



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISC. APPLICATION NO. 24 OF 2012

REPUBLIC.....APPLICANT

VERSUS

THE BOARD OF TRUSTEES NATIONAL

SOCIAL SECURITY FUND 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

AND

BOARD OF TRUSTEES, LOCAL AUTHORITIES

PENSIONS TRUST INTERESTED PARTY

MAVOKO MUNICIPAL COUNCIL.....Ex-Parte APPLICANT

R U L I N G

1. The Ex-parte Applicant was granted leave to apply for orders of certiorari and prohibition in this matter on the **8th of February, 2012**. Consequently, it filed a Notice of Motion dated **23rd February, 2012** seeking:
 - i. **An order of certiorari to issue quashing the decision of the respondents to prosecute it (ex-parte applicant) and its officers in Machakos CM NSSF Case No. 140 of 2012.**
 - ii. **An order of prohibition, prohibiting the respondents from prosecuting the applicant and its officers on account of non-remittance of contribution to the 1st respondent.**
2. The Application was supported by grounds set out in the statutory statement which set out the name and description of the Applicant and the relief sought. Facts in support of the relief sought were that the Ex-parte Applicant's workers are covered under the Local Authority Pensions Trust; the Applicant has not been contributing deductions to the National Social Security Fund, because the council is exempted both under the **National Social Security Fund Act (NSSF ACT)** and the **Retirement Benefits Act** and the **Local Authorities Pensions Trust**.
3. On the **24th January, 2012** the Ex-parte Applicant, its Clerk and Treasurer were served with summons to appear before the **Chief Magistrate's Court Machakos** in **NSSF case No. 140 of 2012** to answer charges of failing to remit contributions. The taking of plea was deferred to **9th February, 2012** the court having questioned the legality of the proceedings; the action of the **1st Respondent** is against the law and the decision should be quashed and the Prosecution stopped.

4. The grounds upon which the application is premised are therefore that the Respondents have acted against the provisions of the **Retirement Benefits Act**, the **Local Authorities Pensions Fund**, and the **National Social Security Fund Act**. The 1st and 2nd Respondents lack jurisdiction to charge the Applicant and its officers. Therefore the 1st Respondent violated rules of natural justice when they proceeded to apply for summons without first giving the Applicant the right to be heard.
5. The application was also supported by an affidavit verifying facts relied on.
6. The 1st Respondent through its legal officer, **Austin Boko** filed a replying affidavit to the application dated **16th April, 2012** where he deponed that the 1st Respondent is a mandatory Public Provident fund established under the **National Social Security Funds Act, Cap 256 Laws of Kenya** and **Section 5** of the said Act provides for Compulsory Registration of Employers and failure to do so is an offence. The Ex-parte Applicant has complied and is duly registered as Employer Number 00005150 and is hence a contributing employer. Only exempt persons and casual workers are not supposed to be registered with the 1st Respondent. For any Pension Body to be exempt, the Minister in charge of social security must approve the said exemption in writing and by Notice in the Gazette. The 1st Respondent's Board of Trustees have no power to exempt any person but can only make recommendations to the Minister.
7. He stated that it is within his knowledge that failure to remit contributions by any employer is an offence hence the Ex-parte Applicant being charged contrary to **Section 36 (a)** of the NSSF Act. The power to demand payment has been invoked legally and if there is any defence it has to be tendered in the trial court. The Debt Repayment Plan was not issued to the Ex-parte Applicant on the basis that they were exempted from remitting contributions but to report payment paid based on the information contained in the Form DR -1 for various financial years in question.
8. That the Ex-parte Applicant has not been condemned unheard but will have ample opportunity to produce exculpatory evidence and cross examine witnesses and that the 1st Respondent cannot arbitrarily shield the employees under it from contributing to the 1st Respondent and hence offer complete social security as envisaged by the Constitution.
9. The Interested Party filed a replying affidavit through **Katherine Kisila**, its Board Secretary who deponed that the Interested Party is a successor of the **Kenya Local Government Officers' Superannuation Fund**, a pension scheme for local government officers and was established long before the gazettelement of the **National Social Security Fund Act (NSSF ACT)** and the establishment of the 1st Respondent; the **Kenya Local Government Officers' Superannuation Fund** was the successor to earlier pension schemes for local government officers established under the **Nairobi Municipality (Superannuation Fund) Rules, 1950** and the **Municipalities Ordinance 1928**.
10. The Ex-parte Applicant has made arrangements for pension and other retirement benefits for its employees. In particular, the Ex-parte Applicant is a sponsor of **the Local Authorities Pensions Trust ("The Pension Scheme" or LAPTRUST)** which is sponsored by some other 175 Local Authorities. The Ex-parte applicant is therefore an **'exempt person'** within the meaning of **NSSF ACT**. The 1st Respondent did not seek the opinion of the Minister and consent of the 2nd Respondent before instituting **Machakos Chief Magistrate's Court Criminal Case No. 140 of 2012** which is *ultra vires* **Article 157(6)** and **(9)** of the **Constitution** and **Section 37 (1)** of the **NSSF Act**.
11. On the **25th June, 2012** the 1st Respondent raised a Preliminary Objection on the grounds that the Ex-parte Applicants Notice of Motion is fatally defective for not complying with **Order 53 Rule 1** of the **Civil Procedure Rules**.
12. It was submitted by the 1st Respondent that the application lacks compliance including lack of evidence in the affidavit that supports it. The verifying affidavit is made up of 3 paragraphs whereas the 1st paragraph introduces the deponent, the 2nd paragraph verifies facts stated in paragraph A, B, C and D of the statement and the 3rd paragraph deposes that what is stated therein is true.
13. I believe that 1st Respondent intended to raise the Preliminary Objection pursuant to the provisions of **Order 53 Rule 1 (2)** which provides thus:

“An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”

The provision sets out what documents should be attached to an application seeking leave in a judicial review matter. The statement is required to contain the name and description of the Applicant, the relief sought and the grounds upon which they are sought. Looking at the Ex-parte Applicant’s application it sets out the name and description of the Applicant, the relief sought and the grounds upon which they are sought. The only addition in the statement is paragraph C that provides for the facts of the relief sought. It is true as argued by the 1st Respondent that the verifying affidavit ought to state and verify facts. Several cases have emphasized this fact. (See **KRA –VS- Owaki C.A No. 45 of 2000; Republic –VS- Permanent Secretary Office of the President Ex-parte Patrick Mutua Mbithi [2014] eKLR; Republic –VS- Senior Resident Magistrate’s Court Kajiado & 2 Others Ex-parte Mpaayo Masaine Ole Sonkoi [2004] eKLR and Kenya Telecommunications Investment Group Ltd –VS- Telecommunications Commission of Kenya [2004] eKLR.**

14. It is however important to note as correctly submitted by the Interested Party that the application should have been brought up when the matter came up for hearing interparte on **23rd April, 2012** since the objection was based on the note that provides for granting of leave to institute the proceedings.
15. That notwithstanding, it is important to consider whether the omission which was on form was fatal. In this case the Ex-parte Applicant went a step ahead and in addition to the verifying affidavit filed a supporting affidavit that clearly sets out the facts and evidence he wishes to rely on.
16. The verifying affidavit may have fallen short of stating and verifying the facts but the supporting affidavit covered for the omission. Although the procedure that ought to be adopted does not provide for supporting affidavits, should the same be filed and considered it may not be prejudicial to the Respondents. This was stated in the case of **Republic –VS- Kikuyu Land Dispute Tribunal & Another Ex-parte Kenneth Ndungu Muigai & Another [2013] eKLR:-**

“the procedure guiding judicial review applications does not, however, have room for supporting affidavits. This position was restated in Republic –VS- Land Disputes Tribunal Court Central Division and Another Ex-parte Nzioka [2006] 1 EA 321.... However, in such matters the court must take into account the principle of proportionality and see where the scales of justice lie. The law is now 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 that ultimate end of justice. The court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. (See Suleiman –VS- Amboseli Resort Limited [2004] 2 KLR 589). The court has therefore to consider the effect of striking out the application herein as against considering the same on its merits the defects notwithstanding. In this case, if the court were to opt for the former, the ex-parte applicant would forever be driven from the seat of justice since under sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya such application must be brought within six months of action complained of. It is therefore my view that in the circumstances of this case the court ought to invoke its powers under Article 159(2)(d) of the Constitution and deem the said irregularity as a procedural deficiency and proceed to determine the Motion on its merits.”

In another case of **Republic –VS- National Social Security Fund Board of Trustees & Another Ex-parte Town Council of Kikuyu [2014] eKLR** court stated that:

“It is true that the verifying affidavit sworn by the ex-parte applicant was a five paragraph affidavit which was very thin in the facts relied upon by the applicant. If that was the only affidavit sworn in support of the ex-parte applicant’s case, I would have

had no hesitation in finding that there were no factual averments on the basis of which the court could make a determination in favour of the ex-parte applicant. However, the ex-parte applicant also filed a supporting affidavit with the Chamber Summons for leave. Although the filing of the “supporting affidavit” instead of “verifying affidavit” was an irregularity, it is my view that that is the kind of irregularity which was contemplated by Article 159(2)(d) of the Constitution. It is therefore my view that in the circumstances of this case, it cannot be said that the Ex-parte Applicant’s case was supported by the factual averments.”

17. From the foregoing it is apparent that I must consider the substantive merit of the case and the express provisions of **Article 159(2)(d)** of the **Constitution**. In that vein I dismiss the Preliminary Objection with no orders as to costs.
18. Coming to the substantive application; In seeking prerogative orders set out in the application, the Ex-parte Applicant contends that it is a Local Authority which remits its employees’ contributions to the **Local Authority Provident Fund** hence exempted from remitting contribution to the **National Social Insurance Fund** as it is exempted under the **National Social Insurance Fund Act, Retirement Benefits Act** and **Local Authorities Pensions Trust**. Further, that the 1st Respondent has always issued the Ex-parte Applicant with a clearance every year because of the exemption.
19. The 1st Respondent on the other hand argues that registration is compulsory as it is a **Public Provident Fund** established under **Section 5** of the **NSSF Act**. None of the Local Authorities in the Republic of Kenya have been exempted. Even the Ex-parte Applicant is duly registered as **Employer No. 00005150** having been registered in 1970 and have been remitting their contributions.
20. **Section 5** of the **NSSF Act** provides thus:

“(1) There is established a body to be known as the National Social Security Fund Board of Trustees which shall, inter alia, be vested with the responsibility of directing and managing the Fund.

(2) The Board shall, by that name be a body corporate with perpetual succession and a common seal, and may in its corporate name be capable of—

(a) suing and be sued;

(b) purchasing, holding, managing and disposing of movable and immovable property; and

(c) entering into such contracts as it may consider necessary or desirable and for the purposes of this act.”

The section provides for compulsory registration of members of the fund and contributing employers. The provision of the law gives the Minister of Labour and Social Security the discretion to specify any class or description of employees or persons who are to be registered as members of the fund and those contributing employees. These persons ought to be gazetted and the action taken upon recommendation of the Board of Trustees established under the Act. Unless otherwise provided, persons automatically exempted are casual workers. The repercussion of failure to register is an offence.

21. The Statute, however, provides for a certain category of persons though employed who should not be registered as members of the fund. These are exempted persons and casual labourers. The second schedule to the Act paragraph 1 of the schedule recognises exempt persons as those eligible to receive any pension benefits under any scheme to which the Pension Act applies and persons entitled to receive pension benefits under any scheme (statutory and non-statutory) approved by the Minister in writing for the purposes of the schedule as a scheme providing comparable benefits, being persons in Public Service, Local Government Authority or any Co-

- operation or body established for public purposes (Emphasises mine).
22. It is clear that persons that are exempt include **the Local Government Authority**. The Ex-parte Applicant falls within this ambit.
 23. It is argued that the Ex-parte Applicant has been making contributions of its employees to the **Local Authorities Pension Trust** which was established under the **Local Authorities Pensions Trust of 2007**. The said employees of the Ex-parte Applicant being members of the **Local Authority Pension Trust** are exempt persons.
 24. The Ex-parte Applicant has demonstrated that its employees have been contributing to the **Local Authority Pension Trust** whereby they are entitled to receive pension benefits, these are automatic exempt persons therefore the 1st Respondent cannot demand contributions from them.
 25. With regard to institution of criminal charges against any person offending the law as provided by the **NSSF Act**, the 1st Respondent is not obligated to seek approval of the Minister prior to commencement of the prosecution in all cases.

Section 37(1) of the NSSF Act Chapter 258(Laws of Kenya)

Revised Edition 2010 (1989) provides thus:

“Proceedings for an offence under this act may, notwithstanding anything in any law to the contrary, be commenced at any time within the period of three months from the date on which evidence, sufficient in the opinion of the Minister to justify a prosecution for the offence, come to his knowledge, or within the period of twelve months after the commission of the offence whichever period last expires.”

The Minister may give directions as to commencement of proceedings depending on sufficient evidence being provided or an enforcement officer may institute proceedings if an offence is committed within a duration of 12 months. **(See also Section 39 of the NSSF ACT).**

26. It has been demonstrated that the Ex-parte Applicant were persons exempted from making contributions to the NSSF. Therefore, by charging them the 1st Respondent acted *ultra vires* which was contrary to the rules of natural justice. In the premises I do issue an order of certiorari calling into this court the decision of the 1st Respondent to prosecute the Ex-parte Applicants and its officers in **Machakos NSSF case No. 140 of 2012** which is hereby quashed.
27. Consequently, an order of prohibition is issued against the 1st Respondent prohibiting it from prosecuting the applicant and its officers on account of non-remittance of contribution to the 1st Respondent for the period **July 1990 to July 2011** stated in the charge sheet.
28. Costs of the application shall be borne by the 1st Respondent.

DATED, SIGNED and DELIVERED at MACHAKOS this 15th day of JULY 2015.

L. N. MUTENDE

JUDGE