and Section 8 of the Law Reform Act, chapter 26, of the Laws of Kenya. The Respondents are the Minister for Labour and Human Resource Development, the National Social Security Fund, the Attorney General and the Chief

Magistrate's Court, Milimani Nairobi. The Application seeks the following orders; that:-

1. An Order of mandamus do issue compelling the Minister for Labour and Human Resource Development the 1st Respondent to exercise its powers under the provisions of section 7 of the National Social Security Fund Act and consider and determine the Applicant's request for exemption from the provisions of the said Act.
2. An Order of Mandamus do issue compelling the Minister for Labour and Human Resource Development the 1st Respondent to exempt the Applicant from making standard contributions to the 2nd Respondent with effect from 1st January,1991 and any other period subsequent thereto.
3. An Order of Prohibition do issue prohibiting the 2nd Respondent from demanding from the Applicant standard contributions from the period starting from 1st January,1999 to date or any other period subsequent thereto.
4. An Order of certiorari do issue to remove into this Honourable Court the proceedings in the Chief Magistrate's Court at Milimani Commercial Courts in Civil Suit Number 10926 of 2003 and have the same quashed.
5. An Order of prohibition do issue prohibiting the Fourth Respondent or any other subordinate court whatsoever from hearing or continuing to hear or determine the said civil suit Number 10926 of 2003 in its present form and nature.
6. A declaration that the refusal by the 1st Respondent to formally exempt the Applicant from making contributions to the 2nd Respondent is unlawful null and void against the principles of natural justice.

The Applicant's case is that:-

- (i) Vide a legal notice No.109 published in the Kenya Gazette Supplement Number 23 of 10th April,1987, the Applicant was established as a state corporation under the State Corporations Act.
- (ii) That on or about 1st January,1991 the Applicant established a staff superannuation scheme which was duly registered pursuant to the provisions of the Law.
- (iii) That upon registration of the said scheme as aforesaid the same was duly granted exemption from the provisions of the Income Tax Act.
- (iv) That since the date of registration the Applicant has been making its and its employees' contributions to the said scheme which is currently managed by Barclays Bank of Kenya Ltd on the Applicant's behalf.
- (v) That upon registration of the scheme the Applicant wrote to the Minister for Labour and Human Resource Development, the 1st Respondent herein asking formal exemption from making contributions to the National Social Security Fund, the 2nd Respondent with effect from 1st July,1991 the date when the scheme became effective and in accordance with the provisions of section 7 of the NSSF Act.
- (vi) That pursuant to the said provisions of the NSSF Act and also the provisions of the Retirement Benefits Act, the Minister for Labour and Human Resource Development is under an obligation to consider the Applicant's request and formally exempt the Applicant from the provisions of the said Act and if not formally give reasons for his decision on failure to grant an exemption.
- (vii) That the Minister for Labour and Human Resource Development has refused and/or neglected to exercise his power and/or discretion under the provisions of the NSSF Act and/or neither has

he communicated his decision or otherwise to the Applicant.

(viii) That there is filed in the Chief Magistrate's Court Milimani a case under the Debts (summary Recovery) Act, Chapter 42 in which the 2nd Respondent claim's Kshs.135,511,464 together with accrued interest from the Applicant on account of alleged unpaid standard contributions for the period between the years 1991 and 2003.

(ix) That the Applicant rightfully maintains that by virtue of the incorporation for superannuation scheme it is entitled as a matter of right to an exemption from making contributions to National Social Security Fund with effect from 1st January,1991 and accordingly the claim under CM.CC.No.10926 of 2003 cannot lie in law and in fact.

(x) That further Applicant maintains that the Minister for Labour and Human Resource Development has abused his power and is in breach of his statutory duty by failing to exempt the Applicant from the provisions of National Social Security Fund Act and/or failing to arrive at a decision and/or by failing to communicate his decision in respect of the same.

(xi) That the Applicant stands to suffer double jeopardy by reason of the failure of the 1st Respondent to exercise his statutory duty aforesaid.

(xii) That by commencing and continuing to maintain in the Chief Magistrate's court Civil Suit No.10926 of 2003 against the Applicant whilst being aware that the Applicant is entitled as a matter of right to an exemption the 2nd Respondent is abusing the powers conferred to it under the NSSF Act and as such the suit is a gross abuse of the process of court and should be quashed.

(xiii) That it is just and proper and equitable that the orders sought herein be granted to the Applicant.

(xiv) The 2nd Respondent is accountable to the 1st Respondent being the parent Ministry and by commencing proceedings against the Applicant under CM.CC.NO.10926 OF 2003 the 2ND Respondent's actions were callous and purely actuated by malice and bad faith as they are aware that the Applicant's application for exception is yet to be considered and that the Applicant is entitled to an exemption.

The Respondents oppose this application. Both the First and Second Respondents filed Replying Affidavits on 3rd November, 2004. Before delving into the facts and merits of the application, it is essential that this court first deals with a threshold issue, one which must be dealt with at the outset. It could have been taken up as a preliminary issue on a point of law but the First and Second Respondent took it up in their submissions through counsel.

The First and Second Respondents have argued that Prayers 1,2,3 and 4 of the Application are time-barred by provisions of law and, therefore, cannot be granted. The said Respondents have invoked the provisions of section 9(3) of the Law Reform Act and submitted that the limitation of action applies in this case since this application was made six (6) months after the judicial proceedings in the subordinate court was commenced on 24th October,2003.

Section 9 (3) of the Law Reform Act provides as follows:-

“(3) in any case of an application for an order of certiorari to remove any judgments, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such a shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings is subject to appeal, and the time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

Order 53, Rule 4(2) is prescribed in exactly the same terms. The application for leave to file this application was made on the 9th July, 2004, exactly eight (8) months and nine (9) days after the debt recovery proceedings were commenced. The grant of leave was to operate as a stay of any hearing or continued or further hearing of the said Civil Suit Number 10926 of 2003 in the Chief magistrate's Court – Milimani or in any other magistrate's Court. This means that the said proceedings have yet to be determined and are therefore still pending. Are these proceedings caught by the statutory limitation or bar?

In my view and interpretation, section 9(3) of the Law Reform Act and Order 53 Rule 4 (2), contemplate the conclusion or finalization of judicial proceedings. The said provisions refer to: -“.....**any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed.....**”(emphasis mine).

Judgments, orders, decrees and convictions are final decisions of a court of law. Such decisions subject to any appeal and/or subsequent setting aside or reversal are final in nature. They arise after the hearing of the judicial proceedings in question. In the said context, I do hereby hold that the principle of “**ejusdem generis**” applies to the term “**or other proceedings**” at the end. This must refer to a final decision in any other proceedings and which is executable or enforceable. It is for this reason that the said statutory provisions limit the period to six (6) months “**or such a shorter period as may be prescribed under any written law, and where that.....other proceedings is subject to appeal.....**” A decision or proceedings is generally subject to appeal upon conclusion or determination.

I, therefore, do hereby hold that the proceedings in the Chief magistrate's Court at Milimani Commercial Courts in Civil suit Number 10926 of 2003 is strictly not time-barred by the provisions of statutes. I also do hereby hold that the said proceedings are not amenable to judicial review by way of an Order of Certiorari on the ground that there is no final decision like a judgment, order, decree, conviction etc in the said proceedings. The said proceedings are still pending in the subordinate court due to the order of stay granted in this suit on 9th July, 2004. A pending suit or proceedings is not amenable to judicial review by way of orders of certiorari until a definite order is made and which is subject to an appeal by law, within six (6) months or a prescribed shorter period. As a result, prayer 4 for an order of certiorari in this application is not sustainable.

Arising from the aforesaid decision I am of the view that prayer 3 has been overtaken by events. In the said prayer the Applicant seeks an order of prohibition to issue prohibiting the 2nd Respondent from demanding from the Applicant contributions from the period starting from 1st January, 1999 to date or any other period subsequent thereto. The Second Respondent in its Replying Affidavit sworn by Mr. Naphtali Okongo Mogere on 26th October, 2004 (paragraph 23) deponed as follows:-

“ 23. that the inspection established that a total sum of Kshs.132,511,464 was owing from KNH in unpaid standard contributions and under-payment in the period from January 1991 to March 2001. This amount in arrears attracts a statutory penalty of 5% per month until payment in full. (Exhibit marked “NOM II” are copies of notices of inspection, inspection reports, a schedule of unpaid contributions by KNH, unheeded letters of demand to KNH to pay up and a schedule of employee contributions paid according to the pay roll but not remitted to the Fund)”.

The Applicant did not file any further affidavit or tender any evidence to rebut this statement of fact. The court has also carefully perused the bundle marked “**NOM 11**” and is satisfied that the Second Respondent on diverse dates between 6th September, 2000 and 22nd October 2003 made demands of payments of standard contributions from the Applicant. The Second Respondent made these demands before this application was filed and well before the debt recovery proceedings were instituted in the subordinate court. Prohibition looks to the future and not the past and as a result, Prayer 3 is not available to the Applicant.

In Prayer 6, the Applicant seeks a declaration or declaratory order. It is trite law in Kenya that the

only judicial review orders provided for under the Law Reform Act and Order 53 are orders of Mandamus, Prohibition and Certiorari. There is no provision relating to declarations and this court has no jurisdiction to grant the same in exercise of its judicial review powers.

In the light of the foregoing, the only prayers which this court can proceed to consider on their merits and facts are Prayers 1, 2 and 5.

In prayer 1, the Applicant wants this court to make an order of Mandamus compelling the Minister to exercise his powers under the provisions of section 7 of the National social Security Fund Act and consider and determine the Applicant's request for exemption from the provisions of the said Act. And in Prayer 2 the Applicant wants an order of Mandamus compelling the Minister to exempt the Applicant from making standard contributions to the 2nd Respondent with effect from 1st January 1991. On the basis of such orders, the Applicant in prayer 6 wants an order of Prohibition to issue prohibiting the Fourth Respondent or any other subordinate court whatsoever from hearing or continuing to hear or determine the aforesaid Civil Suit Number 10926 of 2003 in its present form and nature.

There are two main grounds for this application as can be seen from the grounds listed hereinabove, namely:-

1. That on or about 1st January,1991 the Applicant established a staff superannuation scheme which was duly registered pursuant to the provisions of the Law. The Applicant maintains that by virtue of the incorporation of the superannuation scheme it is entitled as a matter of right to an exemption from making contributions to the National Social Security Fund with effect from 1st January,1991 and accordingly the claim under CM.CC.no.10926 OF 2003 cannot lie in law and in fact.

2. The Applicant further maintains that the Minister has abused his power and is in breach of his statutory duty by failing to exempt the Applicant from the provisions of National Social Security Fund Act and/or failing to arrive at a decision and/or by failing to communicate his decision in respect of the same. That pursuant to the provisions of the NSSF Act and the Retirement Benefits Act the Minister is under an obligation to consider the Applicant's request and formerly exempt the Applicant from provisions of the said Act and if not formally give reasons for his decision on failure to grant an exemption.

With regard to the first ground, the Applicant has not produced any evidence or referred to any provisions of any law that it is entitled to as a matter of right to an exemption from making standard contributions to the National Social Security Fund on the basis that it duly established and registered a staff superannuation scheme on 1st January,1991. This court does not know the basis for this assertion. In any case, this could be a ground of defence in the debt recovery proceedings in the subordinate court and is not a matter for judicial review in the circumstances. This ground must, therefore, fail in these proceedings.

With regard to the second and last ground reference must be made to the source of the Minister's powers to exempt a person from compulsory registration and contribution as a member of the National Social Security Fund under section 5 of the Act. Section 7 of the Act provides as follows:-

“7 (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 inforce

(c) 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, add to, delete from or vary in the second schedule any class or description of exempt person.”

While the ultimate power and discretion for exemption lies with the Minister, he can only do so upon the recommendation of the Board of Trustees of the National Social Security Fund, the Second Respondent herein. The Applicant is not an exempt person listed under the second schedule. The Minister exercises his discretion in accordance with Regulation 1 of the Second schedule. For him to approve any scheme (statutory or non-statutory) for purposes of exemption, he must be satisfied that such a scheme provides comparable benefits to its members vis – avis that provided by the National Social Security Fund.

Upon careful study of the aforesaid legal provisions, I am of the view that the Minister’s power to exempt or refuse exempt is provided under the law. The said power and/or discretion is not transferable neither can he be compelled to make his decision in one way or the other. It is arguable that a person who has been refused exemption may challenge such a refusal if he can show that the decision by the Minister is say ultra vires the Act as the reasons and considerations given by the Minister are outside the objectives of the statute i.e. the welfare and benefit of Kenyan workers. For instance, it would appear unreasonable for the Minister to reject pension scheme that provides far better benefits to its members than that under the National Social Security Fund without any compromise of assurance, reliability and absolute security.

In the present application, one of the Applicant’s complaints is that the Minister has failed in arriving at a decision regarding its application for exemption or to communicate his decision. The Applicant submitted that if there is a refusal then such must be communicated formally giving reasons for such a decision.

On their part, the First and Second Respondents argued that the Applicant did not forward or present a “pension scheme” to the Minister for his consideration and which would have enabled him to allow exemption or reject it. It was submitted that for the Minister to act and invoke his powers there must be a “**pension scheme**”. There is no standard from prescribed and the nature the scheme should take. However, it must contain enough information that a determination may be possible as to whether the proposed scheme provides comparable benefits to its members or not.

I have carefully perused the Applicant’s verifying Affidavit, the responding affidavits filed by the First and Second Respondents and all annexed exhibits. On a balance of probability, I hereby do make the following findings:-

1. That in the course of 1991, the Applicant established a staff superannuation scheme for its employees.
2. On the 13th September,1991, the Directorate of the Personnel Management in the office of the President approved the Kenyatta National Hospital staff superannuation scheme for purposes of the Pensions Act, (cap.189) with effect from 5th September,1991.
3. On the 10th August,1994, the Applicant applied for exemption from contributions to the National Social Security Fund as required under section 7(3) of the Act and the second schedule. The application was not to the Minister but to the 2nd Respondent, the National Social Security Fund.
4. On 2nd May,2000, the Applicant formally applied for exemption to the Minister enclosing copies of a Declaration and the pension scheme.
5. The Minister through the affidavit sworn by the Permanent secretary, Ambassador Nancy Kirui on 1st November,2004 (paragraph 7) admitted that he received the correspondences referred to in the verifying Affidavit (FMM2). These are the applications for exemption and reminders thereof.

6. The Minister did not formally respond to the said application or raise any issue about not receiving a “**competent submission of a pension scheme**”. This is first raised in his Replying Affidavit in these proceedings.

7. The Minister has not to date allowed the exemption applied for neither has he rejected the same.

8. Before 1997, the Minister could make his decision without any reference to any person. However through an amendment, Act No.5 of 1997, it was a requirement that the Board of Trustees of the second Respondent, the National Social Security Fund makes its recommendations before the Minister exercised his power.

9. Despite the lengthy correspondence between the Applicant and the National Social Security Fund 2nd Respondent and the fact that the latter knew of the existence of the application for exemption it did not make any recommendations to the Minister to allow the application for exemption or to reject it.

In the light of the aforesaid findings, I do agree that the Minister in exercise of his statutory duties could allow or refuse the application for exemption by the Applicant. Once he made his decision, he was obligated by law to formally inform or notify the Applicant of his decision. It is at this stage that the Applicant would know exactly what to do with its long existing superannuation scheme and how to terminate it and transfer the funds to the National Social Security Fund as would be required by Law. The Applicant would also then be in a position whether to appeal to the Minister, refer the matter to the cabinet, Parliament or even the courts. This is because of the importance of the matter touching on the welfare and livelihood of thousands of employees of the largest teaching and referral hospital in Kenya.

The Application for exemption by the Applicant was not a simple matter and the Minister was under a duty to consider it with all the seriousness and expedition that the matter deserved. Instead, the Minister has done nothing for a period of twelve years since the first application for exemption. Despite the duty imposed on him by section 7(3) of the Act, the Minister did nothing. I do hereby hold that the Minister has to date not considered the Applicant’s application for exemption and he cannot purport to make a decision through these proceedings.

The Minister was also under a duty to communicate his decision to the Applicant once he made a decision. Understandably, this could not be possible because the Minister has yet to make a decision in the first place. The Applicant has a right to know of the outcome of its application within a reasonable time and if a rejection, the reasons for the refusal.

I do hereby hold that the Minister of the First Respondent is in breach of his statutory duties under section 7(3) of the Act and the second schedule, Regulation 1. The Minister by his inaction has caused the Applicant untold anxiety and suspense thereby violating the rights of the members of the Kenyatta National Hospital staff superannuation scheme who are the true beneficiaries of the scheme. Under the Law, this court has the jurisdiction to compel him to discharge his duties in accordance with the Law. Where a public officer is required by statute to take a positive act or step, he cannot fold his hands and sit back. He must carry out his duty one way or the other, applying all the rules of natural justice and fair play.

With regard to the second Respondent, it is my view that it was under a statutory duty to advise the Minister and recommend to him whether to accept the application for exemption by the Applicant or to reject it. After 1997, the Minister could only exercise his power and discretion after receiving the recommendations of the Board of Trustees of the Second Respondent.

In this case, the Second Respondent became aware of the applications by the Applicant for exemption, first in 1994 and in 2000. The first application was in fact made to the second Respondent directly, perhaps on the basis that it managed the National Social Security Fund and was the right authority to deal. Such a belief could not have been totally misplaced considering that the law was subsequently amended in 1997 requiring the input and recommendations of the Second Respondent. It is my view, that from 1997, the Second Respondent became statutorily bound to advise the Minister and to enable him

make his decision regarding the application for exemption.

The Second Respondent did not make any recommendations to the Minister and instead continued to make demands for payment of the arrears of standard contributions from 1991 and to take legal action against the Applicant. I find that in the circumstances, the Second Respondent could not charge and prosecute the Applicant as it did on 30th November,2001 for failing to pay the contributions, demand the said payments or sue for the recovery of the same, until and unless it forwarded its recommendations to the Minister as required by law. Its opinion and advise in its Replying Affidavit during these proceedings comes late in the day, is irrelevant and addressed to the wrong party or forum (the court).

Within this context and the requirement of total impartiality and fairness, being an interested party in the decision, I think that the actions of the Second Respondent in instituting the debt recovery proceedings for the sum of kshs.135,511,464/= being alleged arrears of standard contributions in the circumstances was in bad faith, unreasonable and in breach of the principles of Natural Justice.

The result of the foregoing is that I do hereby grant an Order of Mandamus in terms of prayer 1 of the Notice of Motion dated 15th July,204. I also do hereby grant an Order of Prohibition in terms of prayer 5 of the said application. I disallow prayers 2,3,4 and 6. As there is no prayer for costs, each party shall bear his/its costs. Orders accordingly.

DATED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF OCTOBER,2006.

MOHAMMED IBRAHIM

JUDGE