



Republic v National Social Security Fund Board of Trustees; Kamau (Exparte) (Environment and Land Judicial Review Case E017 of 2022) [2024] KEELC 7240 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7240 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E017 OF 2022
LN MBUGUA, J
OCTOBER 30, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES RESPONDENT

AND

MIKE MAINA KAMAU EXPARTE

RULING

1. The Respondent’s Notice of Motion dated 12.7.2024 is for determination. It seeks orders to review, vary and /set aside the judgment and ruling of this court delivered on 8.6.2023 and 30.4.2024 respectively. It also seeks an order of consolidation of this suit with ELC Suit No. 104 of 2007: National Security Fund v Geoffrey Chege Kirudi, Mike Maina and 2 Others, as well as cost of the application.
2. The application is premised on grounds on its face and on the supporting affidavit sworn on 12.7.2024 by Kellen Njue, the Respondent’s General Manager, Legal Services and Corporation Secretary. She avers that in its ruling dated 30.4.2024, the court found the managing trustee of the Respondent guilty of contempt of court for failing to settle the Ex – Parte Applicant’s party and party costs awarded in ELC Suit No. 104 of 2007.
3. She contends that there are additional considerations which necessitates a review of the said ruling as well as the judgment delivered on 8.6.2023, being that there exists 2 conflicting orders over the same subject matter.
4. It is argued that the judgment of 8th June 2023 as well as the ruling of 30th April 2024 were delivered without consideration of the stay of execution orders issued by the trial court in the primary matter



- thereby creating a conflict on the operations of the two rulings. Adding that the subsistence of a stay order restraining any execution of the party and party costs awarded herein effectively bars the Respondent from making any payment with respect to the costs herein.
5. That unless the court intervenes, there is a likelihood that the Respondent's managing trustee, Mr. David Koross will be sentenced in circumstances beyond his control and it would be unjust given that he has complied with conditions for stay requiring to pay ksh.2 million as security pending the determination of the appeal.
 6. The Respondent's submissions are dated 19.8.2024 and address the following issues;
 - i. Whether the application satisfies the criteria set forth to warrant a review?
 - ii. Whether the court should stay, suspend and or vacate the sentencing of the Respondent's managing trustee?
 - iii. Whether the suit should be consolidated with ELC Suit No.104 of 2007: National Social Security Fund v Geoffrey Chege Kirudi, Mike Maina & 2 others?
 7. On the 1st issue, it is submitted that the application is predicated on the basis that there was a mistake/ error apparent on the face of the record and that there are other sufficient reasons to warrant review, which meets the parameters for review under Order 45 of the Civil procedure rules.
 8. It is argued that the ruling of 30.4.2024 falls within the meaning of error apparent on the face of the record as the managing trustee of the Respondent was found to be guilty of contempt despite there being a stay of execution order. The cases of National Bank of Kenya Limited v Ndung'u Njau [1997] eKLR as well as Nyamongo v Nyamongo Kogo 92001 EA 170 are relied upon to buttress this argument.
 9. It is also submitted that the existence of 2 conflicting orders by the same court will cause confusion and great embarrassment to the judicial process and further erode public confidence and that the same brings an element of sufficient reason to warrant review to give this court an opportunity to clarify the said orders.
 10. On the 2nd issue, it is submitted that to avoid serious miscarriage of justice, the sentencing of the Respondent's Managing trustee ought to be stayed, set aside and /vacated.
 11. On the issue of consolidation, it is submitted that the court has power to consolidate suits under Order 11 Rule 3 (1) (h) of the Civil Procedure Rules and should consolidate the instant suit with ELC Suit No. 104 of 2007 as they arise from the same facts and share a common question of law which concerns execution and /or stay of execution of costs. That further, the rights/reliefs sought arise from the same transactions being the judgment delivered on 22.11.2019 in ELC Suit No. 104 of 2007.
 12. In opposition thereof, the Ex Parte Applicant filed a Notice of Preliminary Objection dated 17.7.2024 contending that the application is resjudicata and that the court is functus officio, having delivered a ruling in the matter on 30.4.2024. It was submitted that the application does not meet the criteria for review under Order 45 of the Civil Procedure Rules as there is neither discovery of any new and important matter or evidence nor is there any mistake or error apparent in the face of the record.
 13. It is submitted for the Rxparte Applicant that the issues raised by the Respondents are the same issues that have been raised before and determined vide the ruling of 30.4.2024, thus they are res judicata and offend the provisions of Section 7 of the *Civil Procedure Act*.



14. It is also argued that the application is barred by the doctrine of finality. To this end, the cases of Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others [2007] eKLR as well as the case of Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR are cited.
15. I have considered all the arguments raised herein. It is crystal clear that the suit JR E017 OF 2022 is not an independent suit. The said suit was essentially filed to effectuate the judgment in the case ELC 104 OF 2007. It follows that the orders given in the older suit have a direct impact on the suit JR E017 OF 2022.
16. The records in the suit ELC Civil Suit 104 of 2007 indicates that vide a ruling issued on 5.10.2023, a stay of execution of the order for costs issued on 29.11.2021 was issued pending hearing and determination of Nairobi Civil Appeal No. E025 of 2023 NSSF Board of Trustees v Geoffrey Chege & 3 Others, on condition that the Respondent herein would pay ksh.2 million within 30 days. Vide the said court's further orders of 29.7.2024, the time within which to pay was extended.
17. On the other hand, the ex parte applicant filed Misc. Civil Application No. E017 of 2022 seeking to compel the Respondent herein to pay costs arising from ELC Civil Suit 104 of 2007. The said orders were granted in the judgment delivered on 8.6.2023 before the order of stay of execution was issued in ELC 104 of 200. Ultimately, another ruling was delivered on 30.4.2024 in which the respondent was found to be in contempt of court.
18. What resonates from the foregoing is that the court is not functus officio in view of the pronouncement that these Judicial Review proceedings are not independent from the suit ELC N104 of 2007, thus the application is not resjudicata. Another issue to discern is that there are conflicting orders as there is a stay in the substantive file of which the matter is at the Court of Appeal. That being the case, the court ought to harmonize the situation by setting aside the orders of 30.4.2024 issued in the current file.
19. On consolidation,, I make reference to the case of Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 Others [2014] eKLR where the court stated that;

“The Civil Procedure Rules mandates Courts to consider consolidation of suits and in so doing, to be guided by the following :-1. Do the same question of law or fact arise in both cases? 2. Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction? 3. Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party?”
20. Consolidation of the instant suit and ELC Civil Suit 104 of 2007 would go along way to save time and also save the court from issuing conflicting orders. However, I reiterate that the judicial review proceedings were only filed to effectuate the judgment in the older file. In the circumstances, I decline to consolidate the matters but I give orders that the two files be handled at the same time by one judge.
21. The final orders are as follows;
 1. The Preliminary Objection is dismissed.
 2. The application is partially allowed in which the orders of 30.4.2024 are hereby set aside;
 3. The two files are to be handled together by the same judge.
 4. Each party is to bear their own costs of the application and the preliminary objection.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30th DAY OF OCTOBER, 2024
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Nduta holding brief for Kamau Kuria for Ex parte Applicant

Kimathi holding brief for SC Muma for Applicant/Respondent

Court assistant: Vena

