



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAKURU

PETITION NO. 11 OF 2014

KENYA PLANTATION AND AGRICULTURAL

WORKERS' UNION.....PETITIONER

VERSUS

THE BOARD OF TRUSTEES, NATIONAL SOCIAL

SECURITY FUND.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Today's date was fixed for hearing of the petitioner's application dated 19.6.2014. The 2nd respondent has prayed for time to file the grounds of opposition and the replying affidavit. The 1st respondent and the petitioners were ready for the hearing but share the view that because the matter is of great public concern, the 2nd respondent should be accorded a chance to file the opposing papers.

In those circumstances, parties requested for time to consult on the issue and effect of interim orders. The court granted them time and upon return, they had not reached a compromise on the interim orders.

The petitioner has urged that interim orders should be granted pending the hearing and determination of the application. Particularly, the petitioner has submitted that the National Social Security Fund Act, 2013 makes unconstitutional provisions. Sections 18, 19, 20 and 71 have been cited as offending the constitution.

Of particular and immediate concern are the provisions of section 19 of the Act. **Section 19(1)** provides that every employer who, under a contract of service, employs one employee or more shall register with the fund as a contributing employer and shall, register his employee or employees, as a member of the Fund. **Section 19(2) of the Act** then provides that any person who is registerable as an employer under the section shall produce proof of registration with the scheme as a precondition of dealing with or accessing public services. The parties are not in dispute that any person reasonably engaged in affairs of life would easily qualify as an employer under the section. It is the petitioner's case that the section has the effect of denying many citizens access to public services.

The petitioner's further case is that the National Social Security Fund Act, 2013 is essentially not a Social Security Act. It has been submitted that Article 43(3) requires the state to provide social security to persons who are unable to support themselves and their dependants. The petitioner's case is that the

National Social Security Fund Act, 2013 is not such legislation because it provides for workers who are able to support themselves and their dependants. The Act is not a “**poor law**” aimed at providing for social security for the disadvantaged or economically backward members of the society.

The petitioners have further urged that pension and provident schemes should be anchored upon the voluntary engagement and agreement of the employees and the law should not force the employees who otherwise belong to legitimate and acceptable schemes to be members of the National Social Security Fund.

For the 1st respondent, it has been urged that staying the operation of the legislation will seriously cripple the social security system as embedded in the National Social Security Fund Act, 2013.

For the 1st respondent, it has further been urged that if the legislation is stayed, there would be no contributions to the NSSF and the provisions of Article 43 of the constitution would be defeated.

The petitioner has urged that if the legislation is stayed, parties will have room to consult on the law and agree upon the best way forward. It has been submitted for the petitioner that there would be no prejudice to the respondent because employers and employees will continue to contribute to the 1st respondent the dues as they obtained before the new law pending resolution of the dispute. The petitioner has lamented that the 1st respondent will proceed to implement the new law on the basis of regulations which have not been agreed upon under the tripartite arrangements of the employers, employees and Government.

The court has carefully considered the issues in dispute. Section 2 of the Constitution declares the supremacy of the constitution. The constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government. **Sub-Article 2(4)** declares that all law including customary law that is inconsistent with the constitution is void to the extent of the inconsistency and any act or omission in contravention of the constitution is invalid.

In the present case, it is the opinion of the court that the petitioner has raised serious arguable points on whether the legislation in issue, the National Social Security Fund Act, 2013 is constitutional or not. The particular arguable issues as they emerge at this stage are as follows:

- 1. Whether sections 18, 19, 20 and 71 of the Act are constitutional.**
- 2. Whether the Act furthers the provisions of Article 43 on the right of persons to social security and particularly as envisaged under sub-Article 43(3) of the constitution.**
- 3. Whether Section 71 undermines the principle of employees voluntary and agreed contributions to a pension or provident scheme.**
- 4. Whether the regulations governing implementation of the National Social Security Fund Act, 2013 have been enacted and will be applied in accordance with the provisions of Article 10 on the national values and principles of governance and particularly, democracy and participation of the people; human dignity; equity; social justice; inclusiveness; good governance, integrity, transparency, accountability and others as provided in the Article.**

The court has considered the provisions of **Article 232(1) (a), (b), (c), (d), (e) and (f)** on values and principles of Public Service being high standards of professional ethics, efficient, effective and economical use of resources; responsive, prompt, effective, impartial and equitable provision of services; involvement of the people in the process of policy making; accountability for administrative acts and transparency and provision to the public of timely accurate information. The court has measured those values and principles against the emerging issues as given in this case. The court finds that there are serious arguable issues that have been raised in this case about the manner the National Social Security Fund Act, 2013 is being implemented that would require in depth consideration at the full hearing of the application and the petition.

The court finds that an interim order in the circumstances of this case will serve not only the interests of the parties but the general public interest that attaches to the case.

The court finds that there is a tripartite understanding that the parties; the employers, employees and the government have between 27.12.2013 when the National Social Security Fund Act was published and the former National Social Security Fund Act repealed, continued to make contributions to the NSSF as per the former law. In the circumstances, on the basis of that tripartite arrangement, no prejudice will be suffered by any of the parties if those contributions will continue to be made as agreed or understood by the parties throughout the material time the National Social Security Fund Act, 2013 has been in force to-date.

In conclusion, the court makes interim orders and directions as follows:

1. **Pending the interpartes hearing of the application filed for the petitioner or further orders by the court, there shall be a stay of implementation of sections 18, 19, 20 and 71 of the National Social Security Fund, 2013.**
2. **Pending the interpartes hearing of the application filed for the petitioner, the parties are encouraged to convene a tripartite meeting convened by the Cabinet Secretary for Labour, Social Security and Services towards amicable resolution of the dispute and the relevant report of proceedings filed in court by the hearing date.**
3. **Pending the interpartes hearing or further orders by the court, under the tripartite understanding or arrangements, the parties, as the employers, the employees and Government will continue to make contributions to the 1st respondent as prevailing before the implementation of the National Social Security Act, 2013.**
4. **The 2nd respondent to file and serve replying affidavits and grounds of opposition by 2.7.2014.**
5. **Costs shall be in the cause.**
6. **Parties are invited to agree on a convenient date for hearing of the application.**

Signed, dated and delivered in court at Nakuru this Wednesday 25th June, 2014.

BYRAM ONGAYA

JUDGE