



Kenya Tea Growers Association & 2 others v National Social Security Fund Board of Trustees & 13 others (Petition (Application) E004 of 2023 & Petition E002 of 2023 (Consolidated)) [2023] KESC 42 (KLR) (Election Petitions) (16 June 2023) (Ruling)

Neutral citation: [2023] KESC 42 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
ELECTION PETITIONS**

**PETITION (APPLICATION) E004 OF 2023 & PETITION E002 OF 2023 (CONSOLIDATED)
MK KOOME, CJ, PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA & I LENAOLA, SCJJ**

JUNE 16, 2023

BETWEEN

**KENYA TEA GROWERS ASSOCIATION 1ST APPELLANT
AGRICULTURAL EMPLOYERS ASSOCIATION 2ND APPELLANT
COUNTY PENSIONERS ASSOCIATION 3RD APPELLANT**

AND

**THE NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES 1ST RESPONDENT
THE CABINET SECRETARY FOR LABOUR, SOCIAL SECURITY AND SERVICES 2ND RESPONDENT
THE RETIRMENT BENEFITS AUTHORITY 3RD RESPONDENT
THE COMPETITION AUTHORITY 4TH RESPONDENT
THE HON. ATTORNEY GENERAL 5TH RESPONDENT
KENYA COUNTY GOVERNMENT WORKERS UNION 6TH RESPONDENT
KENYAN UNION OF ENTERTAINMENT AND MUSIC INDUSTRY EMPLOYEES 7TH RESPONDENT
KENYA BUILDING, CONSTRUCTION, TIMBER, FURNITURE & ALLIED TRADES EMPLOYEES UNION 8TH RESPONDENT
UNION OF NATIONAL RESEARCH INSTITUTES STAFF OF KENYA (UNIRISK) 9TH RESPONDENT
KENYA GLASS WORKERS UNION 10TH RESPONDENT**



NKAURAKI EDWIN LESIDAI & 89 OTHERS 11TH RESPONDENT
CENTRAL ORGANISATION OF TRADE UNIONS (COTU) 12TH
RESPONDENT
FEDERATION OF KENYA EMPLOYERS (FKE) 13TH RESPONDENT
KENYA QUARRY AND MINE WORKERS UNION 14TH RESPONDENT

(Being applications for stay of execution of the Judgment of the Court of Appeal (Okwengu, Warsame & Mativo, JJ. A) dated 3rd February, 2023 in Civil Appeal No. 656 of 2022) and/or conservatory orders restraining the implementation of Sections 18,19, 20 & 71 of the National Social Security Fund Act, 2013)

An interested party cannot introduce new issues or go beyond the main parties' case

The instant applications sought among other orders a conservatory order restraining the 1st, 5th, and 13th respondents from implementing sections 18, 19, 20 and 71 of the National Social Security Fund (NSSF) Act, 2013 and stay of execution and/or implementation of the judgment by the Court of Appeal pending the hearing and determination of the appeals. The court held that the crucial or overriding interest in any matter before a court was that of the principal or primary parties. It was precisely for that reason that a party joined as interested party could not introduce new issues or go beyond the main parties' case. The court also highlighted the principles to be considered in issuing interim orders.

Reported by Kakai Toili

Civil Practice and Procedure – suits – parties to a suit – interested parties - whether an interested party in a suit could introduce new issues in a suit.

Civil Practice and Procedure – orders - interim orders - what were the principles to be considered in issuing interim orders - , No 7 of 2011, section 23A.

Brief facts

Two appeals were lodged before the instant court against the Court of Appeal's judgment at the instance of the County Pensioners Association (the 3rd applicant) and by the Kenya Tea Growers Association and Agricultural Employers Association (the 1st and 2nd applicants respectively). The 3rd applicant filed a notice of motion seeking orders *inter alia* that- a conservatory order be issued restraining the National Social Security Fund Board of Trustees (1st respondent), the Attorney General (5th respondent) and the Federation of Kenya Employers (13th respondent) and their respective agents, proxies or employees from implementing sections 18, 19, 20 and 71 of the (the Act) pending the hearing and determination of its appeal.

