



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, OUKO & M'INOTI, JJ.A

CIVIL APPEAL NO. 119 OF 2014

CONSOLIDATED WITH CIVIL APPEAL NO. 131 OF 2014

BETWEEN

NATIONAL SOCIAL SECURITY FUND BOARD TRUSTEES..... 1ST APPELLANT

THE ATTORNEY GENERAL.....2ND APPELLANT

CABINET SECRETARY, MINISTRY OF LABOUR

SOCIAL SECURITY & SERVICES.....3RD APPELLANT

AND

CENTRAL ORGANIZATION OF TRADE UNIONS (K).....RESPONDENT

(Appeal from the judgment and Order of the High Court of Kenya at Nairobi (Odunga J) dated 8th April, 2014 in MISC.APP. NO. 21 OF 2014)

JUDGMENT OF THE COURT

On 8th April 2014, the High Court of Kenya at Nairobi, (*Odunga, J.*) issued an order of *mandamus* in favour of the respondent, *the Central Organization of Trade Unions (Kenya), (COTU)* directing the 3rd Appellant, *the Cabinet Secretary, Ministry of Labour, Social Security & Services (the Cabinet Secretary)*, to appoint and gazette COTU's nominee to the 1stappellant, *the National Social Security Board of Trustees (the Board)* forthwith "*in compliance with the provisions of section 6 of the NSSF Act, Cap 258, Laws of Kenya.*" Aggrieved by that decision the Board filed *Civil Appeal No. 119 of 2014* on 19th May 2014. On their part, the 2nd appellant, *the Attorney General* and the Cabinet Secretary filed *Civil Appeal No. 131 of 2014* against the same judgment, on 23rd May 2014.

To the extent that the two appeals arose from the same facts and judgment, involved the same parties and raised virtually the same issues, at the hearing of the appeals and with the consent of the parties, we directed that the two appeals be consolidated pursuant to *rule 103 of the Court of Appeal Rules* and be heard and determined in Civil Appeal No 119 of 2014.

The appeal before us raises two central questions. The first is whether an institution, which has nominated a person for appointment as a member of the National Social Security Board of Trustees, has power to “re-call” that member and substitute him or her with another member, outside the procedure and the grounds prescribed by legislation for removal of such member. The second question is whether an order of *mandamus* can, in any event, issue to compel performance of a duty imposed by a statute, which, as of the date the order is made, has been repealed.

It is apposite to start by sketching the factual background to the consolidated appeals, which is as follows. The Board is a body corporate with perpetual succession, a common seal, and among others the power to sue and be sued in its corporate name, to purchase and hold property and to enter into contracts. It is presently established under **section 5** of the **National Social Security Fund Act, 2013**, which came into force on **10th January 2014**. Prior to that commencement date, the Board was established under **section 4** of the **National Social Security Fund Act, Cap 258**. The latter statute was repealed by **section 72(1)** of the 2013 statute. The primary function of the Board is to ensure prudent management and investment of the funds and assets of the National Social Security Fund.

Under the 2013 Act, the Board is made up of nine members, who include the chairperson. Two members of the Board are members by virtue of their offices as Principal Secretaries, two are appointed by the Cabinet Secretary after nomination by the most representative employer’s organization, two are appointed by the Cabinet Secretary upon nomination by the most representative workers’ organization, and three are appointed by the Cabinet Secretary by virtue of their knowledge and experience in matters relating to administration of scheme funds, actuarial science, insurance, accounting and auditing or law. There is also a managing trustee who is an *ex officio* member.

It is common ground that COTU is the relevant body for purposes of nominating the two nominees of the most representative workers organization.

The dispute in this appeal relates to the trustees appointed upon nomination by COTU. Since those trustees were appointed under the repealed Act, it is important to point out that the **First Schedule** of the repealed Act provided a procedure of appointment of the trustees that is largely similar to the procedure under the 2013 Act, which we have set out above. Pursuant to the First Schedule of the repealed Act, the then Minister for Labour, **Mr. John Munyes**, appointed **Mr. Francis Atwoli** and **Mr. Cornelius Ogutu Nyang’un**, as trustees upon their nomination by COTU and their appointment was duly gazetted vide **Gazette Notice No 4686** of 4th April 2012.

Under clause 6 of the first schedule of the repealed Act, a trustee once appointed could resign his or her office in writing addressed to the Minister. In addition, under the same provision the Minister was empowered to declare the office of a trustee vacant if he was of the opinion that the trustee had become unfit to continue in office or incapable of performing his office. The repealed Act did not make any further provision for a vacancy in the office of trustee outside clause 6 of the first schedule.

The 2013 Act, on the other hand, is much more explicit on removal of a trustee. As far as the trustees nominated by COTU are concerned, section 8 (3) of the Act provides as follows:

“8(3) Notwithstanding subsection (1) of this section, the chairperson or a trustee appointed under section 6 (d) (i), (ii) and (iii) may:

- a. **at any time resign from office by notice in writing to the Cabinet Secretary or otherwise cease to represent the interests of the nominating body; or**
- b. **be removed from office by the Cabinet Secretary if the Trustee-**
 - i. **has been absent from three consecutive meetings of the Board without the permission of the chairperson and is unable or has neglected to furnish any plausible reason for his absence;**
 - ii. **is adjudged bankrupt or enters into a composition or arrangement with his creditors;**

- iii. *is disqualified under any provision of the Constitution or any other written law from holding a public office;*
- iv. *is convicted of a criminal offence, which brings to question his capacity or integrity to serve as a Trustee, and sentenced to imprisonment for a term of six months or more;*
- v. *is incapacitated by prolonged physical or mental illness; or*
- vi. *is otherwise unable or unfit to discharge his responsibilities under section 10(3) of this Act.”*

The litigation leading to this appeal was sparked off by a letter dated 23rd July 2103 from the Secretary General, COTU, Mr. Francis Atwoli, who was also one of the trustees nominated by COTU. The letter was addressed to the Cabinet Secretary and advised him that COTU had withdrawn Mr. Cornelius Nyang'un as a trustee. The Minister was accordingly requested to nominate *Ms. Damaris Wanjiru Muhika* as a trustee in lieu of Mr. Nyang'un.

It appears that the Cabinet Secretary did not act on COTU's request and the latter sent another letter on 17th October 2013 in largely the same terms as the first letter. This second letter too did not elicit any response and by a letter dated 14th January 2014 COTU's advocates, *Messrs. J A Guserwa & Company Advocates* made a formal demand for implementation of the changes of trustees as requested by COTU failing which a suit would be filed to compel appointment of COTU's preferred nominee.

Three days later, on 17th January 2014, COTU applied by way of judicial review for leave to apply for an order of *mandamus* to compel the Cabinet Secretary to appoint and nominate COTU's nominee to the Board “*in compliance with the provisions of section 6 of the NSSF Act Cap 258 Laws of Kenya*” and leave to apply for an order of prohibition to restrain the Cabinet Secretary and the Board from convening any meeting of the Board pending the appointment of COTU's nominee.

On the same day the High Court (Odunga, J.), granted COTU leave to apply for *mandamus* and prohibition. The Court further directed that the grant of leave should operate as stay of convening of any meeting of the Board pending the hearing and determination of the substantive Motion, or until further orders.

Pursuant to the grant of leave, COTU filed the substantive Motion on 22nd January 2014. The two main prayers sought in the Motion were worded as follows:

- “1. *That the Honourable Court be pleased to grant the applicant Central Organization of Trade Unions (Kenya) an order of mandamus directed to the 1st respondent to appoint and gazette the applicant's nominee to the Board of Trustees of NSSF forthwith in compliance with the provisions of section 6 of the NSSF Act, Cap 258 of the Laws of Kenya;*
2. *That the Honourable Court be pleased to grant the applicant Central Organization of Trade Unions (Kenya) an order of prohibition directed to the 1st respondent to stop and or restrain the 1st respondent by himself or through his authorized servants or agents namely the NSSF Board of Trustees from convening any Board meeting pending the appointment of the applicant's nominee to the Board.”*

As is patently clear, the duty, which COTU wanted the Cabinet Secretary compelled to perform by an order of *mandamus*, was expressed to have arisen under cap 258, the repealed Act. It is common ground that COTU never amended its application to seek performance of any duty under the 2013 Act. Equally, as of 17th January 2014 when leave to apply for *mandamus* was granted and as of 22nd January 2014 when COTU's Motion was filed, the statute under which the order of *mandamus* was sought had been repealed and replaced by a new statute which had already come into force before the application for leave was filed.

The substantive motion was heard by Odunga, J. and by the judgment dated 8th April 2014 the learned judge issued the order of *mandamus*. The learned judge expressed himself thus:

“Accordingly, the order which commends itself to me and which I hereby grant is an order of mandamus directed to the 1st respondent compelling him to appoint and gazette the applicant’s nominee to the Board of Trustees NSSF forthwith in compliance with the provisions of section 6 of the NSSF Act cap 258 of the Laws of Kenya. The applicant will have costs of this application.”

Aggrieved by the judgment, the appellants filed the consolidated appeal now before us. Although the appellants have raised several grounds of appeal, we are of the firm view that this appeal turns on the two issues that we identified earlier, namely whether COTU had in law the power to recall its nominee after appointment as a trustee and substitute him with another, and whether the order of *mandamus* could be issued to compel performance of a duty, if any, imposed by a statute that had already been repealed as of the date of the order.

Mr. **Fred Ngatia**, learned counsel for the Board answered both questions in the negative. Starting with the first issue on whether COTU could validly recall a trustee who it nominated for appointment and substitute him with another nominee before the expiry of the term and for reasons other than those prescribed in the statute, Mr. Ngatia submitted that COTU or any other nominating body for that matter, did not have such power. It was argued that COTU’s nominees were appointed for a period of three years, which would expire on 3rd April 2015 and that once appointed, a trustee could not be removed from office except on the grounds set out in the Act. Learned counsel emphasized that COTU had not relied on any of the grounds specified in the Act for the removal of a trustee in their quest to remove Mr. Cornelius Nyang’un as a trustee.

It was further contended that COTU could not, in the prevailing circumstances, insist on the appointment of its new nominee as a trustee because to do so would be tantamount to COTU nominating three trustees to the Board instead of the two prescribed by the Act. That also could not be done, it was submitted, because the Cabinet Secretary did not have any residual power, outside the provisions of the Act, to remove a trustee and substitute him or her with another.

On the second issue regarding whether an order of *mandamus* could issue to compel performance of a duty, if any, imposed by a repealed statute, Mr. Ngatia submitted that although the grounds upon which COTU’s substantive Motion was founded alleged that the failure to appoint COTU’s new nominee was ***“in violation of section 6 of the NSSF Act No. 45 of 2013”***, the substantive prayer in the Motion sought an order of *mandamus* to compel ***“compliance with the provisions of section 6 of the NSSF Act Cap 258 Laws of Kenya.”*** In counsel’s view, the order, which was finally issued by Odunga, J. related not to a duty imposed by the 2013 Act, which was the operative law, but to a duty allegedly arising under the repealed Act.

Relying on the old 1830 English case of ***KAY V GOODWIN, 6 BING. 576***, and the judgment of the High Court of Punjab-Haryana in ***NATIONAL PLANNERS LTD V CONTRIBUTORIES ETC, AIR 1958 PH 230***, learned counsel submitted that the effect of repeal of a statute is to obliterate it completely from record and as such, it must be considered as law that never existed. Such a repealed and non-existent law, it was submitted, cannot be the basis of a duty whose performance could be compelled by an order of *mandamus*. ***F.A.R BENNION’S CODE OF STATUTORY INTERPRETATION, Butterworths, 1992 (2nd ed.)***, was cited in support of the proposition that anything done after the repeal of a statute in purported exercise of a repealed provision is a nullity.

We were finally urged, in the circumstances, to find that the learned judge erred by issuing an order of *mandamus* and to allow the appeal with costs and set aside the order of 8th April 2014.

Mr. Bitu, learned counsel for the Attorney General and the Cabinet Secretary, adopted the submissions made on behalf of the Board, emphasizing that under both the repealed and the current Act, the Cabinet

Secretary did not have power to remove a trustee and replace him or her with another outside the situations contemplated by the law. On the same vein it was submitted that COTU or any other nominating body did not have power to recall or replace a trustee.

Ms. Judy Guserwa, learned counsel for COTU was of a totally different mind. It was submitted that COTU, as a body entitled to nominate a trustee, retained the residual power to recall a trustee whom it felt did not represent its interests. It was COTU's further contention that Cornelius Nyang'un, having been relieved of his duties as COTU's national treasurer, no longer represented the interest of the nominating body and therefore could be recalled and replaced. Ms. Guserwa was categorical that COTU was not seeking to nominate three trustees, but merely wanted to replace one, so that its tally of nominees would still remain two.

Regarding whether the court could issue an order of *mandamus* to compel performance of a duty under a repealed statute, counsel submitted that in the circumstances of this appeal, the court could properly issue such an order because COTU had initiated the process of replacement of one of its trustees when the repealed Act was still in force. In counsel's view, so long as the process of recall of the trustee had commenced under the repealed Act, the process could be validly concluded without being affected by the repeal of the Act in the meantime.

Counsel further contended that there was no problem with the substantive Motion and the final order in the judgment of the High Court because the body of the motion had made reference to the correct legislation; that is Act No. 45 of 2013. In any event, it was submitted, the intention of the learned judge was very clear, namely to order the Cabinet Secretary to remove COTU's previous nominee and replace him with a new one. We were accordingly implored to find the appeal lacking in merit and to dismiss the same.

We have carefully considered the application before the High Court, the judgment dated 8th April 2014, the grounds of appeal, the submissions of learned counsel, the law and the authorities cited on behalf of the respective parties. What has caused us considerable anxiety is the question whether the reference in the judgment of 8th April, 2014 to the repealed Act, namely "**section 6 of the NSSF Act, cap 258 Laws of Kenya**" instead of "**section 6 of the NSSF Act, 2014**" was an accidental slip of no moment; a technicality which may be overlooked.

The answer to that question, in our view lies in the proceedings that took place in the High Court after delivery of the judgment dated 8th April 2014. After the judgment, COTU extracted the order on 9th April 2014, which read as follows in the pertinent part:

"1. That an order of mandamus be and is hereby granted directed to the 1st respondent compelling him to appoint and gazette the applicant's nominee to the Board of Trustee NSSF forthwith in compliance with the provisions of section 6 of the NSSF Act Cap 258 of the Laws of Kenya.

Without doubt, as extracted the order was quite consistent with the judgment of 8th April 2014. On 5th May 2014, COTU's advocates wrote to the Deputy Registrar, High Court, in the following terms:

"Kindly place the above referenced file before Justice Odunga for correction of an error appearing in the judgment/order of 8th April 2014 which reads section 6 of the NSSF Act Cap 258 instead of section 6 of the NSSF Act No. 45 of 2013."

It appears that the matter was never placed before Odunga, J. as requested, but nevertheless an amended order was issued on 8th May 2014, now providing as follows in the relevant part:

"1. That an order of mandamus be and is hereby granted directed to the 1st respondent compelling him to appoint and gazette the applicant's nominee to the Board of Trustee NSSF forthwith in compliance with the provisions of section 6 of the NSSF Act Cap 45 of

2013 of the Laws of Kenya.”

Of course the amended order was also erroneous in so far as it referred to a non-existent statute, “NSSF Act Cap 45 of 2013 of the Laws of Kenya.”

Be that as it may the appellants challenged the amended order as being inconsistent with the judgment and having been procured unprocedurally. By a ruling dated 19th May 2014, Odunga, J. found that the amendment of the order was illegal, thus rendering the amended order null and void. Accordingly, he expunged the amended order from the record. The effect of that ruling was to render the order of 9th April 2014 the only valid order. Thus while the learned judge had the opportunity to correct the “error” in the order, if it indeed was an error, he declined to do so. COTU did not take any further action to correct or clarify the order. It acted as if it was thereafter fully satisfied with the order of 9th April 2014.

Granted the above post-judgment developments, we are left with no alternative but to find that the order of *mandamus* issued on 8th April 2014 compelled and was intended to compel performance of a duty under the repealed Act. We have no hesitation in addition, in holding that once an Act of Parliament is repealed, it ceases to exist completely unless the repealing Act provides otherwise, and that the repealed law cannot form the basis of an order of *mandamus*. Speaking for the Punjab-Haryana High Court of India in **NATIONAL PLANNERS LTD V CONTRIBUTORIES ETC (supra), Bhandari, C.J.** stated as follows:

“The effect of repealing a statute is to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law.”

That is the same principle that was stated in **KAY V GOODWIN (supra)** and restated in Bennion’s

Treatise on Statutory Interpretation (supra). Indeed in **REPUBLIC V ATTORNEY GENERAL & 2 OTHERS EX PARTE PETER MUNGAI KIMANI & ANOTHER, HC JRC NO. 415 OF 2013**, Odunga, J. stated as follows regarding a repealed statute:

“In my view, by repeal of the Land Disputes Tribunal Act No. 18 of 1990, no court could purport to exercise any powers thereunder. In adopting the award on 14th August 2013, the learned magistrate was invoking the provisions of sections 7 and 8 of the said repealed Act. Accordingly, the learned magistrate could not purport to exercise a jurisdiction which had ceased to exist by operation of law.”

But even if it were taken that the order of 8th April 2014 was issued to compel the Cabinet Secretary to perform a duty under the 2013 Act, is there, in law a duty on the Cabinet Secretary to appoint COTU’s new nominee, so as to render him amenable to an order of *mandamus*?

In our view, a proper reading of the Act leaves no doubt that the role of the nominating bodies extends to nominating the person(s) they wish to represent them in the Board of Trustees. Once the trustees have been nominated, appointed by the Cabinet Secretary, and their appointment duly gazetted, they are supposed to serve for a period of three years, unless the circumstances provided in section 8(3) arise, justifying their removal from office of trustee. Once appointed, the trustees can only be removed for cause: neither the Cabinet secretary, nor the nominating body has any power to remove a trustee outside the confines of the circumstances set out in section 8(3).

An important aspect of this dispute that, with respect, the learned judge failed to consider was that once appointed, the trustee is not accountable or responsible to his or her nominating institution. **Section 10(4)** of the 2013 Act is clear enough that in the performance of its responsibilities under the Act, the Board is accountable to the “members of the Fund”. **Section 2** of the Act defines “member” to mean a person who is registered as a member of the Provident Fund or Pension Fund pursuant to the Act. The fact that a

trustee is responsible to members of the Fund rather than to the nominating body, in our view explains the reasons why the Act has deliberately restricted the circumstances under which a trustee can be removed, thus denying both the nominating body and the Cabinet Secretary a *carte blanche* in the removal of a trustee.

To interpret the Act so as to create some residual power for the nominating authority or the Cabinet Secretary to recall or remove a trustee from office at will would in our opinion amount to defeating the purpose and intendment of the Act, which is clearly to create some form of secure tenure for trustees for purposes of shielding them from undue influence in the performance of their duties. To read into the law such a residual power would be contrary to the express provisions of the Act. In addition, such an approach would run counter to the basic rule of statutory interpretation, which requires the court to avoid interpreting a statute in such a way as to render any of its provisions superfluous or unnecessary.

The basic question we ask ourselves is this: if the NSSF Act, 2013 were to be interpreted as empowering a nominating body to recall a trustee at will, or as empowering the Cabinet Secretary to remove a trustee at will, what purpose would section 8(3) of the Act serve? In our opinion, proceeding as the High Court did is the surest way of rendering section 8(3) superfluous.

So long as the grounds contemplated in section 8(3) of the Act for the removal of a trustee had not arisen, the Cabinet Secretary had no basis for removing a trustee, much less for appointing another. Since the number of trustees that a nominating body can propose are set by legislation, the Cabinet Secretary cannot appoint another trustee at the behest of a nominating body whilst there is another trustee in office. First, a vacancy in the office of the trustee must arise in the manner contemplated by the Act before the Cabinet Secretary can appoint another trustee.

It must also be remembered that an order of *mandamus* compels a public body or an inferior tribunal to which it is addressed to act in accordance with its duty. The applicant for an order of *mandamus* must have a legal right to the performance of a legal duty. It is trite that no *mandamus* can issue to compel an authority to act contrary to the law. See *KENYA NATIONAL EXAMINATION COUNCIL V REPUBLIC EX PARTE GEOFFREY GATHENJI NJOROGE, CA NO 266 OF 1996*.

In the circumstances of this appeal, we are satisfied that COTU did not have a legal right to the appointment of its new nominee and the Cabinet Secretary had no legal duty to appoint that nominee. Therefore, no order of *mandamus* could issue against the Cabinet Secretary because it would have compelled him to act contrary to the law.

We are satisfied too that in the circumstances of this appeal, Odunga, J. erred by issuing an order of *mandamus* to compel the Cabinet Secretary to appoint COTU's new nominee as a trustee whilst there was no vacancy in the office of trustee as contemplated by law. Secondly that order was issued to compel discharge of a purported duty arising from a statute that had been repealed as of the date of the order. Accordingly, we allow this appeal and set aside the judgment dated 8th April 2014. The appellants shall have costs of this appeal.

Dated and delivered at Nairobi this 13th day of February, 2015

R. N. NAMBUYE

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR