



**ORIGINAL**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**JR NO. 31 OF 2010**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NATIONAL SOCIAL SECURITY FUND.....1ST RESPONDENT**

**CHIEF MAGISTRATE'S COURT, KISUMU.....RESPONDENT**

**J U D G M E N T**

- 1). The Notice of Motion by the applicants herein dated 20-7-2010 prays for the following reliefs:
  - a. **An order of certiorari to remove into this court the respondents charge sheet filed against the ex-parte applicant in Kisumu CMCR No. 139 of 2010 NSSF Case No. 9 of 2010 for purposes of it being quashed and upon hearing the same be quashed.**
  - b. **An order of prohibition to prohibit the respondents from charging the ex-parte applicants or proceedings with the filed suit offences contained in the charge sheet in Kisumu CRC No. 139 of 2010 (NSSF Case No. 9 of 2010).**
  - c. **An order of mandamus compelling the 1st respondent and or their agents to give credit of Kshs. 2,600,000/= to the ex-parte applicants monies received by the 1st respondent from the applicants and held in their suspense account.**
  - d. **Costs and other relief.**

- 2). The application is premised on the statement and the affidavit of Silas Kipruto the applicant's clerk.

The applicants argue that the 1st respondent was hived from Kisumu County Council sometimes in October 1999. According to it the statutory deductions which the 1st respondent is demanding dates back as far as 1984 when the 1st respondent was non existence.

From the applicants bundles of pleadings and annexures they contend that the division of assets and liabilities from the Kisumu County Council to Nyando County Council is yet to be undertaken.

- 3). They argued further that the 1st respondent despite receiving deduction from it has not bothered to give any credit and that it is still holding its money in a suspense account. They therefore argue that the intended prosecution is riddled with malice and the same ought to be quashed.
- 4). The 1st respondent on the other hand argues that it is simply acting within its statutory duty in

demanding the dues from the respondent. They refute the claim that it is time barred by any means. Infact they contend that the applicant does not deny the deduction from 1999 when it was established and that if there is any question of division of assets as suggested by the applicant the respondent has nothing to do with the same.

5). This court has carefully perused the pleadings as well as several annexures to the affidavit. What essentially is not in dispute is that the applicant Nyando County Council was established in 1999 via a Kenya gazette having been hived from the then Kisumu County Council. It is not also in dispute that the applicant is in arrears of the statutory duty whether it was before its formation or thereafter.

6). Having established this, it is not for this court to establish further veracity or otherwise of the dispute between the parties herein. This is not the province of judicial review proceedings. All that is essential to determine is whether the criminal proceedings against the applicant are legitimate or not.

Did the respondent exceeded its mandate or jurisdiction in bringing the charges against the applicants? Was there any malice or breach of any cardinal rules of natural justice?

7). From the parties pleadings, I have no doubt in my mind that there have been various correspondences between them in respect to the subject. The applicant has infact remitted some payment although they argue that it was done under duress.

Equally, the case of the transition from Kisumu County Council to Nyando County Council has all along been known by the parties. Was the respondent therefore in breach of its statutory obligation? I do not think so. The respondent is the custodian of the employees pension and it is mandated to collect and preserve.

By demanding the same from the applicant I find that it acted within its statutory jurisdiction. Section 36, 37, 38 and 39 of the NSSF Act chapter 258 of the Laws of Kenya grants the respondent the prosecuting powers.

8). Respectfully, I do not see any breach by the respondent where it exceeded its powers. As was stated by Lord Templeman in the now famous case of **Reg -VS- Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1988] AC 617**

**“Judicial review is available where a decision making authority exceeds its powers commits an err of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abused its powers”.**

9). The decision by the 1st respondent did not breach any rules of natural justice. The ongoing correspondences between the parties as earlier alluded lends credence to this.

10). This court finds that all the issues raised by the applicant are to say the least their defence which they can raise during the criminal proceedings.

The upshot of all these is that I do not find merit in the application and the same is dismissed with costs to the respondent.

**Dated, signed and delivered at Kisumu this 5th day of February, 2014.**

**H.K. CHEMITEI  
JUDGE**