



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

PETITION NO. 24 OF 2015

(As consolidated with Cause 242/2015 and 339/2015)

GEOFFREY ORIARO CLAIMANT

VERSUS

CABINET SECRETARY MINISTRY OF LABOUR

SOCIAL SECURITY AND SERVICES 1ST RESPONDENT

ANDREW GICHAMBA MUIGAI 2ND RESPONDENT

VESKA JEPKEMBOI KINGONGO 3RD RESPONDENT

ERASTUS MWONGERA 4TH RESPONDENT

NATIONAL SOCIAL SECURITY FUND

BOARD OF TRUSTEES 5TH RESPONDENT

RULING

1. Preliminary objections were raised in Employment and Labour Relations Petition 24 of 2015 and Cause No. 339 of 2015.
2. The objectors state that the Employment and Labour Relations Court (ELRC) lack jurisdiction to deal with the dispute in the two matters and in Cause No. 242 of 2015.
3. It was agreed that the three files be consolidated with Petition 24/2015 being the lead file.
4. The parties agreed to dispose the matter by way of written submissions and highlighting be done on 16th April 2015.
5. The nub of the objection is that the parties to the three suits do not have an employer and employee relationship.
6. That the ELRC was established in terms of **Article 162(2)** of the Constitution of Kenya 2010 as read with **Section 4** of the Industrial Court Act No. 20 of 2011 and the jurisdiction of ELRC is conferred

under **Section 12** of the Act as follows;

*“(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with **Article 162(2)** of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including –*

- a. disputes relating to or arising out of employment between an employer and an employee;*
- b. disputes between an employer and a trade union;*
- c. disputes between trade unions;*
- d. disputes between employer organisations*
- e. disputes between an employers’ organization and a trade union;*
- f. disputes between a trade union and a member thereof;*
- g. disputes between an employer’s organization or a federation and a member thereof;*
- h. disputes concerning the registration and election of trade union officials; and*
- i. disputes concerning the registration and election of trade union officials; and*
- j. disputes relating to the registration and enforcement of collective agreements;”*

7. It was submitted by the objectors that the dispute in the pending suits does not fall in any of the jackets set out under **Section 12 (1)** above in that the Claimants/Petitioner have brought the suits as members of National Social Security Fund (NSSF). It is common cause that members of NSSF as defined under **Section 18** of the NSSF are not employees of NSSF Act within the meaning of **Section 12** of the Industrial Court Act and therefore their relationship with the Respondent, if any is not an employment relationship. There is no nexus between the Petitioner / Claimants and the Respondents, capable of conferring jurisdiction on the Court.

8. For this proposition, the objectors referred to the decision of the Court in **George Onyogo Ochieng Vs. Chemelil Sugar Company Ltd. [2014] eKLR**, where the Court while striking out the Claim for lack of jurisdiction stated thus;

*“under **Section 12** of the Industrial Court Act, 2011 the jurisdiction of this Court is well listed as it relates to disputes relating to or arising out of an employment between an employer and an employee and extends to unions and Federations. The matter before this Court however relate to parties who are not in any way in an employment relationship. It is therefore the finding of this Court that this Court lacks jurisdiction to entertain this claim which should be filed before a Civil Court. I therefore strike out the claim and order Claimants to pay costs to the Respondents herein.”*

9. The objectors further referred the Court to a decision of this Court in **Nick Gichinji Ndichu Vs. Clerk, Kiambu County Assembly & Another [2014] eKLR2** where the Court restated the relevant relationship that confers this Court jurisdiction as follows;

*“**Section 12(1)** of this Act provides that the Court has jurisdiction to hear and determine disputes relating to employment and labour relations including a dispute relating to or arising out of employment between an employer and an employee.*

*Under **Section 2** of the Employment Act, 2007, a ‘contract of service’ is defined to mean;*

‘an agreement, whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time.’

Whereas an ‘employer’ is defined as ‘a person employed for wages or a salary.’

It is clear from the foregoing that the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected. Rather the person must;

be having an oral or written contract of service;

be receiving a wage/salary for the services rendered.

If such a person has a dispute with the person with whom he / she has a contract of service, the Court has jurisdiction over such dispute and has available remedies and has available remedies for that purpose.”

10. The objectors submit that the parties herein lack any such relationship and a determination of this suit by this Court would be a nullity.

11. Reliance was placed on the decision in **Joseph Karobia Gicheru Vs. Michael Gachoki Gicheru [2013] eKLR** where the Court of Appeal observed;

“where a Court or a tribunal embarks on hearing and proceeds to determine a dispute over which it has no jurisdiction, the entire proceedings are empty of legal lite and are null and void abinitio. No amount of acquiescence by any party to the conduct of such proceedings and no measure of consent by parties, no matter how express or deliberate could confer upon such Court or tribunal such jurisdiction. The proceedings and orders are nullities and of no legal effect from inception and remain so to the end.”

12. The Claimants and Petitioner have vehemently opposed the preliminary objection based on the following arguments;

13. The Petitioner and the Claimants have challenged the appointment of the named Respondents to the Board of Trustees of the NSSF claiming that it is not compliant with **Article 10, 27, 232(1) and (2)** of the Constitution of Kenya and seek declarations that the exercise of statutory powers by the Cabinet Secretary responsible for matters relating to labour, under **Section 6(d)(iii)** of the National Social Security Fund Act, 2013 is subject to the provisions of **Article 10** of the Constitution and in particular competitive recruitment so as to realize the National values of public participation, transparency, accountability and rule of law; and therefore seek an order of *certiorari* to remove into the Employment and Labour Relations Court (ELRC) to quash the appointment of the named Trustees of the NSSF Board.

14. The Petitioner and Claimants therefore submit that;

firstly, the relationship of the appointed Trustees and the Cabinet Secretary Labour, Social Security and Services, 1st Respondent and National Social Security Fund 2nd Respondent is one of Employee and Employer and therefore the dispute between them falls squarely within the jurisdiction of this Court as set out under **Section 12(1) & (2)** of the Industrial Court Act, as read with **Article 62(2)** of the Constitution of Kenya, 2010.

15. That on the Authority of the Court of Appeal Decision in **Prof. Daniel N. Mugendi Vs. Kenyatta University & 3 others** which upheld the Decision of the **High Court in United States International University (USIU) Vs. The Attorney General & 2 others**, the Employment and Labour Relations Court (ELRC) has jurisdiction not only to deal with the Employment and Labour issues that arise in this dispute but also has jurisdiction to deal with all Constitutional issues that arise in the dispute since they are incidental to the employment and labour dispute the subject of the suit.

16. Majaja J. in USIU case stated;

“49. A correspondent to the High Court that is the Industrial Court has now been established to deal with employment and labour matters. It follows that all employment and labour relations matters pending in the High Court shall now be heard by the Industrial Court which is now a Court of the status of the High Court. The High Court therefore lacks jurisdiction to deal with matters of employment and labour whether filed in the High Court before or after the establishment of the Industrial Court.”

17. The Petitioner / Claimants therefore submit that this dispute arose from an employee / employer relationship and the High Court lacks jurisdiction to entertain the same.

18. Furthermore, counsel for the Petitioner / Claimants focusing on **Section 12 (2)** of the Industrial Court Act, which reads;

“2 An Application claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.”

19. Submitted that **Subsection 12(2)** in addition to the matters listed under **Subsection 12(1)** adds a further genus of applications, claims or complaints that may be lodged in this Court by or against the parties named under **Subsection 12(2)**.

20. That the present suits question the decision of the Cabinet Secretary, Labour in his administrative capacity.

That the Cabinet Secretary is in charge of NSSF Act, which establishes employees’ pension fund. That the fund is established from revenue jointly deducted from employees and employers. That the impugned decision of the Cabinet Secretary is detrimental to the protection and growth of the fund created for the benefit of employees and therefore this Court has jurisdiction over the matter.

21. The Court was referred to the South African case of **Gcaba Vs. Minister of Safety and Security & others, CCT 64/08 [2009] ZACC 26** for the proposition that this Court has jurisdiction to hear and determine Administrative disputes arising from Executive decisions of the minister in appointing certain individuals to the NSSF Board.

22. It was submitted that the Petitioner / Claimants do not focus on removal of the appointees but the constitutionality of the decision. The Court only need make a declaration and not remove the appointees.

Determination

23. It being not in dispute that the impugned decision of the Minister is the appointment of Trustees of the NSSF Board, it is opportune to get the definition of ‘Trustee.’

24. Black Law Dictionary – Ninth Edition defines ‘Trustee’ thus;

“one who stands in a fiduciary or confidential relation to another, especially one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary. Generally a trustee’s duties are to convert to cash all debts and securities that are not qualified legal investments to reinvest the cash in proper securities, to protect and preserve the trust property and to ensure that it is employed solely for the beneficiary, in accordance with the directions contained in the trust instrument.”

25. In *casu*, the Trustees of the NSSF discharge their mandate as set out in the NSSF Act for the benefit of the beneficiaries who are employees in every sector of this country.

26. It is the Court’s considered view that the Trustees of NSSF are not employees within the meaning of an employee as provided under **Section 2** of the Employment Act, thus; *“‘employee’ means a person employed for wages or a salary and includes an apprentice and indenture learner.”*

27. The 1st and 2nd Respondents are also not employers of the Trustees within the meaning of ‘employer’ under **Section 2** of the Employment Act, that is, ‘employer’ means any person, public body,

firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;

28. It follows that there does not exist an employer and employee relationship between the Appointees and the Respondents nor is there an employment relationship between the members of the NSSF and the Fund itself or the Cabinet Secretary. This is not the end of the matter though.

29. With regard to **Section 12(2)**, it is the Court's considered view that, the provision deals with *Locus Standi* of persons named therein to bring suits to this Court and does not deal with the issue of jurisdiction of the Court as it were.

30. This provision does not therefore confer jurisdiction on this Court in respect of this suit merely because the 1st Respondent is the Cabinet Secretary named under **Sub-section 12(1)**.

31. The subject matter of the dispute, the ultimate implication of which is the lawful oversight and management of funds invested by the employees of this country in NSSF Fund brings this matter closer home in that the dispute falls within **Subsection 12(1)(a)** which confers jurisdiction on this Court in respect of;

“a dispute relating to or arising out of employment between an employer and an employee;”

32. It is not far fetched to see that a dispute concerning oversight over pension funds contributed and invested pursuant to contracts of employment between employees and their employers, is a matter arising out of employment between an employer and an employee;”

33. This Court is best suited to determine the suit and in fact, has jurisdiction to deal with the matter though it is a borderline case in my view.

Accordingly, the preliminary objection is not upheld with the consequence that the consolidated dispute will take its normal course.

Dated and Delivered at Nairobi this 22nd day of May, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE