IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, MWILU & ODEK, JJ.A.)

CIVIL APPEAL NO. 138 OF 2011

BETWEEN

COUNTY COUNCIL OF NYERI .....APPELLANT

AND

BOARD OF TRUSTEES,

NATIONAL SOCIAL SECURITY FUND .....RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nyeri (Sergon J.) dated 8th April, 2011

in

H.C.Misc. Appl. No. 103 of 2010

****

JUDGMENT OF THE COURT

1. By Notice of Motion dated 8th July, 2010, the appellant sought an order of *certiorari* to remove to the High Court and quash the decision of the respondent to demand penalties for late payment of an amount of Ksh.26,927,358.15 being monies deducted from employees of the appellant council and not remitted within time to the respondent. The appellant further sought an order to prohibit the respondent either directly or indirectly through its officers or servants or agents from demanding the said sum of Ksh.26,927,358.15 or any part thereof in purported penalties for late remittance of monies deducted from employees of the appellant County Council.
2. The grounds upon which the appellant sought the orders are that the respondent arrived at the sum of Ksh.26,927,358.15 unilaterally without giving the appellant an opportunity to be heard and without showing how the said sum was arrived at. The appellant contends that it is not in arrears of remittance of any monies to the respondent and it has paid all the statutory dues payable to the respondent. The appellant contends that the respondent is estopped in law from demanding any monies as a result of an agreement dated 6th March, 2006, for Debt Balance Confirmation between the appellant and the respondent wherein it was agreed that the total debt outstanding

from the appellant to the respondent inclusive of interest as at 30th June, 2005, was Ksh.3,346,184/=. It is the appellant's case that the sum of Ksh.3,346,184/= as agreed in the Debt Balance Confirmation has been paid in full to the respondent.

3. Upon hearing the parties, the Honourable Judge ***(Sergon J.)*** in a Ruling dated 8th April, 2011, dismissed with costs the appellant's Motion dated 8th July, 2010, and declined to issue the orders of *Certiorari* and Prohibition as prayed.
4. Aggrieved by the Ruling, the appellant lodged this appeal citing seven grounds of appeal which can be compressed as follows:

i. ***That the learned Judge erred in fact and in law in holding that the respondent adhered to the rules of natural justice in issuing a penalty demand notice to the appellant for Ksh.26,927,358.15.***

ii. ***That the learned Judge erred in law and fact in failing to take into account factors showing that the respondent failed in its responsibility and duty under the National Social Security Fund Act as read with the Local Authorities Fund Transfer Act, Act No. 8 of 1998 to properly exercise its discretion in a manner that was not unfair, unreasonable and oppressive in regard to the manner and timing of the penalty demand notice for Ksh.26,927,358.15.***

iii. ***That the learned Judge erred in law by failing to establish the difference between standard contributions and penalties and failed to take into account the submissions, judicial precedent cited by the appellant.***

iv. ***The learned Judge erred in failing to consider the material contradictions in the averments by the respondent and time limitation as raised by the appellant.***

5. Learned counsel ***R. P. Mugambi*** appeared for the appellant while the firm of **Okoth & Kiplagat Advocates** were on record for the respondent. The appellant made written submissions while the respondent filed grounds for affirming the decision by the trial Judge.
6. Counsel for the appellant submitted that the learned Judge failed to take into account the contention by the appellant that the rules of natural justice were not adhered to; that the appellant was not given an opportunity to make sufficient representation to the respondent before the penalty demand notice was issued. Counsel submitted that there is a presumption in the interpretation of statutes that rules of natural justice shall apply. ***(See Fairmount Investments Ltd. – v- Secretary of State for the Environment, (1976) 1 WLR 1255, 1263)***. It was submitted that the ***NSST ACT*** prescribes how penalties are to be collected and the respondent did not comply with the prescribed procedure. Counsel cited the case of ***Mirugi Kariuki – v- Attorney General, Civil Appeal No. 70 of 1991,*** in support of the submissions. In the ***Mirugi case***, it was stated that once the appellant alleges a breach of the rules of natural justice, the learned Judge should pause and investigations are made on a full inter partes hearing. The appellant submitted that in the instant case, the trial judge had an obligation to pause and evaluate the evidence on record and determine what meetings were held between the parties in order to ascertain whether the appellant was given a hearing by the respondent. It was submitted that the Judge erred in failing to evaluate the evidence to determine this fact and the court erred in finding that discussions had taken place between the parties hereto. Counsel submitted that the trial court erred in finding that the respondent had properly exercised its discretion in issuing the penalty demand notice. It was submitted that the timing of the notice and the mode of communication was improper as it was aimed at denying the appellant access to the ***Local Authorities Transfer Funds (LATF);*** that the respondent regularly issued clearance certificates to the appellant in the years 2006, 2007, 2008 and 2009, indicating that contributions had been made; that the certificates were a representation to the appellant and the administrator of the Local Authorities Transfer Fund that the appellant had cleared all its statutory dues including any penalty.
7. Counsel for the appellant further submitted that by letter dated 20th April, 2005, the respondent issued to the appellant a penalty demand notice which called upon the appellant to pay a sum of Ksh.3,346,184.80 as the outstanding penalty as at 20th April, 2005; that the respondent is estopped

