

AGRICULTURAL EMPLOYERS' ASSOCIATION.....2<sup>ND</sup> PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

THE NATIONAL SOCIAL SECURITY FUND

BOARD OF TRUSTEES .....2<sup>ND</sup> RESPONDENT

AND

PETITION CAUSE NO. 35 OF 2014

KENYA COUNTY GOVERNMENT WORKERS' UNION..... PETITIONER

VERSUS

THE NATIONAL SOCIAL SECURITY FUND BOARD

OF TRUSTEES.....1<sup>ST</sup> RESPONDENT

THE CABINET SECRETARY FOR LABOUR,

SOCIAL SECURITY AND SERVICES..... 2<sup>ND</sup> RESPONDENT

THE RETIREMENT BENEFITS AUTHORITY.....3<sup>RD</sup> RESPONDENT

THE COMPETITION AUTHORITY.....4<sup>TH</sup> RESPONDENT

AND

PETITION CAUSE NO. 34 OF 2014

KENYA QUARRY AND MINE WORKERS UNION..... 1<sup>ST</sup> PETITIONER

KENYA BUILDING, CONSTRUCTION, TIMBER

FURNITURE AND ALLIED TRADES EMPLOYEES UNION.....2<sup>ND</sup> PETITIONER

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA  
AT NAIROBI

PETITION NO. 38 OF 2014

(CONSOLIDATED WITH PETITION 34, 35, 49 AND 50 OF 2014)

IN THE MATTER OF ARTICLE 22(1)

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 30, 35, 40, 41(2)(a) AND  
(b), ARTICLE 43(1)(c), ARTICLE 46; AND ARTICLE 50(1), 2(a),(b),(d),(g) AND  
(k) OF THE CONSTITUTION

IN THE MATTER OF CONTRAVENTION OF RIGHTS UNDER ARTICLES  
10(2)(b) and (c); 201(a), (d) AND (e); 205(1) AND (2); 227(1); 232 OF THE  
CONSTITUTION

IN THE MATTER OF ARTICLES 23(1) AND 3; 156(4); 159(2); 162(2) AND 165  
OF THE CONSTITUTION

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF  
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE  
RULES, 2013

IN THE MATTER OF THE NATIONAL SOCIAL SECURITY FUND ACT NO.45  
OF 2013

IN THE MATTER OF THE NATIONAL SOCIAL SECURITY FUND CAP 258 OF  
THE LAWS OF KENYA (Repealed)

IN THE MATTER OF THE RETIREMENT BENEFITS ACT NO.3 OF 1997

KENYA TEA GROWERS ASSOCIATION.....1<sup>ST</sup> PETITIONER

KENYA UNION OF ENTERTAINMENT & MUSIC

INDUSTRY EMPLOYEES.....3<sup>RD</sup> PETITIONER

UNION OF NATIONAL, RESEARCH INSITUTUTES

STAFF OF KENYA (UNRISK).....4<sup>TH</sup> PETITIONER

KENYA GLASS WORKERS UNION.....5<sup>TH</sup> PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

THE NATIONAL SOCIAL SECURITY FUND BOARD

OF TRUSTEES.....2<sup>ND</sup> RESPONDENT

AND

CENTRAL ORGANIZATION OF TRADE

UNIONS (COTU).....1<sup>ST</sup> INTERESTED PARTY

FEDERATION OF KENYA EMPLOYERS (FKE).....2<sup>ND</sup> INTERESTED PARTY

AND

PETITION CAUSE NO. 49 OF 2014

NKAURAKI EDWIN LESIDAI & 89 OTHERS..... PETITIONERERS

VERSUS

HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

PRISONS DEPARTMENT.....2<sup>ND</sup> RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF INTERIOR &



NATIONAL GOVERNMENT.....3<sup>RD</sup> RESPONDENT

THE BOARD OF TRUSTEES OF N.S.S.F..... 4<sup>TH</sup> RESPONDENT

### JUDGMENT

1. The consolidated petition is against the NSSF Board of Trustees, Cabinet Secretary for Labour, Social Security and Service (CS Labour), the Retirement Benefits Authority (RBA); the Competition Authority (CA) and the Hon. Attorney General being the Respondents respectively. Central Organization of Trade Unions (COTU) and Federation of Kenya Employers (FKE) are cited as interested parties. The gravamen of the petition is for the court to find the enactment of the National Social Security Act No.45 of 2013 (NSSF Act) in its entirety to be in violation of the Constitution of Kenya 2010 and the court to declare it null and void; and in the alternative to find and declare that some of the provisions of the New Act contravene the Constitution and the Competition Act and provide the reliefs sought in the consolidated petition.

2. The Petitioners are seeking the following Orders:

***a) THAT a declaration to issue that Sections 18, 19, 20, 21, 22, 29 & 71 of National Social Security Fund Act 2013 is inconsistent with Articles 24, 26, 28, 27, 36, 41, & 43 of the constitution and is null and void to the extent of the inconsistency to the extent that they purport to:***

***i. oblige employers to register the Petitioners members (and other employees who have adequate alternative pension or social security schemes) with the 1st Respondent; and***

***ii. oblige the Petitioner's members (and other employees who have adequate alternative pension or social security schemes) to join the pension or social security schemes operated by the 1st Respondent;***

***b) A declaration to the effect that sections 18, 19, 20, 21, 22, 29 & 71 of the National Social Security Fund Act, 2013 are unconstitutional, null***



*and void to the extent that they purport to discriminatorily target only employers and employees in the registration, membership and the making of contributions to the 1st Respondent and not the entire Kenyan population as required of a scheme purportedly offering or intended to offer universal social security under Article 43 of the Constitution of Kenya 2010;*

*c) A declaration to the effect that sections 18, 19, 20, 21, 22, 29 & 71 of the National Social Security Fund Act, 2013 are unjustifiable in a free, modern, open, transparent and democratic society to the extent that they purport to-*

*i. oblige employers to register the Petitioners members (and other employees who have adequate alternative pension or social security schemes) with the 1st Respondent; and*

*ii. oblige the Petitioner's members (and other employees who have adequate alternative pension or social security schemes) to join the pension or social security schemes operated by the 1st Respondent; and*

*iii. give the 2nd Respondent wide and discretionary powers in the management of the 1st Respondent and in the manner of dealing with the Petitioners members contributions and accrued benefits in total disregard of the statutory/regulatory/supervisory role of the 3rd Respondent;*

*d) A declaration to the effect that sections 18, 19, 20, 21, 22, 29 & 71 of the National Social Security Fund Act, 2013 are unconstitutional, unjustifiable in a free, modern, open, transparent and democratic society to the extent that they purport to compulsorily appropriate or alienate the Petitioners members' private property (i.e. accrued income/pension) to the 1st Respondent in violation of the Petitioners members' rights under Articles 40 (2) & 41 (2) of the Constitution;*

*e) A declaration to the effect that sections 47 and 68 of the NSSF Act 2013 are oppressive, irrational and unreasonable and unjustifiable in a free, modern, open, transparent and democratic society to the*

*extent that they purport to give regulatory powers to the 1st Respondent instead of the independent sector regulator (the 3rd Respondent);*

- f) An order directing the 3rd Respondent to subject the 1st Respondent to each and all the prudential and regulatory requirements set out in the Retirement Benefits Act, 1997 (Act No. 3 of 1997);*
- g) An order directing the 4th Respondent to review and advise the Government and all key stakeholders on the compatibility of the National Social Security Fund Act, 2013 with the country's competition policy as read with the principles set out in Article 10 (1) (c) of the Constitution of Kenya, 2010;*
- h) An order precluding the 1st and 2nd Respondents from applying the National Social Security Fund Act, 2013 on the Petitioners' members (or any other employees who have adequate alternative pension or social security schemes);*
- i) THAT a declaration do issue and is hereby issued against the 1st and 2nd Respondents, by themselves, their servants, agents, assigns or any person claiming through them or otherwise that deduction of six per centum (6%) from the salary, wages or earnings of the employees and requiring the employers contribution of six per centum (6%) of the employees pensionable earnings and remitting the same to the 2nd Respondent in terms of the National Social Security Fund Act, 2013 is void and unconstitutional,*
- j) THAT the Honourable Court declares the National Social Security Fund Act, 2013 null and void ab initio as it violates the spirit of the Constitution having been enacted in violation of Article 43(3) and Article 27 of the Constitution.*
- k) THAT the Honourable Court declares the National Security Fund Act, 2013 null and void ab initio as its passage into law violated Article 110 and 205 of the Constitution, and*
- l) Such other, further, additional, incidental and/or alternative reliefs*



*or remedies as the Honourable Court may deem just and expedient.*

**FURTHER AND IN THE ALTERNATIVE BUT WITHOUT PREJUDICE TO AFOREGOING PRAYERS, THE COURT ORDERS:**

- 1) THAT the Honourable Court declares Section 13 of the National Social Security Fund Act, 2013 null and void as it violates Article 230(4) (b) of the Constitution.**
- 2) THAT the Honourable Court declares Section 17 subsection (6)(b) of the National Social Security Fund Act, 2013 null and void as it violates Article 50(1)(a) of the Constitution.**
- 3) THAT the Honourable Court declares Section 18 subsection (4) of the National Social Security Fund Act 2013 null and void as it violates Article 30 of the Constitution.**
- 4) THAT the Honourable Court declares Section 19(2) of the National Social Security Fund Act 2013 null and void as it violates Article 21(1), 47(1), 50(1), 232(1) of the Constitution.**
- 5) THAT the Honourable Court declares Section 10 and Third Schedule of the National Social Security Fund Act 2013 null and void as it violates Article 35(1), (2) and (3), Articles 40 and 46 of the Constitution.**
- 6) THAT the Honourable Court declares Section 21 of the National Social Security Fund Act, 2013 null and void as it violates Article 46 of the Constitution.**
- 7) THAT the Honourable Court declares Section 27 of the National Social Security Act, null and void as it violates Article 40 of the Constitution.**
- 8) THAT the Honourable Court declares Section 35(4) of the National Social Security Fund Act 2013 null and void as it violates Article 50 of the Constitution.**
- 9) THAT the Honourable Court declares Section 37(1) of the National Social Security Act 2013 null and void as it is contrary to Article**



*201(a) and 227(c) of the Constitution.*

*10) THAT the Honourable Court declares Section 18(2), 72 and the Second Schedule null and void as they violate the provisions of Articles 10, 201 and 226 of the Constitution.*

*11) THAT the Honourable Court declares Section 49(2) of the National Social Security Act 2013 null and void as it violates Articles 27(1), 30 and 46(a) of the Constitution.*

*12) THAT the Honourable Court award costs of this Petition to the Petitioners.*

### **The Consolidated Petition**

3. The petition is that pursuant to statutory and subsidiary legislation, policy instruments, employment contracts and Collective Bargaining Agreements (CBAs) in place, members of the Petitioners and interested parties have had longstanding and adequate gratuity, pension and security schemes with their employers including but not limited to private and public gratuity, provident Fund and pension schemes, which are far more advantageous to the employees than what NSSF Act No. 45 of 2013 is proposing. Consequently, the proposed mandatory pension scheme under the New Act is unconstitutional, unlawful, oppressive, discriminatory and inferior compared to the benefits that employees enjoy under the various private and public schemes including LAPTRUST and LAPFUND.
4. The petitioners state that the impugned pension scheme will punitively overburden their already strained pay slips owing to their various financial commitments with financial institutions. They are also apprehensive that they will lose the contributions already made to their subscribed pension schemes.
5. The petition is also that the Petitioners were not consulted to give their input. The Kenya Revenue Authority (KRA) has been nominated to collect the contribution raising more questions.

6. The petitioners state further that whereas the repealed NSSF Act, Cap 258 exempted the Petitioners members from registering under the fund, the NSSF Act, 2013 makes it compulsory for all employees to register under the fund, thus making it mandatory for the employer to deduct the dues from an employee's salary. This consequently interferes with the Petitioner and its members' free will to choose a pension scheme of their choice contrary to **Articles 40, 41 and 43 of the Constitution, 2010**.
7. The petition is also that the requirement for the Petitioners members to register with the Fund as a prerequisite for accessing public services is a violation of **Article 27 of the Constitution** on discrimination.
8. The Petitioners members are compelled to join two parallel and duplicative schemes which in effect will double the administrative costs of running the parallel pension schemes. In reducing the percentages to be contributed in the scheme the Respondents are impelling massive job cuts across the county to the detriment of the employees. The impugned sections of NSSF Act, 2013 are inconsistent with the provisions of **Article 10 (1)(c) of the Constitution, 2010** as read with **Section 3 of the Competition Act**, as far as it gives the NSSF Fund *de jure* or *de facto* monopoly in the provision of pension and social security services in the country.
9. The impugned sections of the NSSF Act, 2013 are unconstitutional, null and void for failure to involve the Senate in its enactment as provided in **Articles 110 to 113 of the Constitution**. The challenged provisions are to the extent that they oblige all county governments (Petitioner's members' employers) to make payments to the 1<sup>st</sup> Respondent without corresponding budgetary allocation. **Sections 47 and 68 of the NSSF Act, 2013** are oppressive, irrational and unreasonable to the extent that they purport to give regulatory powers to the NSSF Board of Trustees instead of the RBA – the independent sector regulator.



10. The petitioners further challenge the impugned NSSF Act, 2013 which fail to consider the economic implications on the Kenyan workers. The impugned sections of the NSSF Act, 2013 are inconsistent with **Articles 10, 24, 26, 27, 28, 36, 41(2) (a) and 43 of the Constitution** and therefore null and void to the extent of the inconsistency as decreed by Article 2(4).

11. The provisions of 2013 NSSF Act, 2013 are fatally flawed, unreasonable and unconstitutional in terms of the mandatory registration and contribution by employees and employers since the NSSF does not qualify as a retirement benefit body by any definition.

12. The impugned sections of the NSSF Act, 2013 do not meet the Petitioners' reasonable expectations that Statutes must conform to the Constitution. The Respondents have a constitutional duty to uphold the rule of law and the provisions and spirit of the Constitution.

13. The petitioners pray that the Court ought to determine the constitutional validity of **Sections 18, 19, 20 & 71 of NSSF Act, 2013**. The Petitioners further pray that the Court determines:

- a) *Whether a person who is a member of a Retirement Benefit Scheme ought to register and make contributions to the Fund*
- b) *Whether contributions to the NSSF are lawful*
- c) *Whether the NSSF is regulated under Retirement Benefits Act*
- d) *Or in the alternative, does the legislative provisions under sections 18, 19, 20, 34, and 36 of the 2013 NSSF Act create a Retirement Benefits Scheme that ought to be regulated under the Retirement Benefits Act?*

14. The petitioners state further that the NSSF Act, 2013 makes no reference to County Governments and specifically provides under **Section 2** it applies to the Government of Kenya as an employer; thus discriminatory against county government workers. If the Act applies to County Governments as employers, it imposes a financial obligation on county governments to pay increased pension



contribution to the Fund at the rate of 6% of the employees' pensionable salaries. Consequently, its passage should have adhered to **Articles 110 & 205 of the Constitution**.

15. The NSSF Act, 2013 creates and enhances social security benefits only to employed persons but none to those unable to support themselves such as the unemployed, the old and their dependants. To this extent the New Act derogates from the mandatory obligation imposed on the government under Article 43 of the Constitution to provide reasonable social welfare to the people of Kenya in a progressive manner and the New Act represents a missed opportunity to commence effecting that mandate and is unlawful for discriminating against unemployed Kenyans.

16. The Provisions of NSSF Act, 2013 repealed NSSF Act without being subjected to public debate. Furthermore, the opinion of the Petitioners' members was not sought before the rates of contributions under the NSSF Act, 2013 were fixed.

17. It is not clear from the impugned Act how schemes which had already been approved by the RBA will interface with the schemes created under the NSSF Act, 2013. The Petitioners' members contribute towards pension, gratuity and Security schemes catering for the same purpose for which the NSSF Act, 2013 is enacted and which Act envisages the Petitioners to make both statutory and contractual contribution under the CBA towards an employees' retirement benefits. The Petitioners' members cannot meet such feat and will be denied their right to property under **Article 40 of the Constitution**.

18. Section 13 of the impugned Act provides for the remuneration of the board members to be set by the Board of Trustees and approved by the Cabinet Secretary and that remuneration of public officers such as the Fund's board members ought to be determined by the Salaries and Remuneration Commission (SRC).

19. The petitioner has set out a chronology of the impugned section of the NSF Act, 2013 which are unlawful, unconstitutional and should be declared null and void;

- a) That Section 17 criminalizes any refusal/ neglect to answer a question or to furnish any information or documents when required to do so, without giving limits such as criminal intent of the person or willful disobedience.
- b) Section 18(4) makes it mandatory for "all persons" including employers to be members of the pension fund, thus subjecting them to servitude. Furthermore, making proof of registration with the pension scheme a precondition for the petitioners and their members to access public services as provided for under Section 19(2) of the Act is unconstitutional.
- c) Section 20(2) violates **Article 35(1) (2) & (3)** as it only alludes to employees paid on monthly basis and leaves out a huge group such as casual labourers, piece rate workers, and journey workers among others while operators of exiting pension schemes are not exempted from the application of Section 21 of the impugned Act thus violating their consumer rights under the Constitution.
- d) Section 27 provides for charging of interest on late payment but has no provision that such interest should be credited to a member's account.
- e) Section 35(4) gives the Board absolute power to decline to pay or vary payment to a nominated beneficiary, which amounts to usurping the role of the courts.
- f) Section 37(1) pegs payment of survivors benefits to 36 months' contribution thus denying the survivors' their right to property as the State will appropriate funds contributed by the Petitioners and their members over periods less than 36 months without justification.
- g) Sections 18(2), 72 and the Second Schedule are unconstitutional as Section 72 of the impugned Act repeals the old Act save for Sections 9, 14, 16 and 19 as set out in Clause 2(f) of the Second Schedule. Furthermore, to repeal the old Act before resolving the issue of liabilities and assets under the old Provident Fund infringes on the constitutional rights of the beneficiaries.

20. The petition is that the entire 2013 NSSF Act violates **Articles 43(3) and 27 of the Constitution** and hence the petitioners are seeking the Court to determine the constitutional validity of the entire NSSF Act, 2013 considering the manner in which it was enacted. Alternatively, but without prejudice to the foregoing, that the Court ought to determine the constitutional validity of the **NSSF Act, 2013 at Sections 13, 17(6) (b), 18(4), 19(2), 20, 21, 27, 35(4), 37(1), 49(2), 10 & Third Schedule to the Act, 18(2), 72 & Second Schedule to the Act.**

21. The Petitioners are seeking the Court to determine the constitutional validity of the mandatory contributions to NSSF imposed by the NSSF Act, 2013 which breaches their constitutional rights under **Articles 10(2) (b), 27, 28, 41, 50, 176, 236(b) inter alia** and grant the prayers sought in the consolidated petition with costs.

### Responses

22. Through the office of the Attorney General (AG), the NSSF Board of Trustees denied the contention that the NSSF Act, 2013 compels employees to contribute 6% of their salaries, arguing that the contribution rates are capped at Kshs. 6,000/= for lower earnings limit and Kshs. 18,000/= for upper earning limit. The National Assembly was alive to these deductions and unanimously passed the NSSF Act, 2013 while discharging its constitutional mandate under **Article 94(5) of the Constitution** and alive to the need for the government to provide social security to its citizens under **Article 43.**

23. The AG on behalf of the NSSF Board of Trustees, the CS Ministry of Labour and the Competition Authority further contended that the Competition Act, 2010 does not apply to NSSF because the Fund does not engage in any trade within the manner contemplated under the Competition Act. Consequently, **Petition 35 of 2014** does not reveal any cause of action against the Competition Authority (4<sup>th</sup> Respondent therein).

### Response by RBA



24. The Retirement Benefits Authority (RBA) asserted that contrary to allegations, it effectively participated in the formulation of the subject NSSF Act, 2013 and gave its submissions and recommendations for consideration by the relevant state actors. RBA duly advised and recommended that employees who were members of existing registered retirement benefits schemes be excluded from compulsory membership of the NSSF pension scheme. RBA agreed that there is no constitutional justification to deny contributors their choice of pension scheme to subscribe to as the NSSF Act, 2013 has done. It also advised the government and Parliament against the high level of contributions imposed by the Act on employers and employees alike and that a collapse of many successful pension schemes would complicate the RBA's mandate as a regulator of the pensions industry.

#### Response by Minister for Labour

25. In response to consolidated petition, the CS Ministry of Labour asserted that the enactment of the NSSF Act, 2013 involved full public participation and sensitization as demonstrated in documents filed in court. That contrary to assertions, **Section 37(6) of the impugned Act** makes sufficient and adequate provisions towards benefits of a survivor's family members; NSSF is not a monopoly as **Section 4 of the Act** provides for an opt-out at the Tier II; **Section 13** is not unconstitutional as both the NSSF Board and the CS are obliged to consult SRC in determining the remuneration of the Board or a committee of the Board; the Act gives the self-employed the opportunity to register membership with the Fund and cannot also be declared unconstitutional for not providing social security to non-members of the Fund; **Section 18(4)** is proper because it is the prerequisite to provisions of Section 6 on Board composition; **Section 19(2)** is meant to minimize if not to eliminate evasion of NSSF contributions; nothing under **Section 20(2)** demonstrates how the constitutional right with regard to access to information will be negatively affected; **Section 21** gives employees the right to opt out of Tier II to join the private pension schemes; **Section 27** is clear that the interests charged on members for late payments is credited to the members' accounts; and **Section 35(4)** does not give the Board absolute power

to decline to pay or vary payments to a nominated beneficiary as alleged.

26. The NSSF Board of Trustees further contended that the old NSSF Act was repealed by coming to force of the NSSF Act, 2013 and therefore to stay the operation of this Act means there will be no law regularizing the social security fund. Other employees and employers such as KCB Bank and the Competition Authority of Kenya have already implemented the NSSF Act, 2013 and enhanced contribution scheme.

27. The NSSF further response is that the Petitioners have merely made allegations of violation of the Constitution by the NSSF Act, 2013 without demonstrating the said violation.

#### **Responses by Interested Parties**

28. The Federation of Kenya Employers (FKE) in its replying affidavit state that the impugned NSSF ACT No.45 of 2013 and the provisions contained therein violate Article 10 and 43 of the Constitution and it is in the interest of justice that the provisions of the new Act that are in conflict with the Constitution be declared null and void. This view is also supported by the 2<sup>nd</sup> interested party Central organization of Trade Unions (COTU). The common denominator in this objection as also proffered by the respondents is that the interested parties under negotiated CBAs operate Gratuity and Pension Schemes for the benefit of their members which schemes are not recognized under the new NSSF Act 2013 nor have the contributors towards the gratuity schemes been exempted from making mandatory contributions under Tier I and Tier II pensions contributions established under Section 20 of the New Act. Furthermore, the interested parties' members also operate schemes registered by the Retirement Benefits Authority which schemes have also not been exempted from the operation of the Act, except for the Tier II contributions where an employer may opt to pay the same to a contracted out scheme.

29. That the members of the interested parties were obliged to implement the New Act by making pension deductions from end of June 2014. That under Section 4(d), 21(2) (a) and 68 of the Act, CS Labour published Tier II opt out Regulations



vide Kenya Gazette Supplement No. 88 on 10<sup>th</sup> June 2014. That there was no adequate consultation with the interested parties before the Regulations were promulgated. FKE was only invited to attend one meeting held on 26<sup>th</sup> March 2014 which was not adequate to effectively discuss their concerns about the implementation of the Act. That this violates Article 10(2) (b) and (c) of the Constitution. The interested parties strongly oppose any provision which will subject their members to double contributions at 12% of their salary to their financial loss and detriment and the pension scheme under the New Act cannot be forced on the people it seeks to benefit. That with the resultant effect of the Regulations coming into effect without paying regard to section 21(2) (a) of the Act on Tier II undermines section 3, 5 (1) and 24 of the Competition Act cap 504.

30. That members of the interested parties will suffer irreparable financial loss if they have to implement the New Act in its present form and the court grants the prayers sought by the interested parties accordingly.

#### **Determination**

31. Upon a careful consideration of the pleadings and depositions by the parties the court has crystalized the following issues for determination and will determine them taking into account the submissions and list of authorities provided by the parties summarized below:

- a) **Whether there was sufficient public participation as envisaged under Article 10 of the Constitution of Kenya 2010 prior to the enactment of the NSSF Act No. 45 of 2013.**
- b) **Whether the NSSF Act No. 45 of 2013 has implications on County Finances and therefore the Bill ought to have been tabled before the Senate prior to its enactment in terms of Articles 205(1) and 110 of the Constitution**
- c) **Whether the NSSF Act No. 45 of 2013 violates the Constitutional Rights of the Petitioners' members as set out in the consolidated petition.**
- d) **Whether the NSSF Act No. 45 of 2013 is in conflict with the provisions of the**



### Competition Act.

- e) Whether the petitioners are entitled to the reliefs sought.
- f) Who should bear costs.

### Submissions by the Petitioners

32. The Petitioners submitted that **Article 43(1) (e) of the Constitution** gives every person a right to social security while Clause 3 particularly requires the State to provide appropriate social security to persons who are unable to support themselves and their dependents. That **Article 21(2)** takes it a notch higher by mandating the government to take legislative policy and measures to ensure progressive realization of the rights under Article 43 of the Constitution.
33. 'social security' according to the International Labour Organization (ILO) is the protection of a society and provides to individuals and households to ensure access to health care and to guarantee income security particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner. Kenya has the **International Covenant on Economic, Social and Cultural Right (ICESCR)** which at **Article 9** enjoins all State parties to recognize the right of everyone to social security including social insurance. The provision of social security under international instruments should cover all attributes of social security and involve the entire population and in the case of **Republic v Minister for Home Affairs & others ex-parte Sitamze [2008] eKLR**, the court held that Kenya is a party to ICESCR, and courts must therefore address, recognize and give remedies under the Convention.
34. The petitioners submitted that under the repealed NSSF Act, it was meant to aid in the protection of social security and payment of old age benefits in form of provident fund upon retirement of an employee. The said Funds were heavily borrowed by the Government and mismanaged such that at the time the NSSF Act, 2013 was enacted, the repealed NSSF Fund was reading in the negative and was already insolvent. The Government carried out a survey and established that out of a population of 40 million Kenyans, 20 million persons were eligible to

work but only 13 million were in active employment. Only 3 million out of the 13 million were in the formal employment sector while the remaining 10 million were engaged in in the informal sector.

35. On this backdrop that **Article 43(3) of the Constitution** was enacted to make it a duty for the State to provide appropriate social security to those unable to support themselves and their dependents. However, the enactment of the NSSF Act, 2013 is not in tandem with Article 43 because it does not introduce any benefits for those who are unemployed and generally those unable to support themselves and as such leaves the issue unresolved. In short, its enactment was made to cover up the mismanagement of the debts suffered under the repealed NSSF Act and Fund and is a decoy to have members of public blindfolded towards registering into another Fund that is likely to be mismanaged to their detriment.
36. The Petitioners submitted that the enactment of the NSSF Act, 2013 aims at overburdening the employer and the employee while the Government tasked with providing these social security services is providing nothing in return thereof. The enactment of the NSSF Act, 2013 has merely entrenched discriminative practices by ignoring the underprivileged such as the unemployed and giving exclusive benefit out of the Fund to the State through investment criteria. The United States Supreme Court in the case of **TROPP v DULLAS 356, US 86 1958** held that enactments of Parliament must be judged by the standards of the Constitution. The analogy in the **TROPP case** fits the situation in the present Petition where the Constitution obliges the State to take up legislative measures and policies towards achieving appropriate social security for those unable to. In the case of **Waweru v Republic [2006] 2 EA 349**, the Court held that the law should not allow discrimination either of itself or in its effect.
37. The Petitioners submitted that the Court should hence declare the NSSF Act, 2013 unconstitutional for having been enacted contrary to the spirit of the Constitution, international Conventions and professional advice on the subject.
38. The Petitioners submitted that there is no evidence that the alleged policy paper titled *KENYA SOCIAL PROTECTION POLICY* has been reduced to a



government sessional paper or a cabinet paper to demonstrate the intention to legislate the alleged policies in the document into law. The document tabled in Court is far from being a Sessional Paper to be considered a government policy document and does not therefore constitute the policy document envisaged under Article 21(2) of the Constitution. The said policy paper provides contradicting information as compared to what is stated in the NSSF Act, 2013.

39. In the case of **Patrick Mungai & 22 Others v Nairobi City Council Planning & Architecture Department [2006] eKLR**, the Court in addressing a Policy Paper held that;

*... in city and urban planning, there must be some benchmark upon which future physical planning of the City or urban centre revolves. That benchmark usually is founded upon a blue print paper; some Governments like the U.K. or U.S.A. refer to such major suggestions or proposals as "White Paper". In Kenya we call them a "Sessional paper" it has a higher status than a "Policy Paper." A sessional paper is usually tabled before Parliament, not for enactment, but for general information of the legislative arm of state showing the policy trend of the executive arm of government. Unless the Sessional Paper is translated into law by way of a Government Bill, or a Private Member's Bill, it remains a sessional paper. Like any other Policy Paper, it remains a policy paper. It is not law. It has no legal status. ...*

40. The Petitioners submitted that **Article 118 (1)(b)** as read with **Article 10(2) of the Constitution** makes it mandatory for all Bills to be discussed, vetted by parliamentarians and the public before the same is passed. The NSSF Act, 2013 was passed into law without proper public consultation, participation and involvement as envisaged in Articles 10 and 118 of the Constitution. In the case of **Robert N. Gakure and other v the Governor Kiambu County and others [2014] eKLR**, the court relied on the South African case of *Doctors for Life International vs. Speaker of the National Assembly and Others* and held that according to their plain and ordinary meaning, the words "public involvement" or



“public participation” refer to the process by which the public participates in something and that facilitation of public involvement in the legislative process therefore means taking steps to ensure that the public participate in the legislative process. The Petitioners contended that in this case, the invitation of COTU and FKE alone did not amount to proper public participation for the purposes of enactment of the NSSF Act, 2013.

41. On whether the NSSF Act, 2013 is an Act with financial matters of the County Government within the context of **Article 205(1) of the Constitution**, the Petitioners submitted that since the impugned Act enjoins the County Governments to pay NSSF contributions, then the Bill which preceded its enactment was a financial Bill within the context of Section 205 of the Constitution and the Senate ought to have been involved before enactment. It ought to have been referred to the Commission on Revenue Allocation before enactment.

42. In the case of **The Speaker of the Senate of the Republic of Kenya and the Hon. Attorney General, the Speaker of National Assembly and Others - Supreme Court Advisory Opinion Reference No. 2 of 2013**, the Supreme Court of Kenya referred to the *Final Report of the Task Force on Devolved Government Vol. 1* and with regard to the meaning of a Bill held that “any financial matter concerning County Government”;

*The extent of the legislative role of the Senate can only be fully appreciated if the meaning of the phrase ‘concerning counties’ is examined. Article 110 of the Constitution defines bills concerning counties as being bills which contain provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule; bills which relate to the election of members of the county assembly or county executive; and bills referred to in Chapter Twelve as affecting finances of the county governments. This is a very broad definition which creates room for the Senate to participate in the passing of bills in the exclusive functional areas of the national government, for as long as it can be shown that such bills have provisions affecting the*

*functional areas of the county governments. For instance, it may be argued that although security and policing are national functions, how security and policing services are provided affects how county governments discharge their agricultural functions. As such, a bill on security and policing would be a bill concerning counties.... With a good Speaker, the Senate should be able to find something that affects the functions of the counties in almost every bill that comes to Parliament, making it a bill that must be considered and passed by **both Houses**.*

43. The Supreme Court in the advisory opinion applied the same principles it had applied in the **Matter of the Interim Independent Electoral Commission (2011)** and held that certain functions shared between the national and county governments such as finance, give rise to a concurrent jurisdiction between the two levels.
44. The Petitioners therefore submitted that based on the Supreme Court Advisory Opinions, a Bill concerning a county government is any Bill which affects functional areas of county governments that can be solely of the county governments or co-shared with the national government.
45. Applying the test by the Supreme Court, the NSSF Act, 2013 contains provisions concerning county governments' financial matters such as the pension scheme managed by the county government as an employer. The Bill should subsequently have been referred to the Commission of Revenue Allocation (CRA) for consideration before its passage as envisaged under **Article 205 of the Constitution**. This being a Bill concerning County Governments, the NSSF Bill ought to have been debated by the Senate in accordance with **Article 110 of the Constitution**.
46. The NSSF Bill failed to follow constitutional procedures and hence violated a fundamental constitutional requirement making the resultant Act null and void.
47. In the South African case of **Harris v Minister of Interior and another [1952] (2) SA 428** and the Supreme Court of Uganda case of **Ssemogerere & 2 others v AG Constitutional Appeal No. 1 of 2002 Uganda**, the Courts in both



jurisdictions declared an Act of Parliament invalid and void for failing to follow the prescribed constitutional procedures in its enactment.

48. The Petitioners submitted that the interpretation of **Section 13 of the NSSF Act, 2013** can only be done pursuant to **Section 42 and 43 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya**. section 13 violates the provisions of **Article 230(4) of the Constitution** because it ignores the role of the Salaries Remuneration Commission (SRC) in the fixing of remuneration for board and committee members. With respect to **Section 19(2) of the impugned Act**, they submitted that to the extent that subsection (6) of the said Section provides punishment for failure to register with the Fund, subsection (2) amounts to a duplication and can occasion double jeopardy on the Petitioners. Furthermore, the denial of access of service by mere failure to register with the fund violates **Articles 47 and 50 of the Constitution**.
49. The Petitioners submitted that **Section 17(6) (b) of the impugned Act** is unconstitutional as it violates their members' right to a fair trial guaranteed under **Article 50(2) (b)** which includes the right to be presumed innocent until the contrary is proved and that the Court ought to so declare. The omission of the word 'willfully' in subsection 6(b) creates an offence on its own which is a strict liability offence presupposes that the *mens rea* for the second limb of the offence in that subsection need not be proved and that the paragraph. In the case of **State v White 97 Wn. 2d 92**, the court held that a statute authorizing stoppage of an act of an individual must include standards by which the lawfulness of the stopping must be gauged.
50. With respect to **Section 20 of the NSSF Act, 2013** the petitioner submitted that the provision makes it mandatory for an employee and employer to make contribution into the fund as opposed to piece rate worker, casual worker, fixed term contract workers and the rest, is discriminatory. In this respect, the Petitioners relied on the case of **Law Society of Kenya v the Attorney General & Another [2009] eKLR** where the LSK had challenged the provisions of the Work Injury Benefits Act, 2007 and the court declared the said legislation void because the liability sought to be imposed upon the employers in the statute was



by taking of property without due process of law. the Respondent's attempt to provide for items otherwise omitted in the Act such as casual employees under **Rule 19 of National social security Fund (Members Contribution) Regulations 2015** and **Rule 20** on gratuity pay of the same legal notice, are of no legal effect since the same were not captured under the Act.

51. The Petitioners submitted that **Section 21 of the NSSF Act, 2013** is in violation of **Articles 27, 30, 40, 46 and 47 of the Constitution** since it presupposes that the employer makes payment to tier II contribution and as much as the same has an opting out plan, the same is drafted in a way to require the employer to make contribution or register then opt out. To clarify on the need to interpret the intention of the statute, the Petitioners relied on the case of **Commission of Administration of Justice v Attorney General and another [2013] eKLR** and **Kenya Bus Limited v Minister for Transport [2012] eKLR**.
52. With respect to **Section 35(4) of the impugned Act**, the petitioner submitted that the provision violates **Article 50** in so far as the same vests powers on the NSSF Board to deny a person who has been validly nominated by a beneficiary, the right to benefit from the fund and that this is arbitrary and against the spirit of **Article 27 of the Constitution**. They further contended that giving the Board sole discretion to make arrangement with credit institutions on loans and advances to staff, while ignoring the provision of **Articles 201 and 227(1) of the Constitution** has the danger of allowing the Board to act inconsistently with the rules of fairness.
53. The Petitioners submitted that **Sections 18(2) and 72 of the NSSF Act, 2013** are in breach of **Articles 10, 201 and 226 of the Constitution** as they provide for settling of all liabilities acquired in the repealed NSSF Act within a period of 5 years without an explanation on how an insolvent fund will be able to pay its debt when it is running at a deficit. The lack of clarity on the issue herein is in violation of the beneficiaries' rights under **Article 10, 201 and 35(3) of the Constitution**.
54. The Petitioners submitted that **Sections 49(2) and 71 of the NSSF Act** as read with **section 38 of the Retirement Benefits Act (RBA)** violate the Petitioners' and all private operators, scheme rights under **Article 27(1), 30 and 46(1)(a) of**

the **Constitution** by restricting the investment of pension scheme money to government securities and infrastructure bonds and essentially discriminating against the private financial market operators, and further denying scheme members the opportunity to choose pension funds of their choice.

55. The Petitioners filed Supplementary Submissions wherein they further submitted that the NSSF Board was obligated other than in one newspaper, to develop more proactive alternative ways to reach the public including chiefs holding barazas; conducting road shows; regional workshops at county level; and having radio programs on the subject matter, as opposed to assuming that its Board members FKE and COTU(K) would objectively perform those assignments when most of their members do not even access newspapers. In the case of **Kenya Human Rights Commission General v The Attorney General [2018] eKLR**, the Court asserted that once a petitioner attacks the legislative process on grounds that the law-making process did not meet the constitutional standard of public participation, the onus is on a respondent to demonstrate there was public participation that meets the constitutional standards.

56. The NSSF Act, 2013 is unconstitutional for not having involved the Senate before its passage as held in the case of **Council of Governors and 47 Others v The Honourable Attorney General [2020] eKLR** where the Supreme Court of Kenya considered in detail the effect of failure by Parliament to adhere to the provisions of Article 205 of the Constitution including the Commission on Revenue Allocation making recommendations to the National Assembly and the Senate on any financial matters concerning County Governments, before voting on the Bill. In hindsight, the Petitioners submitted that the passage of the 2013 NSSF Act by Parliament was riddled with fundamental constitutional commissions and omissions including failure to conduct public participation in violation of **Articles 110 and 205 of the Constitution**.

### Respondents' Submissions

57. The AG submitted that a law once made is presumed to be constitutional and legal unless otherwise proven and that the burden of proving otherwise is on the



Petitioners. With regards to **section 13 of the Act**, the AG submitted that the Court should apply the purposive interpretation of statute and not use the literal meaning as reiterated in the case of **Republic v Public Procurement Administrative Review Board & another ex parte Selex Sistemi Integrated Nairobi HCMA No. 1260 of 2007 (2008) KLR 728**.

58. **Section 18(4) of the Act** does not subject either the employer or the employee to servitude merely because both the employee and the employer have to be registered and the Petitioners have essentially failed to prove that the section is unconstitutional. The Petitioners have not demonstrated how **Section 19(2) of the Act** is discriminative or otherwise unconstitutional and further, how **Section 20(2) of the Act** infringed the affected employees' right to information as alleged.
59. In the case of **Anarita Karimi Njeru v the Republic (No.1) 1979 KLR 154**, at **page 1275**, the court stated that a person seeking redress from the High Court on a matter involving reference to the constitution, the person should set out with a reasonable degree of precision, what he complains of, the provisions said to have been infringed, and the manner in which they are alleged to be infringed. In the case of **Daniel Chacha Muriri v Attorney General [2012] eKLR**, the court held that a petitioner is not allowed to throw the Constitution at the court for it to decipher the provisions that have been violated and instead, has the duty to specify and demonstrate with particularity the constitutional rights violated.
60. The AG submitted that nothing in **Section 49(2) of the Act** as read with **Sections 71 and 38 of the RBA Act** offends the provisions of Article 27(1), 30 and 46(1) of the Constitution as alleged because **Section 50(3) of the NSSF Act, 2013** makes sufficient provisions with regards to expenses. The Petitioners should read the Act as a whole and appreciate the overall objective of the Act as held in **Samuel G Momanyi v Attorney General and another [2012] eKLR**.
61. **Section 21 of the Act** serves to expand the availability of more pension schemes and that the approvals needed by private pension schemes is for the schemes to operate as tier II contributory scheme which they do not have presently.



62. The AG submitted that the process leading to the enactment of the impugned Act involved full public participation as well as sensitization as envisaged under **Article 10(2) (a) of the Constitution**. The Petitioners failed to show how the public did not participate either directly or indirectly in the enactment of the NSSF Act, 2013 and blatantly disregarded and or failed or neglected to appreciate the representative sovereignty aspect of the National Assembly. In the case of **Moses Munyedo & 908 Others v The Attorney General and Minister for Agriculture, Petition No. 16 of 2013** the court held that there is a presumption of public participation where legislation has been enacted in accordance with the National Assembly standing orders.

63. The AG further submitted that the impugned Act is constitutional and does not have financial implications on County Governments and that it consequently did not require input of the Senate in its enactment. as per the definition of "Bill" in **Article 110(1) of the Constitution**, the impugned Act falls short of a bill concerning County Governments and does not affect the finances of the county government as alleged. It only creates a social security fund and does not in any way reallocate county finances or its mode of governance and since similarly falls short of a special bill, during its enactment process and consequently not requiring the input of the Senate and only required the input of the National Assembly.

#### **Submissions by RBA**

64. The Retired Benefit Authority (RBA) submitted that the impugned NSSF Act, 2013 does not address the government's obligation under **Article 43 of the Constitution** as it only creates a pension scheme whose membership and contributions is exclusive and limited to persons in employment. The benefits of NSSF contributions thus belong solely to the contributors and the Fund cannot be used to provide social security benefits to the many destitute Kenyans entitled to provision of social security by virtue of **Article 43(1) (e) of the Constitution**.

65. The RBA submitted in partial support of the Petitions that some sections of the NSSF Act, 2013 should be declared unconstitutional for violating employees' freedom of choice. It argued that **Sections 18, 19 and 20 of the impugned**

**NSSF Act** are unconstitutional to the extent that they are mandatory and require employees with superior pension schemes, with current contributions exceeding the statutory 12%, to register with NSSF and remit their contributions to the Fund. The impugned Act ought to have made the contributions by employers under superior schemes optional and created an "Automatic opt out" option because it is impractical and a huge financial burden for both the employer and the employee to register under the New Fund and still maintain their previous pension schemes. The existing pension schemes will be forced to close shop due to cost consideration to the detriment of millions of Kenyans who are currently covered under those schemes.

66. RBA submitted that the general structure of the Fund therefore fails to accord to the Act's objective by creating a pension fund that is analogous to a private scheme exclusively for the Fund's contributors. A social security fund as operated in developed countries allow for opt-outs.

67. The RBA further submitted that the effectual result of operationalization of the NSSF Act, 2013 is to render the functioning of Retirement Benefits Authority nugatory contrary to **Article 46 of the Constitution** and that Sections 18, 19 and 20 of the NSSF Act, 2013 should be amended to provide for an "*Automatic Opt Out*" for those employees with alternative pension schemes with superior benefits.

#### **Interested Parties' Submissions**

68. The County Pensioners Association submitted that the impugned Act is unconstitutional to the extent that its overall object and/or effect is inconsistent with the right to social security as protected under **Articles 21 and 43 of the Constitution**; and it discriminates against LAPTRUST and other DB Schemes without any legal or legitimate justification contrary to **Article 27(1) of the Constitution**. The overarching goal of social protection as envisioned under Article 43 is to ensure that all Kenyans live in dignity and exploit their human capabilities for their own social and economic development. For the right to social security to be realized, the social security system must be financially viable and sustainable and provide adequate benefits in amount and duration of payment.



69. The impugned Act does the opposite by compelling employees and employers to abandon their current pension and social security schemes to join the NSSF Fund whose terms are inferior as compared to the terms enjoyed in the other pension schemes. In the end, the operationalization of the Fund will lead to dissolution of current pension and social security schemes such as LAPTRUST, which provided for 12% contribution from employee and 15% contribution from employer to the benefit of the employee, who is the subject of the social protection envisioned in the Act as opposed to the 6% proposed by the NSSF Act, 2013.

70. The County Pensioners Association also submitted that contrary to public interest of having liberalization and competitive pension schemes, the impugned Act grants NSSF monopoly in provision of social security services in the entire country. Its implementation will therefore kill and stifle other pension and social security schemes across the country, thereby creating macroeconomic instability and social insecurity and further deny LAPTRUST and other pension schemes the cash flow it requires to finance actuarial deficits and make adequate pension payable to the retirees.

71. The County Pensioners Association pray that the orders sought in the consolidated petitions be granted and specifically prayed for declaration that the NSSF Act, 2013 is inconsistent and incompatible with the Constitution of Kenya, 2010 and, accordingly, null and void.

#### **Issue No. 1**

**Whether there was sufficient public participation as envisaged under Article 10 of the Constitution of Kenya 2010 prior to the enactment of the NSSF Act No. 45 of 2013.**

72. The petitioners allege that National assembly violated the provisions of Article 10(1) and 118 (1) (b) of the constitution in that it did not conduct any and or sufficient public participation to create awareness and consensus with the members of the public prior to enactment of the impugned NSSF Act No. 45 of 2013 and on that ground the Act be declared null and void.

73. The respondent opposes this contention alleging that there was sufficient public participation in the process of the enactment of the Act and in any event the people of Kenya have delegated legislative power on their elected members of the Assembly therefore the court lacks jurisdiction to invalidate an Act duly enacted by the national assembly.

74. Article (10) of the Constitution of Kenya 2010 provides:

***The national values and principles of governance in this Article bind all State organs, state officers, public officers and all persons whenever any of them-***

***(a) applies or interprets this Constitution;***

***(b) enacts, applies or interprets any law; or***

***(c) makes or implements public policy decisions.***

75. The national values set out under Article 10 (2) include democracy and participation of the people; equity; social justice; non-discrimination, good governance; transparency and accountability *inter-alia*.

76. Article 94 (1) of the Constitution on the other hand provides:

***94 (1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament***

***(2) Parliament manifests the diversity of the nation, represents the will of the people and exercises their sovereignty.***

***(3) .....***

***(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.***

77. Article 118 on the other hand provides:

***118(1) Parliament shall-***

***(a) ...***



***(b) facilitate public participation and the legislative and involvement in other business of Parliament and its committees.***

78. In the case of **Kenya Human Rights Commission General v The Attorney General [2018] eKLR**, the Court asserted that once a petitioner attacks the legislative process on grounds that the law-making process did not meet the constitutional standard of public participation, the onus is on a respondent to demonstrate there was public participation that meets the constitutional standards.

79. In the present case the respondents in response to the petitioners' allegation that there was no public participation before the bill was enacted attached the following:

- (i) List of attendees in a Stakeholders Forum held at KICC on 8<sup>th</sup> March 2012.
- (ii) List of attendees of COTU Stakeholders meeting held on 21<sup>st</sup> August 2012 at Panafric Hotel, Nairobi.
- (iii) List of attendees of FKE Stakeholders meeting held on 23<sup>rd</sup> August 2022 at Serena Hotel, Nairobi.
- (iv) List of attendees at a retreat for review of the Bill held at Great Rift Valley Lodge, Naivasha on 15<sup>th</sup> to 17<sup>th</sup> July 2012.

80. The respondents in the comprehensive response by Mr. Langat in the replying affidavit state over 4, 500 members of FKE and COTU among other attendees participated in awareness fora on the Bill organized by the respondents to sensitize and involve the members of the public in the legislative process of the Bill and that the above is evidence that all relevant stakeholders participated in comprehensive discussion of the bill before and during the process of its enactment by the national assembly. They have also attached copies of material presented to the participants in the aforesaid stakeholder fora. The respondents state that the fact that some stakeholders do not agree and or fully agree with certain provisions of the Act is not by itself evidence of lack of participation in the enactment process. That in any event the national assembly does not have to

agree with all representations by diverse stakeholders and that the law once enacted is a manifestation of the will of the people and carries with it a presumption of legality once enacted by the national assembly in terms of the powers delegated to the organ by the people. The respondents rely on the case of **Ndyanabo v Attorney General [2001] EA 495** where the court stated that there is a general presumption that every Act is constitutional and the burden of proof thus lies on any person who alleges unconstitutionality. That the petitioners have not discharged that onus. They cited the case of **Pearlberg v varty [1972] 1WLR 534** where it was held:

*I would only emphasize that one should not start by assuming that what parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown ...*

81. The High Court of Kenya in **Robert Gakuru and others v. The Governor Kiambu County and others [2014] eKLR** relying on the **South African Case of Doctors for Life International** held that there was no sufficient public participation by the County Assembly before it enacted the Impugned Finance Act. The Court Stated:

*In Support of their position that there was public participation the respondents have exhibited an advertisement in the Daily Nation of 17<sup>th</sup> August, 2013. However, a careful perusal of the said advert reveals that apart from the mention of the Finance Bill in the Title of the advert and the mention of the Bill in passing, there was no attempt to exhort the public to participate in the process of the enactment of Bill. In my view there was no "facilitation". That the financial Bill was an important Bill cannot be doubted. Its effect on the people of Kiambu in terms of ordering their way of life was bound to be far reaching. It was therefore crucial that the information going out not to have admitted any ambiguity. The other document relied upon were lists of certain persons. However, the said lists only referred to county Integrated Development Plan and not the Finance Bill. There is no evidence at all that at the said meetings the participants were invited to comment on the said Bill let alone that the contents of the*



same were availed to them.

82. The court further stated:

*The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. ... To "facilitate" means to "make easy or easier", "promote" or "help forward". .... Measures need to be taken to facilitate public participation in the law-making process. To achieve this, it may be desirable to provide public education that builds capacity for such participation. Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens ...*

83. In respect of the present matter, the petitioners who participated in the meetings adduced by the respondents did not dispute that they attended the said meetings and that the subject of discussion was the impugned NSSF Bill. The petitioners clearly disagree with many provisions of the Act but did not expressly state that they did not participate in the process of its enactment.

84. The Petitioners bear the initial burden of prove that they were not involved in any and or in any reasonable public participation process during the enactment of the Bill. It is only then that the evidential burden of rebuttal shifts to the respondents to demonstrate that indeed there was reasonable public participation in the enactment process of the Bill.

85. In **Matatiele Municipality and others v President of the Republic of South Africa and others (2) (CCT73/05A) [2006] ZACC12** the court held:

*—the nature of the legislation and its effect on the provinces undoubtedly plays a role in determining the degree of facilitation that is reasonable and the mechanisms that are most appropriate to achieve public involvement.*

86. There is no evidence adduced by the Petitioners either the nature or the method used by the 1<sup>st</sup> respondent for public participation were wanting. They allege that the involvement was not sufficient in that it did not cover all the sectors of the public affected by the New Act especially the informal sectors since FKE and

COTU represent formal sectors.

87. The Court notes that the petitioners in this matter represent the formal sectors that evidently were involved in the legislative process. The informal sectors they complain on their behalf have not placed their objections to the process of enactment of the Bill.
88. It is the considered finding by the court that the petitioners did not discharge their onus of proof for the burden of rebuttal to shift to the respondents. Therefore, the presumption of legality of the NSSF Act No. 45 of 2013 applies in the present case and the court finds that indeed there was reasonable public participation in the enactment of the Bill.

### **Issue No.2**

**Whether the NSSF Act No. 45 of 2013 has implications on County Finances and therefore the Bill ought to have been tabled before the Senate prior to its enactment in terms of Articles 205(1) and 110 of the Constitution**

89. The petitioners have urged the case that the New Act has provisions dealing with financial matters of the county governments within the context of Article 110 as read with Article 205 (1) of the constitution and therefore the national assembly was bound to send the Bill for consideration and passing by the senate after it was passed by the national assembly and before it was assented to by the President. That failure by the assembly to follow this process makes the New Act void *ab initio* and the court should declare it so.
90. That further the Bill ought to have been considered by the commission on Revenue allocation upon its publication and the commission to make recommendations to the national assembly which did not happen in respect of the New Act. That this is an additional reason for the court to invalidate the New Act.
91. Article 110 (1) reads:

***110. (1) In this Constitution, " a Bill concerning county governments" means-***



*(a) a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;*

*(b) a Bill referred to in Chapter Twelve affecting the finances of county governments.*

92. The petitioners have given two reasons why this is a Bill affected by article 110 (1) of the constitution to wit that under section 20 of the New Act it defines an "Employer" as **"a person, public body, firm, corporation, or company who or which has entered into a contract of service and includes Government"**. Secondly petition no. 35 of 2014 is filed by the Union representing employees of county governments who are equally affected by the impugned legislation. It is their case that the New Act enjoins county governments to make financial contributions towards the fund at the rate of 6% of each employee's salary in addition to any contribution made by the employee. It is not in dispute however that the New Act has not specifically referred to "county government". It is the submission by the petitioners that county governments can only pay their contributions towards NSSF by charging the County Revenue Fund established under Article 207 of the Constitution, thus making the payment of such contributions by a county government a financial matter. Furthermore, the petitioners have submitted that since county governments (just like the previously existing local authorities) have pension and retirement schemes or are in the process of establishing some, the various provisions of NSSF Act, 2013 such as Section 20 requiring mandatory contributions to the Fund directly affects the county governments in that money previously being remitted to the schemes that have been existing will be curtailed and have some of it go to the mandatory Fund. Section 21(2) also forces county governments as employers to contribute to the fund pending approval of Tier II schemes.

93. That penalty for non-payment and or late payment under section 27(1) of the New Act will necessarily be paid from the fund where county governments are concerned. In any event salary for all staff of the county governments comes from the county governments budgets which must take into account the NSSF contributions under the New Act.

94. We were referred to the Supreme Court Advisory Opinion in the matter of **The Speaker of the Senate and the Senate of the Republic of Kenya and The Hon. Attorney General. The Speaker of the National Assembly and others- Supreme Court Advisory Opinion No.2 of 2013** where the court opined as follows:

*The extent of the legislative role of the senate can only be fully appreciated if the meaning of the phrase concerning counties” is examined. Article 110 of the constitution defined bills concerning counties as being bills which contain provisions that affect the functions and powers of the county governments as set out in the fourth Schedule; and bills which relate to the election of members of the county assembly or county executive; and bills referred to in Chapter Twelve as affecting finances of the county governments. This is a very broad definition which creates room for the senate to participate in passing of bills in the exclusive functional areas of the national government, for as long as it can be shown that such bills have provisions affecting the functional areas of the county governments.*

95. The court further stated at paragraph 113 and 114 as follows:

*[113] This court in re the matter of the interim Independent Electoral Commission (2011), had that there are certain functions shared between the national and county governments, that give rise to a concurrent jurisdiction between the two levels; and finance is such function.*

*39]: “ Many offices established by the constitution are shared by the two levels of government, as is clear from the Fourth schedule ... We have taken note too that the senate (which brings together county interest at the national level) and the National Assembly (a typical organ of national government) deal expressly with matters affecting county government; and that certain crucial governance functions at both the national and county level – such as finance, budget and planning, public service, land ownership and management, elections, administration of justice – dovetail into each other and operate in unity.”*



96. From the above binding decision of the Supreme Court, it is clear that the NSSF Act No. 45 of 2013 deals with matters to which the senate and the national assembly have concurrent jurisdiction and specifically matters finance, budget and planning and public service in that it imposes mandatory and optional pension schemes for public officers in the national government and county governments even though the Act avoids to mention county governments expressly. Consequently, failure by the national assembly to involve the senate in the process of enacting the bill was fatal to the New Act. This court finds so without much hesitation and declares that the NSSF Act No. 45 of 2013 is null and void *abinitio* for failure to involve the senate in its enactment

### **Issue No.3**

**Whether the NSSF Act No. 45 of 2013 violates the Constitutional Rights of the Petitioners' members as set out in the consolidated petition.**

97. The petitioners have challenged specific provisions of the NSSF Act, 2013 as being unconstitutional particularly Sections 13, 17(6)(b), 18(2), 19(2), 20, 21, 27, 35(4) 49(2) and 71. These shall be addressed on the merits and not in the given order.

98. In respect of this issue, Article 10, 20, 191(5) and 259 of the Constitution provides a guide to statutory interpretation under our constitutional order. The provisions thereof create an obligation to interpret all legislation in a manner that promotes "the spirit, purport and objects of the Bill of Rights". This means that all statutes, including the NSSF Act, 2013 must be interpreted through the prism of the Bill of Rights.

99. When the constitutionality of legislation is in question, a court must examine the objects and purport of that legislation and read the provisions of the legislation, as far as is possible, in conformity with the Constitution. A judicial officer must prefer an interpretation of legislation that falls within constitutional bounds over one that does not, provided that such interpretation can be reasonably ascribed to the legislation within reasonable limits in the application of this principle. In this

regard, the Court of Appeal in the case of **Speaker of the National Assembly of the Republic of Kenya & another v Senate of the Republic of Kenya & 12 others (Civil Appeal E084 of 2021) [2021] KECA 282 (KLR) (19 November 2021) (Judgment)** held that;

*A holistic and purposive interpretation of the Constitution that calls for the investigation of the historical, economic, social, cultural and political background of the provision in question has been consistently affirmed by the courts. The Supreme Court in this respect explained the approach in constitutional interpretation in Council of Governors v Attorney General & 7 others [2019] eKLR as follows:*

*"[42]Under article 2(1), the Constitution is the Supreme law of the land. Article 259 of the Constitution then gives the approach to be adopted in interpreting the Constitution, basically in a manner that promotes its purposes, values and principles. Suffice it to say that in interpreting the Constitution, the starting point is always to look at article 259 for it provides the matrix, or guiding principles on how it is to be interpreted and then article 260 where specific words and phrases are interpreted. It is imperative to note that while article 259 deals with construing of the Constitution and outlines the principles that underpin that act; article 260 deals with interpretation, that is, it is explicit in assigning meaning to the words and phrases it addresses. Hence the opening words in that article are: "In this Constitution, unless the context requires otherwise-".*

*[43]Consequently, in search of the meaning assigned to some words and phrases as used in the Constitution, one needs to consult article 260 to find out if that particular term or phrase has already been defined. It is only where the same has not been defined that the Court will embark on seeking a meaning by employing the various principles of constitutional interpretation....."*

100. In the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, [2014] eKLR**, the Supreme Court of Kenya held that the purposive



interpretation principle avoids the shortcomings of the literal approach, namely absurd interpretations or those that appear to run counter to the purpose and functioning of the legislative regime. a purposive interpretation should be given to statutes so as to reveal their true intention.

101. Article 259 of the Constitution therefore obligates courts in interpreting the Constitution to promote its purposes, values and principles, advance the rule of law, human rights and fundamental freedoms in the Bill of Rights, permit the development of the law and contribute to good governance. In the case of **Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties) [2020] eKLR** the court in addressing the interpretation of a statute vis-à-vis the constitution held that;

*It is the duty of the court to promote the spirit, purport and objects of the Constitution, and to adopt a generous construction instead of a merely textual or legalistic one in order to give effect to the intended constitutional principles. It may also be necessary for the court to identify the mischief sought to be remedied by the specific constitutional provisions, and to contextualize the provisions within the Constitutional architecture as a whole, including its underlying values in Article 10. We are also required by the provisions of Article 159 (2) (e) to promote and protect the purposes and principles of the Constitution..*

102. However, where a constitutional issue arise which, when weighed against the impugned statute be delineable as to whether the law or conduct is inconsistent with the Constitution, the interpretation of such statute must uphold the constitutional context. This includes issues concerning the status, powers and functions of an organ of State; the interpretation, application and upholding of the Constitution. A response must also obtain as to whether the interpretation of any legislation promotes the spirit, purport and object of the Bill of Rights as held in the case of **Magare Gikenyi J. Benjamin v Salaries and Remuneration Commission (SRC) & 146 others; Senate, National Assembly (NA) & 9 others (Interested Parties) [2022] eKLR.**

103. The notion that a statute is unconstitutional or its provisions therefore must be justified through a constitutional lens. The effect of a declaration that a statute is unconstitutional is severe as such a declaration renders the statute inapplicable as held in **Norton v. Shelby County 7 (1886) 118 U. S. 425, 6 S. Ct. 1121, 30 L. Ed. 178.** that;

*An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed*

104. In the case of **Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR** the court held that when a law is found to be inconsistent with the Constitution, it ceases to have any legal consequences. It cannot be revived in any other way. It is inapplicable.

105. in response to the petition, the respondents have relied on the provisions of Article 43 of the Constitution and the state duty to provide social security to its citizens. That the Constitution creates a duty and obligation commensurate to international law and Conventions to anchor social security in statute to ensure every citizen enjoys the right. Therefore, the NSSF Act, 2013 is constitutional and the petitions should be dismissed.

106. Indeed social security is upheld in many jurisdictions as a fundamental human right. It is one of the most novel way of taking care of employees engaged in production as part of the capital outlined under **General Comment No.19** to the provisions of Article 9 of the **International Covenant on Economic, Social and Cultural Rights** which provides that State Parties to the Covenant should recognize the right of everyone to social security, including social insurance. That the right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights.

107. In this regard, under Article 43 of the Constitution, there is a duty on the state to avail resources towards the enjoyment of the right to social security to the citizens. These rights are secured under Article 43(5) of the Constitution;



***(5) In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—***

***(a) it is the responsibility of the State to show that the resources are not available;***

***(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and***

***(c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.***

108. The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Constitutional and Covenant rights under the International Covenant on Economic, Social and Cultural Rights. The duty is on the state to avail resources, allocate resources and remove barriers which may interfere with such allocation of resources since this is not permissible on the basis that the state would have reached a different conclusion outlined under Article 43(5)(c) of the Constitution.

109. The resources to be availed and allocated should emanate from the State pursuant to Article 45 of the Constitution. For the Fund to remove such duty from the state to the registered members is an overreach on its statutory mandate.

### **Specific Provisions**

#### **a) Section 20(2)**

110. The petition is that Section 20(2) violates **Article 35(1) (2) & (3)** of the

Constitution as it only alludes to employees paid on monthly basis and leaves out a huge group such as casual labourers, piece rate workers, and journey workers among others while Operators of exiting pension schemes are not exempted from the application of Section 21 of the impugned Act thus violating their consumer rights under the Constitution.

111. Article 35 of the Constitution secures the right to access to information held by another person and required for the exercise or protection of any right or fundamental freedom. The rights under this Article are further actualized under the Access to Information Act, 2016 and the Guidelines thereof.

112. Section 20(2) of the NSSF Act, 2013 requires that;

***(2) Notwithstanding the provisions of subsection (1), the contributions in the first five years shall be deducted in accordance with the Third Schedule.***

113. With regard to access to information, every registered member is required to open and have an individual account and allowed access to information therefrom. Such an individual account is to be credited all contributions made to the Pension Fund by and in respect of each member of the Pension Fund. Information available under such an individual account is pursuant to Section 24(2) of the NSSF Act, 2013 that;

***(2) The individual Pension Fund Credit shall, in respect of each member of the Pension Fund, at any particular date, show a full break down of—***

***(a) Tier I Fund Credit showing the employer and member contributions separately;***

***(b) where applicable Tier II Fund Credit showing employer and member contributions separately;***

***(c) transfer payments into the account, if any; and***

***(d) interest credited into the account.***

114. And further, Section 24(7) of the Act grants access rights through electronic and manually from the offices of the Fund;



***(7) Where, the information required cannot be obtained, or a member is incapacitated to access the information electronically, the Fund shall give general notice to members informing them to access the information from the Fund manually at specified offices situate in locations convenient to the members.***

115. On these analyses, we find nothing under **Section 20(2)** which demonstrates how the constitutional right with regard to access to information will be negatively affected under the NSSF Act, 2013.

**b) Sections 19 (2)**

116. The petition is that Section 19(2) of the NSSF Act, 2013 predicates access to public services upon membership of NSSF which violates Articles 21(1), 47(1) and 232(1) of the Constitution on the right to equal protection and benefit of the law, on fair administrative action and on the values and principles of the public service respectively.

117. The respondents' case in this regard is that Section 19 of the NSSF Act, 2013 provisions is meant to minimise evasion of NSSF contributions.

118. Section 19(2) of the NSSF Act, 2013 has created a link between registration with the Fund and access to other government services. The requirement is that;

***(2) Any person who is registerable as an employer under this section shall produce proof of registration with the scheme as a precondition of dealing with or accessing public services***

119. The NSSF Act, 2013 is predicated on the right to social security and to provide for contributions to and the payment of benefits out of the Fund. For this purposes, employer and employees are required to register with the Fund as well as voluntary members.

120. The preconditions of the public services to be restricted where there is no registration are not defined.

121. Provision and access to public services is a state function which should only be limited within the parameters of the constitution and the law. It follows that for the precondition of registration under the Fund so as to allow access to public services to be lawful, the reason given must not only be lawful, but it must meet the Article 24 of the Constitution test in that it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

122. In the case of **Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR** the court held that;

*Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary.*

*... to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.*

*a. The first criterion concerned the importance of the objective of the law. First, the objective, which the measures responsible for a limit on a constitutional right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain protection. It is necessary, at a minimum,*



*that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.[33]*

*b. Secondly, the means chosen for the law must be 'reasonable and demonstrably justified', which involves 'a form of proportionality test' with three components: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'[34]*

123. we would then ask, what end would the Fund achieve if such a precondition is addressed otherwise and in a less restrictive manner?

124. The import of Section 19 of the NSSF Act, 2013 is to ensure registration with the Fund and to effect contributions by among other persons, voluntary members. Such objective, though novel, is inherently addressed by the requirement that all person described under the Act as employers and employees should register with the Fund and voluntary contributors encouraged registering as members. There is therefore no legitimate purpose to be achieved by creating a precondition for registration linked to undefined *dealing with or access to public services*. The Fund must market its objectives in an open and democratic society and adopt measures carefully designed to achieve such objectives. Such must be rationally connected to the objective to obtain as many members as possible from the registerable public.

125. Our reading of the entire Section 19 and indeed the entire Act does not find the justification to given precondition requirement which predicates access to public services upon membership of the Fund. Such provision is overreaching

without good cause and creates an unnecessary limitation that cannot be justified in an open and democratic society secured under Article 20(4) (a) and which then in essence violates Articles 21(1) which creates a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights,

126. Further, Article 47(1) of the Constitution on the right to fair administrative action and 232(1) on the right to equal protection and benefit of the law, fair administrative action and on the values and principles of the public service respectively would be an impediment were the provisions of Section 19(2) of the NSSF Act, 2013 to be operationalized.

127. We find and hold that Section 19(2) of the NSSF Act, 2013 is unconstitutional to the extent of its preconditions and restrictions as a precondition of dealing with or accessing public services undefined under the Act. The precondition portends no legitimate purpose.

**c) Section 49(2) and 71**

128. The petition is that **Sections 49(2) and 71 of the NSSF Act** as read with **section 38 of the Retirement Benefits Act (RBA)** violate the Petitioners' rights and all private operators, scheme rights under **Article 27(1), 30 and 46(1)(a) of the Constitution** by restricting the investment of pension scheme money to government securities and infrastructure bonds and essentially discriminating against the private financial market operators, and further denying scheme members the opportunity to choose pension funds of their choice.

129. In the finance, administration and management of the Fund Section 49(2) of the NSSF Act, 2013 requires that;

***2) The Fund shall invest any of its funds which are not for the time being required to be applied for the purposes of the Fund in accordance with the provisions of the Retirement Benefits Act.***

130. These requirements are in addition to requirements imposed by the Retirement Benefits Act pursuant to Section 71 of the NSSF Act, 2013. On the



other hand Section 38 of the RBA Act creates restrictions on use of scheme funds. Section 38(1) provides that;

**(1) No scheme funds shall be—**

**(a) used to make direct or indirect loans to any person; or**

**(b) invested contrary to any guidelines prescribed for that purpose; or**

**(c) invested with a bank, non-banking financial institution, insurance company, building society or other similar institution with a view to securing loans, at a preferential rate of interest or for any other consideration to the sponsor, trustees, members or the manager of such scheme,**

**or in the case of scheme funds which comprise any statutory contributions, be placed in any investment other than Government securities or infrastructure bonds issued by public institutions**

131. We find these provisions as complimentary and not in conflict. Funds which are not for the time being required to be applied for the purposes of the Fund should be invested in movement securities or infrastructure bonds issued by public institution as these are public funds for the benefits of the members.

**d) Section 18(2) and 72**

132. The petitioners also challenge the provisions of Section 18 (2) and 72 of the NSSF Act, 2013 on the grounds that the provisions thereof are in violation of Articles 10, 201 and 226 of the Constitution. The petition is that on the one hand the Act provides that the Fund shall retain and continue to operate the Old Provident Fund previously operated under the now repealed National Social Security Fund Act exclusively for purposes specified under the Second Schedule and that Section 72 of the impugned Act repeals the old Act save for Sections 9, 14, 16 and 19 as set out in Clause 2(f) of the Second Schedule. That to repeal

the old Act before resolving the issue of liabilities and assets under the old Provident Fund infringes on the constitutional rights of the beneficiaries.

133. Our reading of the provisions under Section 18 of the NSSF Act, 2013 reveal a solution to the matter under subsection (3) and which resolve the issue of assets and liabilities arising out of the repealed NSSF Act. Section 18(3) directs that;

***(3) All members of the Old Provident Fund other than members making voluntary contributions to the Old Provident Fund shall, on the commencement date, become members of the Pension Fund and the Managing Trustee shall cause a new account to be opened in accordance with section 24 for each member into which they will start making contributions as provided under this Act.***

134. The individual member account known as the Pension Fund Credit to which shall be credited all contributions made to the Pension Fund by and in respect of each member of the Pension Fund. The account should have a breakdown of the employer and member contributions outlined separately.

135. Further to the findings above, Section 51 of the NSSF Act, 2013 directs that keeping of proper books of accounts in relation to the Old Provident Fund and Pension Fund and all undertakings, investment activities and properties and to render annual accounts.

***51. Accounts and Audit (1) The Board shall cause to be kept all proper books of account and records in relation to the Old Provident Fund, the Provident Fund and Pension Fund and of all the undertakings, the Fund's investment activities and property of the Fund***

136. These provisions well insulate any member under the Old Provident Fund, the Provident Fund and Pension Fund.

**e) Section 17**

137. With regard to the provisions of Section 17 of the NSSF Act, 2013 the petition is that the Act criminalizes any refusal and or neglect to answer a question or to furnish any information or documents when required to do so,



without giving limits such as criminal intent of the person or willful disobedience contrary to Article 50 of the Constitution. However, our reading of the section is that the appointed Compliance Officer is bound by the rules of natural justice in the execution of such mandate and is required to only sanction conduct that is found to be refusal and or neglect to furnish information by willful delays or obstruction in the exercise of any power under this Section.

**f) Section 13**

138. With regard to the remuneration to be paid to the Board and committee members, Under Section 13 of the NSSF Act, 2013 the remuneration, fees and allowances of Board Members and Committee members thereof is subject to the approval of the CS.

139. The SRC mandate is codified under Article 230(4) (a) of the Constitution read together with Section 11 of the Salaries and Remuneration Commission Act. Under Section 11 of the SRC Act, the SRC is conferred with additional functions to those set out under Article 230(4) of the Constitution. These are;

***(a) inquire into and advise on the salaries and remuneration to be paid out of public funds;***

***(b) keep under review all matters relating to the salaries and remuneration of public officers;***

***(c) advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector;***

***(d) conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices;***

***(e) determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;***

***(f) make recommendations on matters relating to the salary and remuneration of a particular State or public officer;***

(g) make recommendations on the review of pensions payable to holders of public offices; and

(h) perform such other functions as may be provided for by the Constitution or any other written law.

140. The SRC is the independent constitutional commission mandated to set and regularly review the remuneration and benefits of all State officers and to advise the national and county governments on the remuneration and benefits of all other public officers. It is to set and regularly review the remuneration and benefits of all State Officers. This position has received judicial backing in various court decisions including **Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others**. The mandate to set and determine remuneration including allowances payable out of public funds to state officers, public officers and holders of public officer, is a function constitutionally vested in the SRC by Article 230 (4) (a) and the SRC Act. SRC is, hence; expected to discharge its mandate in setting and reviewing the remuneration and benefits drawn from public funds and to advise the national and county Governments on the remuneration and benefits of public officers by strictly taking into account the principles in Article 230(5) of the Constitution and as contained in the SRC Act.

141. In the case of **Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission [2014] eKLR** the court held that state corporations are creatures of the national government and its officers are so regulated. Any funds drawn out of such entities are subject to Public Finance Management Act as such are public funds. The Court gave the following emphasis;

*'Public fund' has the meaning assigned to it by the Exchequer and Audit Act (Cap 412 Laws of Kenya). Public money is said therefore to include; revenue, any trust or other moneys held, whether temporarily or otherwise by an officer in his official capacity, either alone or jointly with any other person, whether an officer or not. Given that definition of public funds and given that the Petitioner's members work for institutions, parastatals or*



*corporations that provide a public function, then to my mind they are properly within the public service category and therefore state corporations and their employees fall within the meaning of public office and public officers, and I so find.*

142. The Fund under the NSSF Act, 2013 cannot therefore arrogate such function/mandate to approve the remuneration payable to Board and committee members to the CS under Section 13. Though the sittings of the Board and its committees are regulated under Section 11 and 12 of the NSSF Act, 2013 funds drawn for payment of any remuneration, fees and allowances are drawn from members' contributions to the Fund are regulated under Part VI of the Act and which comprise public funds. For checks and balances, the mandate of the SRC is imperative.

143. We find and hold that Section 13 of the NSSF Act, 2013 is unconstitutional.

**g) Section 27**

144. The petition is that section 27 of the NSSF Act, 2017 is unconstitutional for charging of interest on late payment but there is no provision that such interest should be credited to a member's account. However such notion is incorrect in the context of Section 24(2) (d) and (4) stated in mandatory terms that all interests charged should be credited into the individual member account. A statement therefrom should also reflect the interest credited into the account.

**h) Section 35(4)**

145. The petition is that Section 35(4) of the NSSF Act, 2013 is unconstitutional since it gives the Board absolute power to decline to pay or vary payment to a nominated beneficiary, which amounts to usurping the role of the courts. Also the petitions contends that giving the Board sole discretion to make arrangement with credit institutions on loans and advances to staff, while ignoring the provision of **Articles 201 and 227(1) of the Constitution** has the danger of allowing the Board to act inconsistently with the rules of fairness.

146. First, the principles governing public finances mandates all state actors to abide the values of openness and accountability, including public participation which have been comprehensively addressed above under issue No.1. These are the principles addressed under Article 201 of the Constitution and Article 227(1) on procurement of public services requires that;

***227. (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.***

147. However, the challenged provisions under Section 35(4) of the NSSF Act, 2013 in there nature are self-enforcing and do not in any manner relate and or linked to Articles 201 or 227(1) of the Constitution. The provisions are that;

***(4) Where a person has been validly nominated under this subsection, the Board may decline to pay or vary the nominated beneficiary and shall furnish in writing its reasons therefor.***

148. A validly nominated beneficiary may be rejected by the Board subsection to being furnished with written reasons thereof. Section 47(3) (a) allow an appeal to the Trustee and further under subsection (3) a member or an aggrieved party is allowed a reference to the Court on any question of law arising in connection with the determination of any question by the Managing Trustee any officer or agent of the Fund or the Tribunal, and for appeals to Court from the decision of the Managing Trustee, any officer or agent of the Fund or the Tribunal on any such question of law.

**i) Section 37(1)**

149. the petition is that Section 37(1) pegs payment of survivors benefits to 36 months' contribution thus denying the survivors' their right to property as the State will appropriate funds contributed by the Petitioners and their members over periods less than 36 months without justification. The provisions are that;

***(1) A survivors' pension shall be paid to the dependants, if the member dies before pensionable age and was contributing to the Pension Fund at the time of his death and not less than thirty six***



*monthly contributions had been made by the member immediately preceding the date of death.*

150. The payment addressed under Section 37(1) arise in the unfortunate demise of the contributing member before the pensionable age and at the time *was contributing to the Pension Fund at the time of his death and not less than thirty six monthly contributions had been made by the member immediately preceding the date of death.*

151. The contention that these provisions peg the payment of benefits to 36 months and hence a denial of the total contributions by the deceased member is not correct. This is more so putting into context the provisions of subsection (2) thereof that;

*2) The survivors' pension payable under subsection (1) shall, in aggregate, be equal in value to the member's Pension Fund Credit except that the Tier I Credit in respect of the deceased member shall be increased by an amount equal to the last Tier I monthly contributions multiplied by the lower of half the number of months of potential employment between the member's date of death and attainment of pensionable age and 90 months.*

152. The benefits payable under Section 37(1) results from the total aggregate equal in value to the member's credit. For members under Tier I, there is an increase by a multiplier of half the number of months of potential employment from the date of death to the envisaged pensionable age and 90 months. Such benefit accrue to the beneficiary without any disadvantage save for the demise of the contributing member.

153. In any event, Section 37(6) of the NSSF Act, 2013 makes sufficient and adequate provisions towards benefits of a survivor's family members that;

*(6) Where a deceased member did not satisfy the qualifying conditions prescribed in subsection (1), his dependants shall be entitled to the payment of a lump sum benefit equal to his Pension Fund Credit.*

154. These provisions we find to be reasonable and justifiable in an open and

democratic society based on human dignity and not prejudicial to the beneficiaries in any manner.

**k) Section 20**

155. In as far as section 20 of the impugned Act makes it mandatory to contribute to the fund, it violates rights of employees and employers' free choice. It especially violates the rights of employees who are members of other pension funds and who are members of Trade Unions with CBAs providing categorically that gratuity is payable and those who are on casual employment, on fixed term contracts and piece rate workers. These are the same submissions that were made by the Retirement Benefits Authority as a regulator that the impugned Act is restrictive and only fends for persons in employment and restricts their freedom of choice for superior Pension scheme to NSSF.
156. For members who are already under exiting contributory schemes, there is no constitutional justification to deny contributors their choice of pension scheme to subscribe to as the NSSF Act, 2013 has done which is contrary to Article 49 of the Constitution. See **CIS v Directors, Crawford International School & 3 others [2020] eKLR**.

**l) Discrimination**

157. A running issue in the challenged provisions of the NSSF Act, 2013 was alleged discrimination on the grounds that the Act is unconstitutional to the extent that they purport to discriminatorily target only employers and employees in the registration, membership and the making of contributions to the 1st Respondent and not the entire Kenyan population as required of a scheme purportedly offering or intended to offer universal social security under Article 43 of the Constitution.
158. The petition is also that the enactment of the NSSF Act, 2013 has merely entrenched discriminative practices by ignoring the underprivileged such as the unemployed and giving exclusive benefit out of the Fund to the State through investment criteria



159. The petitioners have challenged the mandatory nature of registration and contributions to the Fund despite having superior pension schemes and further that the NSSF Act, 2013 does not provide the option for an automatic opt-out of the Fund. That one has to register under the Fund before application under Tier II for an opt-out.

160. In employment and labour relations, any matter relating to discrimination must be addressed within the confines of Article 27 of the Constitution read together with Section 5 of the Employment Act, 2007. Both prohibit discrimination against any person under the listed grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

161. In this regard what is discrimination? Article 1(a) of the **Convention Concerning Discrimination in Respect of Employment and Occupation (1958)** defines discrimination as follows: -

*Any distinction, exclusion or reference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.*

162. The position in law is that differential treatment does not necessarily lead to discrimination as addressed at length in a Multi-Judge bench in **Petition 56, 58 & 59 of 2019 (Consolidated), Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR** that;

*Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of*

*normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.*

163. Article 27 of the Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. In **John Harun Mwau v Independent Electoral and Boundaries Commission & Another** the court held that;

*... it must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others, the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the constitution.*

164. Under Section 26 of the NSSF Act, 2013 the CS Labour is given the mandate to make regulations with regard to voluntary registration of person outside the defined relationships under Section 23 of the Act. Section 26 requires that;

***26. Regulations to provide for voluntary registration***

***The Cabinet Secretary, in consultation with the Board, shall subject to section 23, make regulations to provide, subject to such terms and conditions as may be prescribed therein, for—***

***(a) the voluntary registration of persons who are self-employed; (b) the voluntary registration of any class or description of employees as members of the Fund;***

***(c) the voluntary registration of persons who have retired from employment, including persons referred to in section 29(3);***

***(d) review and adaptation of any provision of this Act for purposes of accommodation of circumstances peculiar to self-employed contributors;***



- (e) the time and manner of payment of self-employed contributions;*
- (f) the representation, in whatever manner or form possible, of an organization representing self-employed persons in the Board;*
- (g) the collection and the recovery or furnishing of details in relation to self-employment contributions; (h) the waiving of interest due on arrears of self-employment contributions;*
- (i) any matter ancillary or incidental to voluntary contributions.*

165. We find, save for the singled out issues, these provisions cover all aspects of contracts of service and contracts for service and inclusive of any party seeking to be registered as a member of the Fund under the NSSF Act hence removing any aspect of the alleged discrimination and the gist of it is aptly captured in the case of Mohammed Abduba Dida v Debate Media Limited & another (supra) that:

*It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.*

#### Issue No.4

**Whether the NSSF Act No. 45 of 2013 is in conflict with the provisions of the Competition Act.**

166. Under Article 10 (1) (b) and (c) of the Constitution, Parliament is obliged to observe national values and principles whenever it makes policy decisions and enacts legislation. These provisions are as follows;

**10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—**

- (a) applies or interprets this Constitution;**
- (b) enacts, applies or interprets any law; or**

**(c) makes or implements public policy decisions.**

167. From the submissions set out herein before, Parliament was bound to take into account the constitutional mandate under the above cited provisions before enactment of the impugned Act.

168. Section 3 of the Competition Act provides for objectives of the Competition Act, which states as follows;

***The object of this Act is to enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Kenya, in order to;-***

***(a) increase efficiency in the production, distribution and supply of goods and services;***

***(b) promote innovation;***

***(c) maximize the efficient allocation of resources;***

***(d) protect consumers;***

***(e) create an environment conducive for investment, both foreign and local;***

***(f) capture national obligations in competition matters with respect to regional integration initiatives;***

***(g) bring national competition law, policy and practice in line with best international practices; and***

***(h) promote the competitiveness of national undertakings in world markets among the objectives above is to protect consumers of service and products.***

169. Among the objectives above is to protect consumers of services and products. Section 4(a) defines "competition" as follows; -

**means competition in a market in Kenya and refers to the process whereby two or more persons—**

**(i) supply or attempt to supply to; or**

**(ii) acquire or attempt to acquire from, the people in that market the same or substitutable goods or services;**

170. In the case of getting into a pension scheme, the impugned Act favors



NSSF over other pension providers as social security providers in the entire country. The implementation of this Act would therefore kill or stifle other pension and social security schemes across the country. It is therefore our finding that the impugned NSSF Act is in conflict with the Competition Authority Act.

#### **Issue No.5**

##### **Who should pay costs?**

171. The final issue to consider is who should bear the costs of the consolidated Petitions. In employment and labour relations disputes and for connected purposes, the award of costs is at the discretion of the Court. As this is a matter which clearly raises public interest concerns, it is our view that each party shall bear its own costs.

#### **Final disposition**

Having considered the evidence, submissions and our determination above, we make the following Orders in relation to these petitions;

- (a) A declaration that the NSSF Act No.45 of 2014 has implications on County Finances and therefore the Bill ought to have been tabled before the Senate prior to its enactment in terms of Articles 205(1) and 110 of the Constitution and to this extent the Act is null and void;**
- (b) A declaration that the NSSF Act No. 45 of 2013 provisions are inconsistent with the provisions of Article 10 (1)(b) and (c) of the Constitution as read with Section 3 of the Competition Act by giving the Fund a monopoly in the provision of pension and social security services in the country and to this extent is unconstitutional, null and void;**

- (c) With regard to Section 13 of the NSSF Act No.45 of 2013 to the extent that it requires the payment of allowances and fees approved by the Cabinet Secretary for Labour, a mandate of the Salaries and Remuneration Commission, the said section is in conflict with Article 230(4) of the Constitution and is therefore null and void;
- (d) Further, Section 19(2) of the NSSF Act No.45 of 2013 requires access to public services upon membership of NSSF, the said subsection is in conflict with Articles 21(1), 47(1) and 232(1) of the Constitution and to that extent unconstitutional, null and void;
- (e) Sections 20 of the NSSF Act No.45 of 2013 which makes it mandatory to register and contribute to the Fund and oblige the Petitioner's members (and other employees who have adequate alternative pension or social security schemes) to join the pension or social security schemes operated by the 1st Respondent violates rights of employees and employers' free choice contrary to Article 49 of the Constitution and is hereby declared null and void;
- (f) An ORDER is hereby issued restraining the 1st and 2nd Respondents from applying the NSSF Act No.45 of 2013 on the Petitioners' members (or any other employees who have adequate alternative pension or social security schemes) unless they opt in;
- (g) An ORDER of injunction is hereby issued prohibiting and restraining the Respondents by themselves, their servants, agents, assigns or any person claiming through them or otherwise from demanding, compelling and or

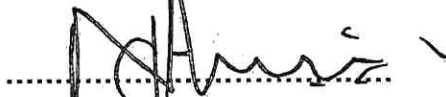


requiring mandatory registration, enrolment or listing of any employer or employee whether registered as a member of any retirement benefit scheme or not to register, enroll or list and contribute their earnings or any part thereof in terms of the NSSF Act No.45 of 2013; and

(h) For reasons outlined above, each party shall bear own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2022.



MATHEWS N. NDUMA

JUDGE



HELLEN WASILWA

JUDGE



MONICA MBARU

JUDGE