



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, & Ouko, SCJJ)*

**PETITION (APPLICATION) NO. E004 OF 2023  
(CONSOLIDATED WITH PETITION NO. E002 OF 2023)**

– BETWEEN –

**KENYA TEA GROWERS ASSOCIATION ..... 1<sup>ST</sup> APPELLANT  
AGRICULTURAL EMPLOYERS ASSOCIATION ..... 2<sup>ND</sup> APPELLANT  
COUNTY PENSIONERS ASSOCIATION ..... 3<sup>RD</sup> APPELLANT**

– AND –

**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  
THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT  
KENYA COUNTY GOVERNMENT  
WORKERS UNION ..... 6<sup>TH</sup> RESPONDENT  
KENYA UNION OF ENTERTAINMENT  
AND MUSIC INDUSTRY EMPLOYEES ..... 7<sup>TH</sup> RESPONDENT  
KENYA BUILDING, CONSTRUCTION,  
TIMBER, FURNITURE & ALLIED**

**TRADES EMPLOYEES UNION ..... 8<sup>TH</sup> RESPONDENT**  
**UNION OF NATIONAL RESEARCH**  
**INSTITUTES STAFF OF KENYA (UNIRISK) ..... 9<sup>TH</sup> RESPONDENT**  
**KENYA GLASS WORKERS UNION ..... 10<sup>TH</sup> RESPONDENT**  
**NKAURAKI EDWIN LESIDAI**  
**& 89 OTHERS ..... 11<sup>TH</sup> RESPONDENT**  
**CENTRAL ORGANISATION OF**  
**TRADE UNIONS (COTU) ..... 12<sup>TH</sup> RESPONDENT**  
**FEDERATION OF KENYA EMPLOYERS (FKE) ..... 13<sup>TH</sup> RESPONDENT**  
**KENYA QUARRY AND**  
**MINE WORKERS UNION ..... 14<sup>TH</sup> RESPONDENT**

–AND–

**LAW SOCIETY OF KENYA ...INTENDED AMICUS CURIAE/APPLICANT**

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*(Being an application for admission of the Law Society of Kenya as an amicus curiae in SC Petition No. E004 of 2023 as consolidated with SC Petition No. E002 of 2023)*

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Representation:

Mr. Ochiel Dudley & Ms. Julia Wachira for the applicant  
*(J. W. Wachira Advocates)*

Mr. Geoffrey Orao Obura for the 1<sup>st</sup> and 2<sup>nd</sup> appellants  
*(Obura Mbeche & Company Advocates)*

Dr. Muthomi Thiankolu for the 3<sup>rd</sup> appellant  
*(Muthomi & Karanja Advocates)*

Mr. Fred Ngatia, SC for the 1<sup>st</sup> respondent  
*(Ngatia & Associates Advocates)*

Mr. Oscar Eredi for the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents  
*(Attorney General Chambers)*

Mr. Kelvin Kimathi h/b for Mr. Charles Agwara for the 3<sup>rd</sup> respondent  
*(Prof. Albert Mumma & Company Advocates)*

Ms. Mwamboa Naazi h/b for Mr. George Kithi for the 6<sup>th</sup> respondent  
*(Kithi & Company Advocates)*

Mr. Dickens Ouma for the 13<sup>th</sup> respondent  
*(Federation of Kenya Employers)*

## **RULING OF THE COURT**

[1] UPON perusing the Notice of Motion dated 15<sup>th</sup> May, 2023 and lodged before this Court on 16<sup>th</sup> May, 2023 by the Law Society of Kenya (LSK) seeking *inter alia* orders that-

a. *Leave be granted for admission of LSK as amicus curiae in the consolidated appeal.*

b. *Leave be granted to the amicus curiae to make written and oral arguments limited to the following points of law:*

i. *What are the constitutional and statutory contours of the Employment and Labour Relations Court's (ELRC) jurisdiction under Article 162 (2) (a) of the Constitution and more specifically its jurisdiction to interpret and apply the Constitution;*

ii. *What approach should a court adopt in interpreting and applying the phrases '**disputes relating to employment and labour relations**' under Article 162 (2)(a) and '**any other written law which extends jurisdiction to the Court relating to employment and labour relations including...**' under Section 12 of the ELRC Act; and*

iii. *Are disputes over validity of pension statutes a category of '**disputes relating to employment and labour relations**' under Article 162(2)(a) of the Constitution? What are the general principles governing pension and pension schemes as a social security measure under Article 43 of the Constitution?*

c. *There be no orders as to costs for this application.*

**[2] TAKING INTO ACCOUNT** the affidavit in support of the Motion sworn by Florence Muturi, the Chief Executive Officer of LSK, on 15<sup>th</sup> May, 2023 and LSK's written submissions dated 29<sup>th</sup> June, 2023 to the effect that; firstly, the crux of the consolidated appeal revolves around the uncertainty of the ELRC's jurisdiction as defined in the Constitution, and its resolution is in public interest. Secondly, that LSK's request for admission as *amicus curiae* is in line with its statutory mandate, as was recognized by this Court in ***Raila Amolo Odinga & Stephen Kalonzo Musyoka v. Independent Electoral and Boundaries Commission, Chairperson Independent Electoral and Boundaries Commission, Uhuru Muigai Kenyatta & Law Society of Kenya***, Presidential Petition No. 1 of 2017; [2017] KESC 35 KLR; and

**[3] MOREOVER**, under Section 4 of the LSK Act, the applicant is required to assist courts in matters relating to legislation, the administration of justice and the practice of law in Kenya; that, LSK's mandate extends to upholding the Constitution, advancing the rule of law as well as protecting and assisting members of the public in legal matters. Thirdly, the points of law (set out herein above) which LSK seeks to advance are geared towards assisting the Court in arriving at an informed decision and developing the law. Further, none of the parties to the consolidated appeal have addressed those points of law. Fourthly, LSK is neutral and governed by fidelity to the law; and it possesses expertise, experience and knowledge relevant to the determination of the dispute. All in all, as per its submissions, it is urged that LSK has met the principles for admission as *amicus curiae* as appreciated by this Court in ***Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others***, SC Petition No. 12 of 2013; [2015] eKLR; and

**[4] COGNIZANT** of the fact that when the Motion was mentioned before the Deputy Registrar of this Court on 5<sup>th</sup> June 2023, advocates for the appellants and the Federation of Kenya Employers (the 13<sup>th</sup> respondent) indicated that their clients had no objection to LSK's admission; and

**[5] UPON** considering the National Social Security Fund (NSSF) Board of Trustees' (the 1<sup>st</sup> respondent) response dated 9<sup>th</sup> June, 2023 opposing the Motion on the grounds that; the main issues in controversy are whether the ELRC has jurisdiction to entertain suits challenging constitutionality of a legislation without any employer-employee dispute; whether the NSSF Bill, as it was, ought to have been tabled before the Senate; and whether the NSSF Act, 2013 gives monopoly to NSSF in provision of pension and social security services. Nonetheless, LSK has not addressed the aforementioned issues in its proposed *amicus* brief and therefore, its participation in the matter will not be of any assistance in resolution of the dispute. Furthermore, the legal issues it intends to raise have been exhaustively addressed by the parties to the consolidated appeal; and in any event, LSK has not met the threshold for admission as *amicus curiae*; and

**[6] NOTING** that the Cabinet Secretary for Labour, Social Security and Services, the Competition Authority and the Attorney General (the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents) vide their grounds of objection and written submissions, both dated 9<sup>th</sup> June 2023, opposed the motion on similar grounds as the 1<sup>st</sup> respondent. In addition, they argued that LSK is guilty of inordinate delay taking into account that Petition No. E002 of 2023 and E004 of 2023 were lodged on 17<sup>th</sup> and 28<sup>th</sup> February, 2023 respectively and the pleadings were closed in March 2023. Besides, they urged that the dispute has been pending before the superior courts below for a period of over ten (10) years yet LSK did not seek to be admitted before those courts. Be that as it may, LSK has also not offered any explanation as to why it seeks to be admitted at this tail end of litigation. What is more, LSK has not demonstrated any expertise in the issues it seeks to advance and has taken sides by advancing the appellants' position; and

**[7] FURTHER NOTING** that the Kenya County Government Workers Union (the 6<sup>th</sup> respondent) vide its response dated 9<sup>th</sup> June, 2023 opposed the Motion on the same grounds as the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents; and

**[8] BEARING IN MIND** that the Retirement Benefits Authority (the 3<sup>rd</sup> respondent) failed to file its response by close of business of 12<sup>th</sup> June, 2023 despite the directions of the Registrar of this Court on even date; and

**[9] APPRECIATING** the role of an *amicus curiae* in any proceedings is to aid a court in arriving at a legal, pragmatic and legitimate decision, anchored on the tenets of judicial duty; and the guiding principles for admission of an *amicus curiae* as set out by Rule 19 of the Supreme Court Rules, 2020 and this Court in the ***Mumo Matemu Case*** in the following terms:

“

- i. *An amicus brief should be limited to legal arguments.*
- ii. *The relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.*
- iii. *An amicus brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the Constitution’s call for resolution of disputes without undue delay. The Court may therefore, and on a case- by- case basis, reject amicus briefs that do not comply with this principle.*
- iv. *An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.*

...”

**[10] WE NOW DETERMINE** as follows:

- i. It is common ground that the crux of the dispute in the consolidated appeal pertains to the parameters of the ELRC's *vis-à-vis* the High Court's jurisdiction as far as the determination of the constitutionality of NSSF Act, 2013 is concerned; the particular issues being; a determination of whether ELRC has jurisdiction to entertain a dispute which does not arise from an employer-employee dispute; and whether the determination of the constitutionality of the NSSF Act, 2013 was the mandate of the High Court under Article 165 (3) (d) (i) or the ELRC under Article 162 (2) (a) of the Constitution.
- ii. Having appraised the proposed *amicus* brief we note that the points of law set out above, which LSK intends to advance, relate to the question of the ELRC's jurisdiction to determine the constitutionality/validity of the NSSF Act, 2013.
- iii. Nonetheless, we cannot help but note that the arguments in the proposed *amicus* brief have largely been addressed in one way or another by the parties to the consolidated appeal through their pleadings and/or submissions. As such, the proposed *amicus* brief does not introduce novel aspects of the legal issue in question. See ***Francis Kariuki Muruatetu & Another v. Republic & 5 Others***, SC Petition No. 15 of 2015 as consolidated with Petition No. 16 of 2015 [2016] eKLR. In addition, we are not convinced that the Motion was brought within reasonable time. For those reasons, we find that LSK has not met the conditions which would warrant its admission as *amicus curiae* in the consolidated appeal.
- iv. While costs should generally follow the event, guided by this Court's decision in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai Estate of & 4 Others***, SC Petition No. 4 of 2012; [2013] eKLR, we find that in these circumstances, an order that each party to bear their own

costs is just and will serve the ends of justice. This is because to order otherwise may have the effect of barring bona fide applications for admission of persons who would assist the Court as *amicus curiae*. We also recognize that the applicant was motivated by public interest to advance the law save that the issues it intends to raise are well covered by the pleadings and submissions on record.

**[11] CONSEQUENTLY** and for the reasons afore-stated, we make the following Orders:

- i. The Notice of Motion dated 15<sup>th</sup> May, 2023 and lodged on 16<sup>th</sup> May, 2023 by LSK is hereby dismissed.***
- ii. Each party shall bear their own costs.***

It is so ordered

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of July, 2023.**

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

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

.....

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

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

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**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**