



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. 35 OF 2014

relating to employment and Labour relations. Those are matters over which the Industrial Court has exclusive jurisdiction.

b. The Industrial Court is established by Parliament pursuant to express provision of the Constitution as having the "status of the High Court".

6. Under **Article 162(3)**, the Constitution further provides that Parliament shall determine the jurisdiction and functions of the Employment and Labour Relations Court. That determination is contained in **Section 12** of the **Industrial Court Act**.

7. That the Constitution did not define the extent to which the Employment and Labour Relations Court, as a Court having the same status of the High Court should deal with matters that come before it which do not wholly relate to Employment and Labour Relations. However, under **Article 159(2)e** both the High Court and the Employment and Labour Relations Court are enjoined to protect and promote the Principles of the Constitution.

8. It was submitted that the issues that fell to be determined in this matter are;

i. whether the National Social Security Fund (**NSSF Act 45 of 2013**) is inconsistent with the letter and spirit of the Constitution and in particular **Articles 43** and **27(1)** read together with **Article 21(2)** of the Constitution;

ii. whether publication of a Government Policy Paper on provision of Social Security can be deemed to have fulfilled the obligation imposed on the Government under **Article 21(2)** of the Constitution;

iii. whether the NSSF Act 2013 is a legislation that includes provisions dealing with financial matters of County governments within the context of **Article 205(1)** of the Constitution and whether the Bill leading to the enactment of the Act should have been referred to the Commission of Revenue Allocation for consideration before its passage by the National Assembly;

iv. whether the National Social Security Fund Bill should have been tabled before the Senate and passed by the Senate before being re-enacted into law;

v. whether Parliament abided with **Articles 205** and **110** and if not, the effect of failure to do so;

vi. assuming the NSSF Act 2013 is constitutional whether the following provisions of the Act are inconsistent with the Constitution.

.Section 13

.Section 19(2)

.Section 49(3)

.Section 18(2) read

together with *Section 72*;

vii. Assuming the NSSF Act 2013, is properly enacted whether the following Sections violate the Petitioners, the employers' and or their employees rights under the Constitution;

9. **Section 17(6)(b)** violating rights and fundamental freedoms under **Articles 50(1)**.

Section 19(2) violating rights and fundamental freedoms under **Article 47** and **50**.

Section 20 violating rights and fundamental freedoms under **Articles 35, 40** and **46**.

Section 27 violating rights and fundamental freedoms under **Article 40**.

Section 35(4), violating rights and fundamental freedoms under **Article 50**.

Section 49(2) violating rights and fundamental freedoms under **Articles 27(1), 30** and **46(1)**.

10. It was submitted that it was clear from the above issues that the dispute before the Court revolves around the legality of the **NSSF Act 2013** or the provisions thereof and the issues themselves raise substantial questions of law under **Article 165(3) (b)** and **(d)** of the constitution and ought to be heard by uneven number of Judges being not less than three to be assigned by the chief Justice.

11. However, the **NSSF Act, 2013** establishes a National Social Security Fund contributed to by employers and their employees and for the payment of benefits out of the fund.

12. Therefore, contributions towards the fund is premised upon there being an employment relationship in the first place. Payments out of the fund are also premised on existence of an employment relationship.

13. It was submitted therefore, a dispute involving the validity of an Act establishing a fund contributed to by employers and employees and regulating payment of money out of the fund to employees and their relatives in the event of certain events associated with employment relationship is a dispute relating to employment and labour relations and may be entertained by the employment and Labour Relations Court as established pursuant to **Article 162(2)** of the constitution.

14. But the issues as framed also allege violation of rights and fundamental freedoms of the Petitioners. **Article 23(1)** of the Constitution provides that the High Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. In addition to the foregoing **Article 165(3) (b)** and **(d)** provide that the High Court shall have;

“(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of;

i. the question whether any law is inconsistent with or in contravention of the Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or any law is inconsistent with, or in contravention of this Constitution;

iii. any matter relating to Constitutional Powers of state organs in respect of County Governments and any matter relating to the Constitutional relationship between the levels of Governments; and

iv. a question relating to conflict of laws under article 191.”

15. From the foregoing, some of the issues raised in the Petition should equally be determined by the High Court.

Indeed **Petition No. 38 of 2014** was first filed in the High Court as **Petition No. 270 of 2014** on 16th June 2014. However, Hon. Lady Justice Ngugi ordered it be transferred to the Employment and Labour Relations Court.

16. The Court had thus recognized that the Employment and Labour Relations Court was competent to entertain the matter.

17. Counsel for all the other parties except Mr. Ngatia for 1st Respondent associated themselves with the submissions by Mr. Orao Obura.

18. The 1st Respondent, in its submissions filed on 24th October 2014 states that the issues raised in the consolidated Petition are not within the provisions of **Section 12** of the Industrial Court Act and that the Petitions were quite properly filed in the appropriate Court but were transferred, without benefit of any legal arguments, to the Employment and Labour Relations Court.

19. The Counsel for the 1st Respondent set out the list of complaints and the impugned Sections of the NSSF Act, 2013 in the written submissions.

20. Counsel further pointed out the reliefs sought by the Petitioners and came to the conclusion that;

i. The petitioners seek the various Sections of the Act be declared unconstitutional, null and void.

*ii. The Petitioners in the alternative seek that since the NSSF Act 2013 was not presented to the Senate for enactment as a money bill the Act should be declared unconstitutional, null and void. That this is a distinct ground that closely follows Supreme Court, Advisory opinion No. 2 / 2013. **The Speaker of the Senate and Another V. Attorney General and others.***

21. Counsel submitted that whether or not the NSSF Act 2013 is in line with the progressive mandate of the state to realize the objects of **Article 43** of the Constitution on Economic Rights is a matter in rival arguments and for determination in this case.

22. The NSSF Act, 2013, relates to entire populace and not limited to employers and employees as seen under **Section 4(b)** on the objectives of the Act. The intention is to provide basic social security for members and their dependants including self-employed persons as well as the large populace in the informal sector.

23. This being the case, Counsel submitted that the High Court under **Article 165(3)(a)** has unlimited original jurisdiction in Criminal and civil matters, but limited only under **Article 165(5)** to matters reserved for the exclusive jurisdiction of Courts established pursuant to **Article 162(2)** of the Constitution.

24. It was submitted by Mr. Ngatia that, this is not a matter under the exclusion provision as it does not relate to employment and labour relations or any of the matters set out under **Section 12** of the Industrial Court Act.

25. Counsel concluded that the competent Court to hear and determine this dispute is the High Court and this Court should simply refer the matter to the High Court accordingly.

26. Counsel further submitted that Counsel have no authority to certify by consent that the consolidated Petition raise substantial issues and should be heard by an even number of Judges. That such certification, under **Article 165(4)** of the Constitution is a preserve of the Judge upon hearing legal submissions by the parties. Counsel referred to **HCC Misc. Civil Application 56/2011**, where the Hon. Chief Justice referred the Petition back to the Judge with directions to attend to;

“more arguments including those of the Respondent and Interested Parties, and thereafter make a decision that gives reasons why the matter should be certified as raising substantial questions of law.”

27. Mr. Ngatia further submitted that it was the High Court upon referral of the consolidated Petition to it, that would consider arguments by the Parties and determine whether it raises substantial questions of law as to warrant the Hon. the Chief Justice to constitute a bench of uneven number of Judges, not being less than three (3).

28. **Determination**

The issues for determination in the consolidated petition from the submissions by the counsel for the parties are common cause. What is in dispute is whether it is the High Court or the Employment and labour Relations Court or both Courts that have jurisdiction to hear and determine the issues arising therefrom.

29. It is clear to me that the issues arising from the consolidated Petition are “mixed grill” as it were.

30. Legality of numerous provisions of the **NSSF Act, 2013** have been brought to question hence the legality of the fund established from contributions of employers and their employees and from self-employed persons for the benefit of the employed and their dependants is the ultimate dispute in this matter.

Neither of the Courts has exclusive jurisdiction over all the issues in dispute in this matter.

This is the sort of dispute that may benefit from the respective strengths and focus of both Courts.

31. In **Evangelical mission for Africa and another Vs. Kimani Gachihi and Another [2014] eKLR, R. Mwongo J.** had this to say on the power of the Hon. Chief Justice under **Article 165(4)**.

*“From the above it is clear that the empanelment of a bench under **Article 165(4)** arises when circumstances are special and the jurisdiction to be exercised is not ordinary.”*

32. The issues in dispute in the consolidated petition raise substantial issues of law of a “mixed grill” nature in that they concern;

i. Interpretation of the Constitution.

ii. Legality of substantial portion of the NSSF Act, 2013.

iii. Legality of a fund premised both on an employer and employee relationship and on self-employment in terms of contributions to and benefits out of the fund.

33. The circumstances presented by the consolidated petition are special and require an extra-ordinary jurisdiction.

34. In **Kenya Medical Research Institute Vs. the Attorney General and 3 others [2014] eKLR**, where the bench constituted by the Chief Justice comprised of a Judge of Employment and Labour Relations Court, a Constitutional and Human Rights Division Judge and a Judge of the Judicial Review Division of the High Court held;

*“A finding that this Court is not properly constituted would not in our view promote the purposes, values and principles of the Constitution, advance the rule of law and the human rights and fundamental freedoms in the Bill of Rights; permit development of the law; or contribute to good governance. In our view to make such a finding would go against the principle that Courts established under **Article 162(2)** are superior Courts of the same status as the High Court.*

*What the Interested Parties are urging this Court to do is in effect to find that the status of the High Court is not the same as the Industrial Court, which finding would go against both the letter and the spirit of the Constitution In our view in assigning Judges under **Article 165(4)** of the Constitution the Chief Justice is free to appoint any Judge of the Court with the status of the High court.”*

35. The Court in arriving to its conclusion relied on the case of **United States International University (USIU) Vs. The Attorney General [2012]eKLR** where it was held;

*“since the Court is of the status of the High Court it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of **Section 12** of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.”*

36. The Decision was cited with approval by the Court of Appeal in **Daniel N. Mugendi V. Kenyatta University and 3 others [2013]eKLR**.

37. In the final analysis the Court makes the following orders.

a. That the consolidated petition raises substantial questions of law concerning employers and employees and matters incidental thereto.

b. That the consolidated Petition raises substantial questions of law on the constitutionality of the **National Social Security Fund Act, 2013** and matters incidental thereto.

c. Arising from the aforesaid the High Court and the Employment and Labour Relations Court have the jurisdiction to determine the issues raised in the consolidated Petition.

d. The Hon. the Chief Justice consider empaneling a bench of uneven number of Judges, being not less than three (3) from both the High Court and the Employment and Labour Relations Court but sitting as Employment and Labour Relations Court to hear and determine the consolidated Petition.

Dated and Delivered at Nairobi this 27th day of February, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE