



**Kibet & another v Attorney General & another (Petition
E205 of 2024) [2025] KEELRC 1318 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1318 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E205 OF 2024**

B ONGAYA, J

MAY 9, 2025

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 22, 27, 30, 35, 40, 41(2) (A) AND (B), 43(1) (C), 46
AND 50(1), (2)(A), (B), (D), (G) AND (K) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS
UNDER ARTICLES 10(2) (B) AND (C), 201(A), (D) AND (E), 205(1)
AND (2), 227(1) AND 232 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE ARTICLES 23(1) AND (3),
156(4), 159(2), 162(2) AND 165 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF THE NATIONAL SOCIAL SECURITY FUND ACT NO. 45 OF 2013

AND

**IN THE MATTER OF THE NATIONAL SOCIAL SECURITY
FUND, CAP 258 OF THE LAWS OF KENYA (REPEALED)**

AND

IN THE MATTER OF THE RETIREMENT BENEFITS ACT NO. 3 OF 1997

BETWEEN



WILLIAM KIBET 1ST PETITIONER

GODFREY MUSAINA 2ND PETITIONER

AND

HON. ATTORNEY GENERAL 1ST RESPONDENT

**THE NATIONAL SOCIAL SECURITY FUND BOARD OF
TRUSTEES 2ND RESPONDENT**

JUDGMENT

1. The petitioners filed the petition dated 11.12.2024 through the firm of Okubasu & Munene Advocates. They prayed for the following Orders:
 - a. A Declaration that the decision to issue a notice to employers to remit funds to National Social Security Fund under Third Schedule of NSSF Act, 2013 is inconsistent with Articles 10(1) (b) and (c), 21(1), 230(4), 27, 41 and 43 of *the Constitution* and is null and void.
 - b. A Judicial Review Order of Certiorari quashing the implementation/ further implementation of the NSSF Act, 2013, which is unconstitutional.
 - c. The costs of this petition be borne by the respondent.
 - d. Such other, further, additional, incidental and/or alternative reliefs or remedies as the Honourable Court may deem just and expedient.
2. The petitioners' case was as follows:
 - a. The petitioners are male adults and citizens of the Republic of Kenya entitled to petition this Honourable Court under Articles 19, 20, 21, 22, 165 and 258 of *the Constitution* of Kenya.
 - b. The *National Social Security Fund Act* No. 45 of 2013 (the NSSF *Act No. 45 of 2013*) was assented to on 24.12.2013 with a commencement date of 10.01.2014. However, the Act's constitutionality was challenged in the Employment & Labour Relations Court by several petitions that were later consolidated into one. The Employment & Labour Relations Court subsequently declared the NSSF *Act No. 45 of 2013* null and void on 19.09.2022 for failure to involve the Senate in its enactment.
 - c. An appeal was later preferred against the decision of the three-judge bench of the Employment & Labour Relations Court. On 03.02.2023, the Court of Appeal subsequently set the appeal aside on the ground that the Employment & Labour Relations Court lacked jurisdiction to declare an Act of Parliament unconstitutional.
 - d. The decision of the Court of Appeal was appealed in the Supreme Court, which pronounced itself on 21.02.2024 that the Employment & Labour Relations Court has jurisdiction to determine the constitutional validity of the NSSF *Act No. 45 of 2013*. However, the said legislation is still being implemented despite it having been declared unconstitutional and such decision of the Court still being in force.
 - e. The petitioners fear that the 1st respondent will proceed and/or further proceed to implement the NSSF *Act No. 45 of 2013* to their detriment and that of other innocent Kenyans.



Furthermore, the 2nd respondent purports to implement the impugned NSSF Act by issuing a notice to employers that they should remit funds as per the Third Schedule of the said legislation, yet it was declared unconstitutional.

- f. Unless this Court invokes its jurisdiction and issues orders as sought herein, there will be further outrage of the rule of law.
3. The petitioners further averred that Sections 13, 19(2), 20 and 3 of the NSSF Act, 2013 are inconsistent with Articles 10(1)(b) and (c), 21(1), 27, 32, 33, 36, 40, 41, 43 47(1), 230(4), 232(1) of *the Constitution* of Kenya, 2010. The said provisions are null and void to the extent that they oblige employers and employees to register and join, respectively, the pension or social schemes operated by the 2nd respondent. Further, to the extent that they purport to discriminatorily target only employers in the registration, membership and the making of contributions to the 2nd respondent, and not the entire Kenyan population as required of a scheme purportedly intended to offer universal social security under Article 43 of *the Constitution* of Kenya. That the said provisions are also unjustifiable in a free, modern and democratic society as they purport to:
 - i. Oblige the employers and other employers with alternative pension or social security schemes to join the pension or social security schemes operated by the 2nd respondent.
 - ii. Oblige the petitioners and other employees with alternative pension or social security schemes to join the pension or social security schemes operated by the 2nd respondent.
 4. The petitioners' further case was that Section 21 of the NSSF *Act No. 45 of 2013* conflicts with the *Retirement Benefits Act*, No. 3 of 1997 to the extent that it gives NSSF regulatory powers over the RBA, the regulator, and turns the regulator into an agent of NSSF by requiring it to account and/or make reports to NSSF on approved contracted out schemes.
 5. The respondents filed grounds of opposition dated 26.02.2025 through the office of the Hon. Attorney General. They opposed the petitioners' petition on the grounds:
 - i. That the petition is an abuse of court process as the petitioners are forum shopping and hounding to obtain a favourable decision by chance. The petitioners are pursuing two parallel court processes over the same subject matter, as the current matter is also ongoing at the Court of Appeal in Civil Appeal No. E656 of 2022 - National Social Security Fund Board of Trustees vs. Kenya Tea Growers Association & others.
 - ii. That the petition offends the subjudice principle as the substratum of the matter had been remitted to the Court of Appeal under the Judgment of the Supreme Court in Supreme Court Petition E004 of 2023 - Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others dated 21.02.2024. Furthermore, another case – Nairobi High Court Petition E016 of 2024 - John Ndegwa vs. Cabinet Secretary for Labour & Social Protection & others, in which the petitioner is seeking similar orders as those in the instant petition, is pending hearing and determination. In the case of Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga [2013] eKLR, the Court held that it is not the form in which the suit is framed that determines whether it is subjudice, rather, it is the substance of the suit, and that, there can be no justification in having two cases being heard parallel to each other.
 - iii. That by extension, the determination of the earlier suit renders the alleged issues cited in this matter as res judicata. Further, the Employment & Labour Relations Court had already pronounced itself in Nairobi ELRC Petition 38 of 2014 consolidated with Petitions 35 of 2014, 49 of 2014 and 50 of 2014. The 2nd petitioner in the instant proceedings also brought the



same issue in Nakuru High Court Petition E019 of 2023 - Godfrey Musaina vs. Hon. Attorney General & the National Social Security Fund Board of Trustees & 4 others.

- iv. That the principle of progressive realisation, as enshrined in Article 21(2) of *the Constitution* of Kenya, 2010, obligates the state to take legislative, policy and administrative measures to gradually fulfil socio-economic rights, including the right to social security under Article 43(1) (e). While the Court has declared the NSSF Act unconstitutional, the immediate cessation of its operations creates a legal vacuum contrary to the state's obligation to ensure a structured transition.
 - v. That the NSSF is a critical institution that safeguards the social security of millions of Kenyan workers and retirees, which makes its continued temporary operation a matter of overriding public interest. Therefore, suddenly halting the Fund destabilises pension management and employer-employee financial arrangements and jeopardises the livelihoods of countless retirees and low-income earners who rely on these benefits for their welfare, creating a social and economic crisis.
6. The 2nd respondent also filed a replying affidavit of David Koross sworn on 26.02.2025, through the office of the Hon. Attorney General. It was averred that:
- i. The NSSF did not contravene Article 46(1)(b) of *the Constitution*, as it is incumbent on every employer, as part of their civic duty, to abide by all applicable laws.
 - ii. Article 43(1)(e) on the right to social security compels the Government to take adequate measures to ensure social security of the citizenry. Furthermore, Section 4 of the NSSF Act provides the NSSF with the legal mandate to provide social security to its members. Social security is also a tool the Government employs to combat discrimination and an essential instrument for reducing poverty and promoting social inclusion. The Fund, which provides social security under Article 43(1)(e), has therefore not contravened the said provision.
 - iii. The low contributions as those in the repealed Act, Cap 258, only increased the vulnerability of citizens during retirement.
 - iv. There has been adequate consistent public sensitisation and issuance of notices on the implementation of new contribution rates has been adequately done, thus removing ambiguities and providing clarity on the impugned Act and its provisions. The impugned provisions cannot be said to be unconstitutional for not serving the economic interests of the petitioner.
 - v. The petitioners have listed numerous constitutional provisions without demonstrating how the same have been violated and or any prejudice suffered or likely to be suffered as a result of the application of the impugned provisions.
 - vi. The 2nd petitioner is a perpetual litigant having previously filed a similar case - Nakuru HCC Petition E019 of 2023 (supra). Upon realisation that he had no chance of success at the High Court, he withdrew the matter on 16.06.2024 in favour of the respondents, in gross abuse of court process. The petitioners are also aware of the pending proceedings before the Court of Appeal on the substratum of this case, remitted back to it by the Supreme Court.
7. The petitioners were deemed to have opted not to file any submissions as per the Court's directions. The respondents filed submissions dated 23.05.2025.
8. The material before the Court show that indeed the matter in dispute is pending determination before the Court of Appeal as remitted to it by the Supreme Court. The instant petition is found an abuse



of the Court process, res judicata as well, sub – judice. It is sub - judice because the matter is properly pending before the Court of Appeal. It is res judicata because this Court already determined the dispute. Accordingly, the petition is liable to dismissal.

The petition is hereby dismissed with no costs, accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 9TH MAY, 2025**

BYRAM ONGAYA

PRINCIPAL JUDGE