from demanding penalty in excess of Ksh.3,346,184.80 as at 20th April, 2005; that the sum of Ksh.3,346,184.80 was the total debt outstanding from the appellant upto the date of the signing of the Debt Balances Confirmation Form on 6th March, 2006; that no reason had been given for the respondent's departure from the letter dated 20th April, 2005.

8. Counsel for the appellant submitted that there was a difference between standard contributions and penalties and the respondent was empowered to collect standard contributions under the NSSF; that the issue of penalties fell under a different category; that the respondent by demanding for penalties violated ***Regulation 19*** of the ***NSST ACT;*** that under ***Section 38*** of the ***NSST ACT***, the respondent is empowered to file a civil suit for recovery of any monies; that there were material contradictions in the respondent's evidence on record where in one instance the respondent contends it has discretion to calculate penalties and in another it states it has no discretion.
9. In opposing the appeal, the respondent in its grounds of affirmation supported the decision by the trial Judge. It was submitted that there is no limitation period preventing recovery of penalty from the appellant; that ***Section 42 (1)(c)*** of the ***Limitation of Actions Act*** excludes application of limitation period to proceedings brought under the ***NSST ACT*** for recovery of any sum or penalty or interest due. As regards the contention that the appellant was not given a hearing before the penalty demand notice was issued, the respondent submitted that ***Section 14*** of the NSSF did not impose an obligation to hear the person affected before a penalty demand notice could issue. The respondent cited the case of ***Commissioner General, Kenya Revenue Authority –v- Silvano Onema Owaki, Civil Appeal No. 45 of 2000,*** in support of the submission. The respondent submitted that a hearing was granted to the appellant. That prior to the issue of the penalty demand notice, two meetings were held between the parties on 1st December, 1999, and 2nd December, 2009, and numerous correspondences were exchanged.
10. On the contention by the appellant that estoppel applies because the respondent issued clearance certificates, counsel submitted that it is against the law for a public body with a statutory obligation to collect contributions and penalty to make a promise not to collect the same.
11. On the distinction between contribution and penalty, counsel for the respondent submitted that though there was a distinction between contributions and penalty, ***Section 14*** of the NSST ACT provides that the penalty accrued shall be added to the contribution and such additional amount (penalty) shall be recoverable in the same manner as the contribution to which it is added. It was stated that penalty automatically accrues to any late payments of a contribution and as such, the difference between a contribution or penalty is not material. The respondent submitted that the appellant had not tendered any evidence to prove that the sum of Ksh.26,927,358.15 as demanded vide the penalty demand was not owed or was fully paid.
12. We have considered the submissions by learned counsel and examined the Record of Appeal. We remind ourselves of the dicta by Lord Scarman in ***Inland Revenue Commissioners – v- National Federation of Self Employed and Small Business Ltd***. (***1981) 2 All ER 93,*** where he stated that it is not for the court to attempt an assessment of the sufficiency of the interest of the person applying for judicial review orders; it is for the applicant to show the reasonable grounds for believing that there has been a failure of public duty. This is a first appeal and it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in ***Selle -vs- Associated Motor Boat Co. [1968] EA 123,*** thus:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider*** **the evidence,** ***evaluate it itself and draw its own conclusions".***

13. The appellant contends that the respondent violated the rules of natural justice as it did not accord the appellant a hearing prior to issuing the penalty demand notice. Counsel submitted that the right to be heard is a requirement in all disputes and the substance of the dispute should be investigated and decided on their merit (***see Trust Bank Ltd. – v- Amalo Company Ltd., (2002) 2 KLR 627***; see also ***Savings & Loan Kenya Ltd- v- Odongo, (1987) KLR 294)***. A right to a hearing is a fundamental right and as this Court observed in the case of ***Richard Ncharpi Leiyagu -vs- Independent Electoral and Boundaries Commission and 2 Others, C.A. No. 18 of 2013, Nyeri:***

"The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law".

14. The respondent submitted that a hearing was given to the appellant. It was submitted that two meetings were held one on 1st December, 1999, and the second on 2nd December, 2009. In addition, the respondent submitted that under Section 14 of the ***NSST ACT***, it was under no obligation to hear the appellant prior to the penalty demand notice being issued. In the ***Commissioner General, Kenya Revenue Authority – v- Silvano Onema Owaki***, ***Civil Appeal No. 45 of 2000***, this Court differently constituted while dealing with the issue of placing seals in a fuel tank and seizure of goods under ***Sections 175*** and ***199*** of the ***Customs and Excise Act (Cap 472),*** stated that there was no obligation to hear the person affected nor is there an obligation to accord the person affected an opportunity to be heard. ***Section 14*** of the ***NSST ACT*** provides that:

> ***"If any contribution for which a contributing employer is liable under this Act is not paid within one month after the end of the month in which the contribution period or the last day of the contribution period to which it relates falls, a sum equal to five per cent of the amount of that contribution shall be added to the contribution for each month or part of the month thereafter that the amount remains unpaid, and any such additional amount shall be recoverable in the same manner as the contribution to which it is added***".

15. In our reading, ***Section 14*** is a provision that gives the right to impose penalty and the formula for determining the penalty. It is a mechanical and mathematical provision which is self-executing. The formula for penalty is given as 5% of the outstanding contribution. The Section does not require an opportunity to be heard or a hearing; what is pertinent is the determination of what amount of contribution is outstanding and has not been paid. Once this sum is determined, ***Section 14*** of the ***Act*** comes into play and the section requires a mathematical exercise to calculate and add the penalty to the outstanding contribution. The evidence on record shows that two meetings between the appellant and the respondent did take place in 1999 and 2009 and the various correspondence exchanged between the parties. It is our considered view that in all these instances, an opportunity was granted to the appellant to challenge the sums and figures indicated as contributions that have not been remitted. We do find that the contention that the respondent denied the appellant the right or opportunity to be heard is not supported by the evidence on record. There was not a prescribed mode of being heard.
16. The other ground of appeal is that the trial judge erred in not finding that there is a distinction between contributions and penalty. We have examined the provisions of ***Section 14*** of the ***NSST ACT***. The heading of the Section is "*penalty for delayed payment of contributions*". A reading of the Section clearly indicates that whenever a contribution is outstanding for over one month, a penalty shall be imposed. Whereas we concur with the appellant that there is a difference between a contribution and penalty, it is our considered view that for purposes of determining the amount due and owing, the distinction between contribution and penalty helps a party to understand and appreciate how the total amount due is arrived at. We find that the distinction is relevant for accounting and reconciliation exercise. Once a party understands how the calculations have been made and the amount due arrived at, the entire sum is due and it is immaterial as to whether the amount due originated as a penalty or contribution. We find that the trial judge did not err in failing to make a distinction between contributions and penalties as what was before the court was not an accounting or reconciliation exercise. It was not the duty of the trial judge to reconcile the figures tendered in evidence and to determine what amount, if any, was due to the respondent. Likewise, we hold that it is not the duty of this Court to reconcile the figures and determine the amount due and owing, if any, by the appellant to the respondent. The primary issue before the High Court and this Court is whether an order of c*ertiorari* and or Prohibition should issue and whether sufficient facts have been laid to support the issuance of such orders. The judicial review orders of *certiorari* and prohibition were not envisaged to be tools for reconciliation of accounts between parties.
17. The appellant invoked the provisions of the Local Authorities Transfer Fund Act in support of the submissions that the respondent exercised its powers in order to deny the appellant access to its

allocation of the Local Authorities Transfer Fund. We have considered this submission and we are of the view that the respondent as a public body was under duty to exercise its statutory obligation. In the absence of any cogent evidence, we do not see any reason to impute ulterior motives on the part of the respondent. The appellant further cited the provisions of ***Regulation 19*** of the ***Local Authorities Transfer Fund Act*** to define what constitutes penalties, contributions, debts and statutory charges. The respondent issued the penalty demand notice pursuant to the provisions of the ***NSST ACT***. It is our view that unless expressly stated in the statute, one cannot use the provisions of the Local Authorities Transfer Fund Act to interpret the provisions of the ***NSST ACT***. A provision of one statute cannot be used to interpret another.

18. The appellant in his appeal contends that the respondent's demand is caught by the limitation period. The respondent submitted that the issue of limitation was not raised in the pleadings but in submissions by counsel and it should be ignored. We state that limitation is a point of law that goes to justiciability of a matter and points of law can be raised at any time during the proceedings. On our part, we have examined the provisions of ***Section 42 (1) (h)*** of the ***Limitation Act (Cap 22)***. ***Section 42 (1) (h)*** of the ***Limitation Act*** provides:

> ***"This Act does not apply to:***
>
> ***(h) civil proceedings brought under the National Social Security Fund Act for the recovery of any contributions or any other sum and any penalty or interest thereon".***

19. Based on the provisions of ***Section 42(1) (h)*** of the ***NSST ACT,*** we make a finding that the penalty demand notice and any amount due for recovery under the provisions of the ***NSST ACT*** are not caught by the limitation period.
20. The appellant further contends that the learned judge erred to the extent that he failed to appreciate the contradictions in the evidence given by the respondent. We have re-evaluated the evidence on record by the respondent and it is our considered view that the contradictions identified were immaterial to the issue before the trial court. ***Section 14*** of the ***NSSF ACT*** clearly gives the respondent the power to recover any outstanding contributions and penalties and the contradictory testimony by the respondent cannot change the purport and substance of ***Section 14*** of the ***NSST ACT.***
21. On the issue of estoppel, we find that estoppel cannot operate to defeat the provisions of a statute (See ***Tarmal Industries Ltd. – v- Commissioner of Customs and Excise (1968), EA 471)***. The respondent is under a statutory duty to collect contributions and any penalty due thereon. We have examined the provisions of ***Section 39 (1)*** of the ***Limitation Act*** which applies to contract. The obligation on the part of the respondent to collect contributions and penalty is statutory not contractual.
22. The appellant also contends that the learned judge erred in failing to find that the respondent by issuing the penalty demand notice under the National Social Security Fund Act as read with the Local Authority Fund Transfer Act did not properly exercise its discretion and did so in a manner that was not fair, was unreasonable and oppressive particularly in its timing. We have considered this submission and we cite the case of ***Commissioner General, Kenya Revenue Authority – v- Silvano Onema Owaki***, ***Civil Appeal No. 45 of 2000***, where it was stated that:

> ***"We observe that the Revenue Authority in carrying out the duties imposed upon it by Parliament could not, without proof be said to be acting maliciously."***

It is our considered view that in the instant case, the respondent cannot without proof be said to have been acting unfairly, unreasonably and in an oppressive manner. The record does not show the basis upon which the respondent is alleged to have been oppressive or unreasonable. The dispute between the parties hereto involves a mathematical calculation as to what contributions have been paid, when they were paid, outstanding contributions if any and the penalty due thereon. Nothing is more objective and reasonable than mathematical calculations and payment dates that are verifiable. Our re-evaluation of the evidence on record shows that the appellant did not demonstrate the unfairness, unreasonableness and the oppressive nature on the part of the respondent in issuing a penalty demand notice for Ksh.26,927,358.15. The penalty demand notice clearly stated that the amount demanded was penalty for late remittance of

contribution. We do find that the demand notice was reasonable to the extent that it specified the reason for the demand being made.

23. In totality, it is our considered view that the grounds contained in the memorandum of appeal have no merit and this appeal is hereby dismissed with costs.

Dated and delivered at Nyeri this 5th day of February, 2014.

MARTHA KOOME

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JUDGE OF APPEAL

PHILOMENA MWILU

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR