



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 226 OF 2015

BETWEEN

THE NATIONAL GENDER AND

EQUALITY COMMISSION PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF LABOUR

AND SOCIAL SECURITY 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, the National Gender and Equality Commission, has instituted the present Petition against the 1st Respondent, the Cabinet Secretary, Ministry of Labour and Social Security and the 2nd Respondent, the Attorney General, who is the legal representative of the Government in civil proceedings by dint of **Article 156** of the **Constitution**. The Petitioner is aggrieved by the actions of the Respondents, which it views as unreasonable and unconstitutional, and which have resulted in the delay in the implementation of the **Social Assistance Act**, assented to on 14th January 2013, with a commencement date of 25th January, 2013. In its Petition dated 29th May 2015 it seeks therefore the following orders:

(a) A declaration that the 1st Respondent has violated and infringed the provisions of Article 43 of the Constitution.

(b) A declaration that the 1st Respondent is acting ultra vires by performing the functions of the National Social Assistance Authority.

(c) A permanent injunction restraining the 1st Respondent from performing the National Social Assistance Authority's functions.

(d) An order of mandamus compelling the 1st Respondent to immediately operationalize the Social Assistance Act No. 24 of 2013.

(e) Any other order that this Honourable Court may deem to be fit and just to ensure that the constitutional provisions are protected and enforced.

(f) Costs of this Petition be in the cause.

The Petitioner's Case

2. The Petitioner's case is contained in its Petition and Affidavit in support sworn on its behalf by Chairperson, Winfred Lichuma on 29th May 2015 and two sets of Written Submissions dated 17th March 2016 and 12th May, 2016 respectively.

3. It is its case that the **Social Assistance Act** was assented to on 14th January, 2013 and its commencement date was stated to be 25th January, 2013. And that it was to give effect to **Article 43 (1)** of the **Constitution**, by establishing the National Social Assistance Authority and to also provide for the rendering of social assistance to persons in need.

4. The Petitioner has also stated that the Cabinet Secretary for Labour, Social Security and Services is mandate to operationalize the **Social Assistance Act** through the said Ministry and was to take up the task of constituting the Board of Management of the National Social Assistance Authority as provided in the Act.

5. It is the Petitioner's case therefore that since the assent of the **Act**, the 1st Respondent has failed, neglected and or refused to constitute the said Board of Management without any good reason or at all and that inaction amounts to a contravention of the law.

6. Further, it has asserted that it came to its realization that the 1st Respondent, in not operationalising the **Act**, created a lacuna in the due process of providing assistance to interest groups as envisaged in the **Act**. That in that regard, it gave an advisory opinion to the 1st Respondent and the 1st Respondent in response alluded, to among other issues, the fact that there were challenges in implementing the **Act** and operationalizing the Board of Management as it has both oversight and implementation authority and therefore, that anomaly has resulted in the delay in putting in place relevant structures to implement the **Act**.

7. Additionally, that the 1st Respondent wrote to it informing it that the Ministry was in the interim carrying out the functions of the National Social Assistance Authority through various Departments as well as the Social Protection Secretariat. The Petitioner has argued that the 1st Respondent in doing so, is acting *ultra vires* by purporting to perform the envisaged Authority's functions.

8. In its Submissions, the Petitioner added that the 1st Respondent has not demonstrated that the **Social Assistance Act** as assented to, is so fatally defective that it cannot be implemented and in any event, no single law is perfect and that is why there is provision for amendments and or repeal and as such, it argued that the 1st Respondent is either speaking from a position of fear of the unknown or ignorance.

9. The Petitioner in support of its case relied on the decision in **Republic vs Kenya National Examination Council ex parte Gathenji and Others, Civil Appeal No. 266 of 1996** for the proposition that the purpose of an order of mandamus is to remedy the effects of an justice so that justice can be truly done and as such, the effect of such an order is to compel the performance of a statutory duty, where a person or body has failed to perform it, to the detriment of one who has a legal right to expect that the duty ought to be performed.

10. Furthermore, it placed reliance on **Republic vs County Government of Machakos**, (no citation was

provided), in support of its case while urging the Court to grant the orders sought herein.

11. It submitted further that the Senate has published two Bills namely, the **Senior Citizens Care and Protection Bill, 2014** which is awaiting committal for 2nd Reading; and the **Preservation of Human Dignity and Enforcement of Socio - Economic Rights Bill, 2015**, which has already passed the 2nd Reading stage. In that regard, it was its position that both Bills expand the mandate of the Authority established under the **Social Assistance Act** and they also give effect to **Articles 57 and 43** of the **Constitution**, respectively. Further, that the 1st Respondent is the body mandated with the implementation of the **Senior Citizen's Care and Protection Bill** and has a big role in the success of the Bill and as such, the failure to operationalize the **Social Assistance Act** will have a ripple adverse effect on all laws being passed by Parliament expanding the mandate of the National Social Assistance Authority.

12. In the Petitioner's further view, it is trite that once a law has been enacted, it has to be implemented to the letter unless its validity and or legality has been challenged and appropriate orders obtained whose effect is to prevent such implementation. That the delay in appointing and gazetting members of the Board of Management of the Authority has and continues to have adverse effects on vulnerable persons in society as per the Act and hence is a violation of **Article 43 (1)** of the **Constitution**.

13. The Petitioner further dismissed the assertions by the 2nd Respondent that the Act was sneaked into Parliament and pointed out that the submission that the Court will be encroaching and acting contrary to the doctrine of separation of powers is misplaced and the allegations by the 2nd Respondent in that regard are unsubstantiated. It further argued that the possibility of raising a challenge on the 1st Respondent's actions was long anticipated and the Respondents were therefore aware that the present proceedings would be instituted but that fact notwithstanding, they have not adduced any evidence to show that a process for the amendment of the Act was ever initiated.

14. The Petitioner has therefore argued that unless an order of mandamus, *inter alia* is issued against the 1st Respondent, to compel her to operationalize the Act, her office will continue acting *ultra-vires* and contrary to the law.

The 1st Respondent's Case

15. The 1st Respondent opposes the Petition and filed an Affidavit in reply sworn on her behalf by Willy Fiona Mwasiagi, an Assistant Director for Gender and Social Development in the Ministry of Labour, Social Security and Services, on 10th August 2015.

16. It is her case that social assistance is a constitutional right under **Article 43 (3)** of the **Constitution** and that in order to give effect to the said provision, the Ministry, in consultation with relevant stakeholders, developed the National Social Protection Policy, which was approved during the ninth Cabinet meeting held on 17th May, 2012. Thereafter the 1st Respondent directed that a Sessional Paper on the **National Social Protection Policy** and the **National Social Protection Bill** be prepared and tabled before the National Assembly.

17. The **Bill** was forwarded to the National Assembly on 21st November, 2012 for deliberation but before the same could be approved, one Hon. Joyce Laboso, MP, introduced the **Social Assistance Bill** in the 10th Parliament, as a private member's Bill, and the same was deliberated upon and was subsequently passed as an Act of Parliament upon assent by the President on 14th January, 2013.

18. It is her further contention that the **National Social Protection Bill** developed by the Ministry provided for the establishment of a proper framework for effective coordination and oversight for all social protection programmes including social assistance, social security and health insurance and that after the enactment of the **Social Assistance Act**, it was realized that the same was not aligned to the broad policy recommendations encapsulated in the **National Social Protection Policy** and that it also

negated the spirit of good governance, which recognizes that an institution cannot monitor or oversee its own actions since its accountability would not be ensured; and did not clearly outline the role of the Social Assistance Authority i.e. whether it should be involved in the direct provision of social assistance or that it would only be the regulator of social assistance programmes.

19. It is the 1st Respondent's other contention that the **Act** does not also provide for transitional provisions and hence leaving a lacuna as to what will happen to the interventions and institutions that are currently providing social assistance.

20. It submitted that in any event, the Ministry is not intent on violating the law and instead intends to discharge its mandate concerning social assistance in the most effective and efficient manner, and in view of the challenges in the implementation thereof, it held two stakeholder meetings on the implementation of the **Social Protection Policy** and the **Act** and the meetings recommended that the **National Social Assistance Council Bill** be amended and the draft **National Social Protection Council Bill** also be amended to incorporate the issues of social assistance stipulated in the **Act**. Furthermore, that the Ministry has already re-submitted to the National Assembly the **National Social Protection Policy** for its consideration.

21. The 1st Respondent has further taken the position that the delay in putting in place the relevant structures to implement the **Act** is not deliberate and hence its actions cannot be said to be in contravention of the law. That therefore the Petition is misguided and ought to be dismissed.

The 2nd Respondent's Case

22. The 2nd Respondent opposed the Petition through its Written Submissions dated 4th May 2016.

23. It was its contention that the **Social Assistance Act**, which was allegedly sneaked into Parliament as a private members Bill, is not comprehensive and hence is not the appropriate Act that was contemplated to give effect to **Article 43** of the **Constitution**.

24. The 2nd Respondent further contended that the **Act** has various shortcomings as highlighted by the 1st Respondent, and submitted that those challenges make the implementation of the **Act** impossible. In that regard, it contended that the aforesaid challenges prompted the formulation of the **National Social Protection Bill** which is currently before Parliament and which would address all the concerns raised by stakeholders.

25. Further, according to the 2nd Respondent, the Court ought not to be seen as preventing the Executive and Legislative arms of Government from undertaking their constitutional obligations as that goes against the doctrine of separation of powers. In that regard, it relied on the decisions in **Commission for Implementation of the Constitution vs National Assembly and 2 Others [2013] eKLR**, **Peter O. Ngoge vs Francis Ole Kaparo and 4 Others [2007] eKLR**, and **Kenya Youth Empowerment and 2 Others vs Attorney General and Another, Petition No. 101 of 2011** in support of its argument that it is not the function of the Court to interfere with the internal arrangements of Parliament unless it can be shown that they violate the **Constitution**, and the Court should hesitate to enter into the arena of merit review of a constitutionally mandated function by another organ of the State where the organ has proceeded with due regard to procedure.

26. The 2nd Respondent argued furthermore that there are no factual matters placed before the Court and the matter at hand is overloaded with unwarranted apprehension, speculation, suspicion and unfounded mistrust which have no basis in law in light of the holding in the case of **Centre for Rights Education and Awareness and Others vs John Harun Mwau and Others, Civil Appeal No. 74 and 82 of 2012**. Additionally, that the orders sought in the Petition are actuated by malice, are sought in bad faith and through misrepresentations to the Court and are merely meant to tarnish the reputation of the 1st Respondent as well as to stifle the smooth running and exercise of the administrative functions of her office.

27. In addition, it was the A.G's submission that there are no particular grievances articulated in the Petition other than the Petitioner raising issues that strictly fall within the purview of the 1st Respondent, and the Petitioner has approached the Court without clean hands and hence the Petition ought to be dismissed. Relying further on **Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 Others, Civil Appeal No. 290 of 2012**, it was its contention that the orders sought in the Petition are not efficacious in the circumstances as the same would have the effect of interfering with the doctrine of separation of powers and that in any event, none of the Petitioner's rights and fundamental freedoms have been infringed at all.

28. It is also the 2nd Respondent's contention that the Bill to address the contentious issues around the **Social Assistance Act** is already in Parliament and the Court ought to restrain itself from making any orders pertaining to social assistance policy, and allow Parliament to debate the same. Furthermore, it relied on the decision in **Communications Commission of Kenya and 5 Others vs The Royal Media Services Limited and 5 Others [2014] eKLR** in support of its argument that there ought not to be a vacuum by failure or delay on the part of the Legislature to enact any law and that is why all existing laws were allowed to continue operating on condition that they would be construed with necessary alterations, adaptations, qualifications and exceptions in order to bring them into conformity with the **Constitution**.

29. For the above stated reasons, the 2nd Respondent has urged the Court to dismiss the Petition with costs.

Determination

30. Having read and outlined the Parties' respective cases above, the sole question arising for determination is whether there has been any infringement of the **Constitution**, as alleged by the Petitioner, and whether the orders sought herein should be granted.

31. In that regard, it will be noted that the key grievance by the Petitioner is the alleged failure by the Respondents to implement and give effect to the **Social Assistance Act**. In that regard, it is uncontested that the said Act was assented to on 14th January, 2013 and was to take effect from 25th January, 2013. The objective of the **Act** is outlined as follows:

An Act of Parliament to give effect to Article 43 (1) (e) of the Constitution; to establish the National Social Assistance Authority; to provide for the rendering of social assistance to persons in need and for connected purposes.

32. Can it then be said that the Respondents have acted in contravention of the law by failing to implement the **Act** and giving effect to its provisions? My answer to that question must be a categorical finding in the negative. That finding is fortified by the fact that at the moment, and as the Parties herein acknowledge, in their respective pleadings, there are various Bills pending before either the Senate or the National Assembly touching on the right to social security as guaranteed under the **Constitution. Article 43(1) and (3) of the Constitution** in that regard provides that:

(1) Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food of acceptable quality;

(d) to clean and safe water in adequate quantities;

(e) to social security; and

(2) ...

(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.

33. While therefore the **Constitution** guarantees the right to social security the State is under an obligation to put in place measures that shall ensure the realization of the said right. In the present case, it will be noted that prior to the enactment of the **Social Assistance Act**, there was in place **Sessional Paper No. 2 of 2014 on National Social Protection Policy** enacted by the State with the aim of providing social assistance to those in need. However, subsequent actions have been undertaken by the State through the enactment of various Laws, with various other Bills touching on the same matter still pending before either the National Assembly or the Senate. For instance, the 1st Respondent has pointed out that the Senate has published two key Bills, namely, the **Senior Citizens Care and Protection Bill, 2014** and the **Preservation of Human Dignity and Enforcement of Socio Economic Rights Bill, 2015**.

34. It will be noted that the objective of the **Senior Citizens Care and Protection Bill** is;

An Act of Parliament to give effect to Article 57 of the Constitution; to provide a framework for the care of senior citizens; to establish a framework for the empowerment and protection of senior citizens and the maintenance of their well-being, safety and security; and for connected purposes.

35. On the other hand, the **Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill**, states that it is;

As an Act of Parliament to establish a framework for the preservation of human dignity; for the promotion, monitoring and enforcement of economic and social rights; to establish mechanisms to monitor and promote adherence by County Governments to Article 43 of the Constitution; and for connected purposes.

36. It will be noted further, that the **National Social Protection Council Bill**, pending before Parliament, is said to be;

As an Act of Parliament to provide for the establishment of the National Social Protection Council; for a comprehensive framework of national social protection programmes; and for connected purposes.

The above said Bills thus clearly make provisions touching on economic and social rights as guaranteed under **Article 43** as well as **Article 57** of the **Constitution**.

37. The Respondents in the above context have asserted that the implementation of the **Social Assistance Act** has been made difficult by the fact that it is defective in various aspects and the State is taking various actions in order to remedy the situation. They submitted further that it is uncontested that a stakeholders meeting was held in which discussions led to various recommendations for amendments to be made to the **Act** and to further align the same with the **National Social Protection Policy** in order to effectively implement **the Act** and give effect to **Article 43** of the **Constitution**. That assertion has not been contested by the Petitioner.

38. Based on the material before this Court therefore, the Court is satisfied that indeed various actions are being undertaken by the State in regard to the streamlining of the **Social Assistance Act** and as it stands, the matter is properly before the Legislative arm of Government for consideration and for necessary action to be taken. In that regard, it would be premature for this Court to intervene at this point and make any orders, as sought in the present Petition, in regard to social assistance and security and specifically on the implementation of the **Act**.

In stating so, the Court is alive to the doctrine of separation of powers which obligates this Court not to

encroach on any of the mandates of other arms of the Government save in very exceptional circumstances. I say so because the doctrine of separation of powers is not an absolute bar by the Court from acting when properly called upon to do so as was noted by the Court in **Kenya Small Scale Farmers Forum and 6 Others vs Republic of Kenya and 2 Others, Petition No. 1174 of 2007** where it was stated that:

“[34] This court has on several occasions dealt with the extent of its powers vis a vis other government organs. The common denominator running across these authorities being the holding that where there is a breach of the Constitution, or where certain actions are challenged on the basis of their unconstitutionality, the High Court will not hesitate to exercise its supervisory and enforcement jurisdiction bestowed upon it under Article 165 to protect and promote fidelity to constitutional values...” (Emphasis added)

39. In addition, the Court of Appeal in **Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 Others, Civil Appeal No. 290 of 2012** opined that:

“(49) It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other’s functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court’s dicta in the petition the subject of this appeal that: “[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions...” (Emphasis added)

40. Applying the above principles to the present circumstances which are clear and peculiar to the issue at hand, I have demonstrated why it would not be appropriate to interfere and grant the orders sought herein because in doing so, this Court would be acting prematurely in the face of all that Parliament is to do. It is also to be noted that it would have been a wholly different scenario if the State had merely enacted the **Social Assistance Act** and sat back without taking any further action towards its implementation. In such a situation, this Court would not have hesitated to intervene.

41. In the event, I am unable to hold that there has been any infringement of the rights of any vulnerable persons under **Article 43** of the **Constitution** as no such evidence has been placed before this Court, and furthermore, while **Article 43** guarantees the enjoyment of socio-economic rights, including the right to social assistance, I am satisfied that the steps being undertaken by the State are in line with the progressive realization of the said right as stipulated under **Article 20 (2)** of the **Constitution** which is to the effect that:

The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

42. Based on my analysis above, I am unable to find any violation of the Constitution or any law for that matter, as a result of the Respondents’ actions and in any event, I reiterate that the steps taken by the State are indicative of the fact that the delay in the implementation of the **Social Assistance Act** has neither been deliberate nor unreasonable.

Disposition

43. For the above stated reasons, the Petition dated 29th May, 2015 is hereby dismissed.

44. Let each Party bear its own costs.

45. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2016

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 7TH DAY OF DECEMBER, 2016

EDWARD MURIITHI

JUDGE