The gist of the 3rd applicant's motion was that; the Employment and Labour Relations Court (ELRC) held that the Act was unconstitutional and that subsequently, the Court of Appeal set aside the ELRC's decision on the ground that the ELRC lacked jurisdiction to entertain the dispute. The 3rd applicant stated that its appeal raised arguable issues which included that; the Court of Appeal misconstrued articles 162(2)(a) and 165(3)(b) (d) and (5) of the of Kenya, 2010 (the Constitution) as far as the scope of the jurisdiction of the ELRC *vis a vis* the High Court was concerned. The 3rd applicant further argued that its appeal would be rendered nugatory unless the order sought was granted.

The 1st respondent opposed the 3rd applicant's motion on the grounds that; the 3rd applicant lacked *locus standi* to lodge its appeal and motion; in that, having been joined as an interested party at the ELRC, it could not purport to take over the role of the primary parties by filing its appeal and the motion; furthermore, the 3rd applicant's membership consisted of former employees of local authorities who were contributors to the Local Authorities Pension Trust (Laptrust) and that the Laptrust scheme was closed in 2012. The 1st respondent thus



stated that the Act did not apply to the 3rd applicant nor to its contributors; and as such, the 3rd applicant had no conceivable interest or grievance it could pursue.

The 1st and 2nd applicants motion apart from seeking a similar order restraining the implementation of sections 18,19, 20 and 71 of the Act, as the 3rd applicant, the 1st and 2nd applicants sought stay of execution and/or implementation of the judgment by the Court of Appeal pending the hearing and determination of their appeal. They argued that their appeal was arguable as the Court of Appeal erred in assuming jurisdiction and determining the merits of the proceedings before the ELRC, which it had declared as null and void. They further argued that their appeal would be rendered nugatory because the implementation of the Act would impose a heavy and unbearable financial burden on its members and if their appeal succeeded, they would not be able to recover the contributions made.

Issues

- i. Whether an interested party in a suit could introduce new issues in a suit.
- ii. What were the principles to be considered in issuing interim orders?

Held

1. The 3rd applicant by a motion dated June 18, 2015 sought to be joined as an interested party at the ELRC. The 3rd applicant's stake or interest in the proceedings before the ELRC, revolved around the implementation and constitutionality of the Act. The motion was allowed by the parties' consent dated August 6, 2015 and filed in the ELRC on August 12, 2015. From a perusal of the 3rd applicant's motion and appeal before the court, the aforementioned interest was the basis upon which it had lodged its motion and appeal therein.
2. While Laptrust doors were closed in 2012 to new members, it had not been demonstrated that the scheme did not receive contributions on behalf of its existing members who were still in active service. Indeed, the 1st respondent admitted that Laptrust was still in existence. Therefore, the 3rd applicant possessed the same identifiable interest in the dispute which led to its admission at the ELRC in the matter at hand.
3. The crucial or overriding interest in any matter before a court was that of the principal or primary parties. It was precisely for that reason that a party joined as interested party could not introduce new issues or go beyond the main parties' case. Some of the primary parties in the proceedings at the ELRC, that was, the 1st and 2nd applicants had also lodged an appeal, Petition No E004 of 2023, which had been designated as the lead file with the consent of the parties. Perusal of the prayers/reliefs and the case advanced by the 3rd applicant in its appeal as well as its motion revealed that they were more or less in tandem with the 1st and 2nd applicants' case and reliefs sought in their appeal and motion. As such, it could not be said that the 3rd applicant's interests had gone over and above that of the primary parties.
4. The 3rd applicant had not introduced a new issue that was either not canvassed before the superior courts below or did not arise from the impugned judgment. As to whether the 3rd applicant should have filed a review before the Court of Appeal as opposed to an appeal before the instant court, that issue would go to the merit of its appeal and ought to be addressed in the consolidated appeal.
5. The court was guided by section 23A of the , which set out the court's discretionary power to issue interim orders. The court was also mindful of the guiding principles in , SC Applic No 5 of 2014; [2014] eKLR. The principles in question being that the applicants should demonstrate that the consolidated appeal was arguable; the appeal would be rendered nugatory unless the orders sought were granted; and that it was in the public interest that the orders sought be granted.
6. The Court of Appeal simply set aside the ELRC judgment on the ground that it lacked jurisdiction to entertain the matter. As such, the Court of Appeal did not issue a positive order capable of execution as defined by the Court of Appeal for East Africa in the case of [1976] KLR 63. In that, it did not order any party to do anything or to refrain from doing anything. Besides, to issue the stay would mean reversing or undoing the impugned judgment at that interlocutory stage or determining a key issue on



jurisdiction and thereby prejudicing the pending appeal. Therefore, the 1st and 2nd applicants' prayer for stay of execution or implementation of the impugned judgment could not issue at the interlocutory stage.

7. With regard to the conservatory order restraining the implementation of sections 18,19,20 and 71 of the Act, the applicants had demonstrated that the consolidated appeal was arguable. In that, the issue of the jurisdiction of the ELRC *vis a vis* the High Court with regard to the dispute at hand was one that warranted the court's consideration. Nonetheless, the applicants had not met the other two principles to warrant the conservatory order sought. The 1st and 2nd applicants did not deny the 1st respondent's contention to the effect that their members had since complied with the Act.
8. None of the applicants demonstrated that in the event the consolidated appeal succeeded that the contributions made to NSSF would be lost or inaccessible to the contributors or their beneficiaries. The interest of justice would be best served by hearing and determining the consolidated appeal on priority basis so as to settle the main dispute.

Applications dismissed.

Orders

- i. *The 1st and 2nd applicants' notice of motion dated March 2, 2023 and filed on March 3, 2023 was dismissed.*
- ii. *The 3rd applicant's notice of motion dated February 16, 2023 and filed on February 17, 2023 was dismissed.*
- iii. *Costs of the motions to abide the outcome of the consolidated appeal.*
- iv. *The consolidated appeal to be set down for hearing on a priority basis.*

Citations

Cases

1. Attorney General v Law Society of Kenya & Another (Civil Application No 144 of 2009; [2009] eKLR) — Explained
2. Macharia & Another v Director of Public Prosecutions & 11 others (Petition 9 (E011) of 2022; [2022] KESC 61 (KLR)) — Explained
3. Munya v Kithinji & 2 others (Petition 2B of 2014; [2014] eKLR; [2014] 4 KLR 318) — Explained
4. Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015; [2021] KESC 31 (KLR)) — Explained
5. National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others (Civil Appeal No. E656 of 2022) — Explained
6. University of Eldoret & Another v Sitienei & 3 others (Application No 8 of 2020; [2020] eKLR) — Explained
7. Western College of Arts and Applied Sciences v Oranga & 3 others (Civil Application 4 of 1976; [1976] KECA 15 (KLR)) — Explained

Statutes

1. Competition Act, 2010 (Act No12 of 2010) — In general — Cited
2. Constitution of Kenya, 2010 — article 162 (2) (a); 165 (3) (b) (d),(5) — Interpreted
3. Employment And Labour Relations Court Act, 2011 (Act No 20 of 2011) — section 18, 19, 20, 71 — Interpreted
4. National Social Security Fund (NSSF) Act, 2013 (Act No 45 of 2013) — section 18, 19, 20, 70,71 — Interpreted
5. NSSF (Member Contributions) Regulations, 2014 (Act No 45 of 2013 Sub Leg) — regulation 20 — Interpreted
6. Supreme Court Act, 2011 (Act No 7 of 2011) — section 18,19,20,21(2), 23A, 24(1), 71 — Interpreted
7. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — rule 31(6), 32 — Interpreted



Advocates

None mentioned

RULING

Representation:

Mr Geoffrey Orao Obura for the 1st and 2nd applicants (Obura Mbeche & Company Advocates)

Dr Muthomi Thiankolu for the 3rd applicant (Muthomi & Karanja Advocates)

Mr Fred Ngatia, SC for the 1st respondent (Ngatia & Associates Advocates)

Ms Schola Mbilo for the 2nd, 4th and 5th respondents (Attorney General Chambers)

Mr Charles Agwara for the 3rd respondent (Prof Albert Mumma & Company Advocates)

Mr Tamari Katana for the 6th respondent (Kithi & Company Advocates)

1. This ruling will dispose of two motions dated February 16, 2023 and March 2, 2023 filed by County Pensioners Association (the 3rd applicant) and Kenya Tea Growers Association and Agricultural Employers Association (the 1st and 2nd applicants) respectively.
2. It is instructive to note that two appeals were lodged before this court against the Court of Appeal's judgment dated February 3, 2023 in Civil Appeal No 656 of 2022. These being Petition No E002 of 2023 at the instance of the 3rd applicant and Petition No E004 of 2023 by the 1st and 2nd applicants. The two appeals were consolidated after the motions in issue had been filed by a consent order recorded by this court and dated March 31, 2023, wherein Petition No E004 of 2023 was designated as the lead file.
3. On February 17, 2023 the 3rd applicant filed a notice of motion dated February 16, 2023 under rule 31(6) of *Supreme Court Rules, 2020* seeking orders *inter alia* that-

A conservatory order be issued restraining the National Social Security Fund Board of Trustees (1st respondent), the Attorney General (5th respondent) and the Federation of Kenya Employers (13th respondent) and their respective agents, proxies or employees from implementing sections 18, 19, 20 and 71 of the *National Social Security Fund (NSSF) Act, 2013* pending the hearing and determination of the 3rd applicant's appeal.

4. The aforesaid motion is supported by an affidavit sworn on February 16, 2023 by the 3rd applicant's Secretary General, Charles Ikenye Muiruri, as well as written submissions of even date. The gist of what is stated in both the affidavit and the submissions can be summarized as that; the Employment and Labour Relations Court (ELRC) by a judgment dated September 19, 2022 held that the *NSSF Act*, (the Act) was unconstitutional; subsequently, the Court of Appeal in the impugned judgment set aside the ELRC's decision on the ground that the ELRC lacked jurisdiction to entertain the dispute; the 3rd applicant's appeal raises arguable issues to wit; the impugned judgment is irregular because the 1st and 5th respondents failed to serve the 3rd applicant with the notice of appeal, record of appeal and hearing notices of their appeal before the Court of Appeal despite the 3rd applicant's participation in the ELRC proceedings; the Appeal before the Court of Appeal proceeded in the absence of the 3rd applicant contrary to the *audi alteram partem* rule; the Court of Appeal misconstrued articles 162(2) (a) and 165(3)(b)(d) & (5) of the *Constitution* as far as the scope of the jurisdiction of the ELRC *vis a vis* the High Court is concerned; the Court of Appeal erred by failing to remit the dispute to the High Court for determination after finding that the ELRC lacked jurisdiction; and the Court of



- Appeal failed to appreciate that the act conflicted with the Competition Act to the extent it gave NSSF monopoly in the pension industry.
5. Further, that the 3rd applicant's appeal would be rendered nugatory unless the order sought is granted; the 1st, 5th and 13th respondents had moved with haste to implement the act with effect from March 9, 2023; implementation of the act would cause unimaginable and irreversible havoc on the pensions industry especially due to mass transfers of employees from superior private pension schemes to NSSF; in any event, the respondents will not suffer any prejudice since the implementation of the provisions in question had been stayed at the ELRC for several years with the parties' consent; and that the 3rd applicant had met the threshold for issuance of the order sought, as set out in University of Eldoret & another v Hosea Sitienei & 3 others, SC Applic 8 of 2020; [2020] eKLR.
 6. Supporting the motion, Kenya County Government Workers Union (the 6th respondent) relied on its grounds in support of the motion and written submissions dated February 2, 2023 and March 2, 2023 respectively. Similarly, the 1st and 2nd applicants relied on their replying affidavit sworn by Apollo Kiarrii, the 1st applicant's secretary and executive officer, on February 28, 2023 and their written submissions of even date. The said respondents basically reiterated the 3rd applicant's position as detailed above.
 7. On the other hand, the 1st respondent *vide* a replying affidavit sworn by its Chairman, Anthony Muriuki Munyiri, on February 28, 2023 and its written submissions of even date opposed the motion on the grounds that; firstly, the 3rd applicant lacks *locus standi* to lodge its appeal and motion; in that, having been joined as an interested party at the ELRC, the 3rd applicant cannot purport to take over the role of the primary parties by filing its appeal and the motion at hand; furthermore, the 3rd applicant's membership consists of former employees of local authorities who were contributors to the Local Authorities Pension Trust (Laptrust); the Laptrust scheme was closed in 2012 and solely exists for the purpose of paying the last contributor therein before being wound up; the act does not apply to the 3rd applicant nor to its contributors; and as such, the 3rd applicant has no conceivable interest or grievance it can pursue.
 8. Secondly, the 3rd applicant's appeal does not raise any arguable issue for reasons that; the Court of Appeal made no findings on sections 18,19,20 and 71 of the Act hence there is no basis for this court to issue the order sought; besides, complaints which were raised pertaining to sections 18 and 71 in the ELRC were dismissed and no appeal was lodged against that finding; the 3rd applicant's advocate was at all material times aware of the proceedings before the Court of Appeal; and following the delivery of the impugned judgment, the Act has been fully implemented. Thirdly, that the 3rd applicant's appeal would not be prejudiced in the event it succeeds since contributions to NSSF are credited to individual accounts of members. Besides, public interest lies with the implementation of the Act in light of the crisis facing Kenya of insufficient social security coverage which leads to old age poverty.
 9. Likewise, the Cabinet Secretary for Labour, Social Security and Services, the Competition Authority and the Attorney General (the 2nd, 4th and 5th respondents); and the Retirement Benefits Authority (the 3rd respondent) echoed the 1st respondent's arguments. Save that the 2nd, 4th and 5th respondents added that the 3rd applicant's remedy with respect to the allegation of not having been heard by the Court of Appeal lies with it seeking review of the impugned judgment as opposed to the appeal before this court. In that regard, the 2nd, 4th and 5th respondents relied on a replying Affidavit sworn by Geoffrey E Kaituko, the Permanent Secretary in the Department for Labour and Skills Development, on March 1, 2023 and their written submissions of even date. On its part, the 3rd respondent placed reliance on its written submissions dated February 28, 2023.



10. We also take note of the 3rd applicant's supplementary affidavit in rejoinder, sworn by Charles Ikenye Muiruri on March 3, 2023. The tenor of it being that; having failed to serve its pleadings in the Court of Appeal upon the 3rd applicant, the 1st respondent is estopped from accusing the 3rd applicant of sneaking in issues that were not canvassed before the Court of Appeal or worse still, for failing to file a cross appeal in the Court of Appeal; the 1st respondent is precluded from questioning the 3rd applicant's locus or motive on account of executing a consent allowing its joinder/participation at the ELRC; and the matter before this court revolves around the constitutionality of the Act hence capable of being canvassed by any person. Moreover, the Court of Appeal does not review its decisions where a right to appeal against such a decision exists, as in this case.
11. As we pointed out in the opening paragraph, the 1st and 2nd applicants on March 3, 2023 filed a notice of motion dated March 2, 2023. The motion is anchored on sections 21(2), 23A and 24(1) of the [Supreme Court Act, 2011](#) and rules 31(6) and 32 of the [Supreme Court Rules, 2020](#). Apart from seeking a similar order restraining the implementation of sections 18,19, 20 and 71 of the Act, as the 3rd applicant, the 1st and 2nd applicants seek –
 - Stay of execution and/or implementation of the judgment delivered on February 3, 2023 by the Court of Appeal in [Civil Appeal No E656 of 2022](#) pending the hearing and determination of the 1st and 2nd applicants' appeal.
12. This motion is supported by an affidavit sworn by Apollo Kiarri on February 28, 2023 on behalf of the 1st and 2nd applicants. It is also augmented by their written submissions dated March 2, 2023, which are substantially predicated on the same grounds as the 3rd applicant's motion. the only addition being that the 1st and 2nd applicants appeal is arguable as the Court of Appeal erred in assuming jurisdiction and determining the merits of the proceedings before the ELRC, which it had declared as null and void; the 1st and 2nd applicants' appeal will be rendered nugatory because the implementation of the Act would impose a heavy and unbearable financial burden on its members who will be compelled to contribute towards the mandatory pension scheme under the Act and at the same time towards the existing private pension schemes and gratuity schemes; besides, in the event their appeal succeeds they will not be able to recover the contributions made to NSSF; by virtue of section 19(2) of the [Act](#) their members stand to be denied access to public services in the absence of proof of registration to the mandatory scheme under the Act; and public interest tilts in favour of granting the orders sought.
13. The 6th respondent's grounds in support of the motion mirror the 1st and 2nd applicants' propositions.
14. The 1st respondent opposed the 1st and 2nd applicants' motion by a replying affidavit, sworn by Anthony Muriuki Munyiri on March 13, 2023 and its written submissions of even date, which are to the effect that; in setting aside the High Court judgment, the Court of Appeal did not issue any order capable of execution, as aptly set out in [Western College of Arts and Applied Sciences v Oranga](#) [1976] KLR 63; the orders sought are tantamount to asking this court to undo or reverse the Court of Appeal's decision at an interlocutory stage before determination of the merits of the appeal, as appreciated by the Court of Appeal in [Attorney General v Law Society Of Kenya & Another](#), Civil Applic No 144 of 2009; [2009] eKLR; gratuity is neither the equivalent of social security or pension benefits nor can it be a substitute to social security; the 1st and 2nd applicants' members would not be compelled to make double payments as regulation 20 of the [NSSF \(Member Contributions\) Regulations, 2014](#) allows employers to deduct any portion of contribution remitted to NSSF from the amount of gratuity payable to an employee; and the real reason the 1st and 2nd applicants oppose the implementation of the Act is to enable their members to avoid registration and making contribution for seasonal/casual workers who comprise the largest percentage of their workforce.



15. Further, that the 1st and 2nd applicants' appeal will not be rendered nugatory as the 1st and 2nd applicants' members have since complied with the Act by registering and making contributions to NSSF; the contributions made to NSSF will be refundable at the election of the employer and employee; the government by dint of section 70 of the NSSF Act, 2013 acts as a guarantor of public interest in NSSF and would step in when need arises to protect the interests of members; and public interest lies with the implementation of the Act which actualizes the right to social security as enshrined under article 43(1)(e) of the Constitution.
16. The 2nd, 4th and 5th respondents also opposed the 1st and 2nd applicants' motion on essentially similar grounds as the 1st respondent. The 2nd, 3rd and 4th respondents relied on a replying affidavit that was sworn by Geoffrey E Kaituko on March 13, 2023 and their written submissions dated March 16, 2023.
17. By way of rejoinder, the 1st and 2nd applicants filed a further affidavit, sworn by Apollo Kiarri on March 16, 2023 and Written Submissions of even date. They urged that the 1st respondent is incapable of making any commitments for refund of contributions on behalf of the government.
18. Having considered the foregoing, our understanding is that the challenge concerning the 3rd applicant's capacity/*locus standi* goes to the competency of its motion as well as appeal. It is therefore apposite to deal with this issue before delving into the merit of the motions. The 3rd applicant's capacity is challenged on two fronts; firstly, that due to the status of its membership it is devoid of any identifiable interest in the matter at hand; and secondly, having been joined at the ELRC as an interested party it lacks capacity to institute the motion and the appeal.
19. It is common ground that the 3rd applicant by a motion dated June 18, 2015 sought to be joined as an interested party at the ELRC. The 3rd applicant deposed that it is an umbrella body representing over 6,000 retirees who were contributors to Laptrust, a defined benefit pension scheme, whose members are earning their pension from the said scheme; Laptrust was established for employees of the former local authorities now county governments; the sustainability of Laptrust like any other defined benefit pension scheme is significantly dependent on contributions from employees in active service and employers to finance actuarial deficits and make adequate payments to retired members; the implementation of the Act would compel employers and employees to abandon Laptrust and other existing pension schemes or divert their contributions to NSSF due to the heavy and unbearable financial burden that would ensue from making contributions to two pension schemes; as such, the livelihoods and social security of the 3rd applicant's members would be jeopardized. It further deposed that its main objectives, as evinced in its constitution, include playing an active role in the management of Laptrust through its representation in the Board of Trustees; and working for better legislation to maintain and improve the status of social welfare of retired persons.
20. Our preliminary view is that the 3rd applicant's stake or interest in the proceedings before the ELRC, revolved around the implementation and constitutionality of the Act. It is also not in dispute that the motion was allowed by the parties' consent dated August 6, 2015 and filed in the ELRC on August 12, 2015. Our perusal of the 3rd applicant's motion and appeal before this court reveals that the aforementioned interest is the basis upon which it has lodged its motion and appeal herein. While Laptrust doors were closed in 2012 to new members, it has not been demonstrated that the scheme does not receive contributions on behalf of its existing members who are still in active service. Indeed, the 1st respondent does admit that Laptrust is still in existence. Therefore, at this very interlocutory stage, we are persuaded that the 3rd applicant possesses the same identifiable interest in the dispute which led to its admission at the ELRC in the matter at hand.



21. As to whether the 3rd applicant has taken over the role of the primary parties, it is well settled that the crucial or overriding interest in any matter before a court is that of the principal or primary parties. It is precisely for this reason that a party joined as interested party cannot introduce new issues or go beyond the main parties' case. This much was succinctly appreciated by this court in *Francis Kariuki Muruatetu & another v Republic & 5 others*, SC Petition No 15 & 16 of 2015 (consolidated); [2016] eKLR and *Samuel Kamau Macharia & Another v Director of Public Prosecution and 11 others*, SC Petition (Applic) No 9 (E011) of 2020.
22. It is remarkable that some of the primary parties in the proceedings at the ELRC, that is, the 1st and 2nd applicants have also lodged an appeal, Petition No E004 of 2023, which has been designated as the lead file with the consent of the parties. Perusal of the prayers/reliefs and the case advanced by the 3rd applicant in its appeal as well as its motion reveals that they are more or less in tandem with the 1st and 2nd applicants' case and reliefs sought in their appeal and motion. As such, it cannot be said that the 3rd applicant's interests have gone over and above that of the primary parties. What is more, we find that the 3rd applicant has not introduced a new issue that was either not canvassed before the superior courts below or did not arise from the impugned judgment. As to whether the 3rd applicant should have filed a review before the Court of Appeal as opposed to an appeal before this court, we find that issue would go to the merit of its appeal and ought to be addressed in the consolidated appeal.
23. Moving on to the motions at hand, we are guided by section 23A of the *Supreme Court Act*, which sets out our discretionary power to issue interim orders. Equally, we are mindful of the guiding principles in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC Application No 5 of 2014; [2014] eKLR. The principles in question being that the applicants should demonstrate that the consolidated appeal is arguable; the appeal would be rendered nugatory unless the orders sought are granted; and that it is in the public interest that the orders sought be granted.
24. Beginning with the prayer seeking stay of the impugned judgment, we note that Court of Appeal simply set aside the ELRC judgment on the ground that it lacked jurisdiction to entertain the matter. As such, the Court of Appeal did not issue a positive order capable of execution as defined by the Court of Appeal for East Africa in the often-quoted case of *Western College of Arts and Applied Sciences v Oranga & others* [1976] KLR 63. In that, it did not order any party to do anything or to refrain from doing anything. Besides, to issue the stay would mean reversing or undoing the impugned judgment at this interlocutory stage or determining a key issue on jurisdiction and thereby prejudicing the pending appeal. Therefore, the 1st and 2nd applicants' prayer for stay of execution or implementation of the impugned judgment cannot issue at this interlocutory stage.
25. With regard to the conservatory order restraining the implementation of sections 18, 19, 20 and 71 of the Act, we are persuaded that the applicants have demonstrated that the consolidated appeal is arguable. In that, we find the issue of the jurisdiction of the ELRC *vis a vis* the High Court with regard to the dispute at hand is one that warrants this court's consideration. Nonetheless, we are not satisfied that the applicants have met the other two principles to warrant the conservatory order sought. The 1st and 2nd applicants did not deny the 1st respondent's contention to the effect that their members had since complied with the Act. In particular, that they had registered and started making contributions to NSSF as envisaged under the Act. Likewise, none of the applicants denied the 1st respondent's contention that following the impugned judgment that the Act has since been implemented. Besides, none of the applicants demonstrated that in the event the consolidated appeal succeeds that the contributions made to NSSF would be lost or inaccessible to the contributors or their beneficiaries.



- 26. All in all, we are of the view that the interest of justice will be best served by hearing and determining the consolidated appeal on priority basis so as to settle the main dispute.
- 27. Consequently and for the reasons afore-stated, we make the following orders:
 - i. The 1st and 2nd applicants’ notice of motion dated March 2, 2023 and filed on March 3, 2023 is hereby dismissed.
 - ii. The 3rd applicant notice of motion dated February 16, 2023 and filed on February 17, 2023 is hereby dismissed.
 - iii. Costs of the motions shall abide the outcome of the consolidated appeal.
 - iv. The consolidated appeal be set down for hearing on a priority basis.

It is so ordered

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE, 2023.

.....
M. K. KOOME
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....
P.M. MWILU
DEPUTY CHIEF JUSTICE & COURT VICE PRESIDENT OF THE SUPREME COURT

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify this as a true Copy of the Original
REGISTRAR
SUPREME COURT OF KENYA

