



THE SUPREME COURT OF KENYA

KENYA TEA GROWERS ASSOCIATION & 2 OTHERS VS. THE NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES & 13 OTHERS

SC PETITION NO. E004 OF 2023 AS CONSOLIDATED WITH PETITION NO. E002 OF 2023

DATE OF JUDGMENT: 21ST FEBRUARY, 2024

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Court allows the appeal on a narrow ground, remits the matter to the Court of Appeal, and orders each party to bear its own costs.

Background

Following the enactment of the National Social Security Fund Act 2013 (*NSSF Act 2013*), five constitutional petitions were instituted challenging the constitutionality of the said Act. Two petitions were filed before the Constitutional and Human Rights Division of the High Court at Nairobi, and three before stations of the Employment and Labour Relations Court (*ELRC*) in Nairobi and Nakuru. Thereafter, the High Court transferred the two petitions before it to the ELRC on grounds that the issues raised therein related to social security and employment matters, properly falling within the jurisdiction of the ELRC.

At the ELRC, a consent was recorded consolidating Nakuru Petition Nos. 49 and 50 of 2014 with Nairobi Petition Nos. 35, 34 and 38 of 2014 (the *consolidated petition*); certifying the matter as raising substantial questions of law under Article 165(4) of the Constitution; and requesting that the file be forwarded to the Chief Justice for empanelment of a bench of an uneven number of Judges. Instead of constituting a bench as requested, the Chief Justice directed that the issue of the ELRC's jurisdiction to determine the constitutional validity of the *NSSF Act 2013*, be argued before the Principal Judge of the ELRC. Pursuant to these directions, *Nderi Nduma J.* heard the parties; ruled that both the High Court and ELRC had jurisdiction to determine the issues raised in the consolidated petition; and requested the Chief Justice to empanel a bench of an uneven number of judges from both the High Court and ELRC (sitting as the ELRC), to determine the matter.

Shortly after, the Court of Appeal delivered its judgment in ***Karisa Chengo & 2 Others v. Republic*** [2015] eKLR, declaring the empanelment of a mixed bench of Judges from the High Court and courts of equal status unconstitutional. This prompted the Chief Justice to reconstitute a bench of three judges from the ELRC to determine the consolidated petition.

During the hearing of the petition, the appellants urged that their members had long-standing adequate pension and social security schemes with their employers which were more

advantageous than that proposed by the NSSF Act 2013. Therefore, they were apprehensive that they would be overburdened and lose their years' contributions to the existing pension schemes. Furthermore, they challenged the constitutionality of the Act on grounds of, inadequate public participation; compulsory registration of employees under the Fund unlike the National Social Security Fund Act Chapter 258 (now repealed), which exempted members of existing pension schemes from registration; the unjustifiable requirement for registration with the Fund as a prerequisite for accessing public services; failure to involve the Senate in the enactment process yet County Governments were obliged to make payment to the Fund; giving regulatory powers to the NSSF Board of Trustees instead of the Retirement Benefits Authority; enhancing social security benefits of employed persons only, therefore discriminating against the unemployed; setting of the Board's remuneration by the Cabinet Secretary for Labour and Social Security which is a function of the Salaries and Remuneration Commission(SRC); and granting the NSSF Board a monopoly in the provision of pension and social security services to the detriment of other providers in the industry.

The ELRC allowed the consolidated petition, and found that the Act had implications on County Governments' finances, and therefore ought to have been tabled before the Senate; the provision of social security through resource allocation was a duty of the State and not the registered members; Section 19(2) of the Act imposing registration as a pre-condition to access public services was unjustifiable and contrary to Articles 20(4)(a), 21(1) and 24 of the Constitution; Section 13 usurped the SRC's mandate to approve remuneration payable to the NSSF Board; and that the Act would stifle or kill other pension providers. However, the court rejected the claim of insufficient public participation. Ultimately, the trial court declared the NSSF Act, 2013 unconstitutional.

On first appeal, the Court of Appeal overturned the ELRC, set aside its Judgment and all consequential Orders on the grounds that the ELRC lacked jurisdiction to determine the constitutional validity of the NSSF Act 2013. According to the Appellate Court, the issue fell squarely within the jurisdiction of the High Court under Article 165(3)(d)(i) of the Constitution, and in any event, the dispute did not arise from an employer-employee relation as prescribed in Section 12 of the ELRC Act. Furthermore, the Court of Appeal held that the ELRC erroneously concluded that the concurrence of the Senate and National Government was required in enacting the NSSF Act, 2013.

In the appeal before the Supreme Court, the Court framed the following issues for determination:

1. *Whether the 3rd appellant is a proper party to participate in the appeal as of right under Article 163(4) (a) of the Constitution;*
2. *Whether the Employment and Labour Relations Court lacked jurisdiction to determine the constitutional validity of the NSSF Act 2013;*
3. *Whether the Court of Appeal exercised original jurisdiction in partially determining the constitutionality of the NSSF Act 2013;*
4. *Whether the case should be remitted to the High Court for determination; and*
5. *Reliefs, if any, available to the parties.*

Upon consideration, the Supreme Court has held as follows:

1. Issue 1:

- i. Despite not participating in the proceedings before the Court of Appeal, the 3rd appellant participated the proceedings before the trial court and has a demonstrable interest in the case;
- ii. Furthermore, the 3rd appellant's case and prayers are identical to those of the primary parties, the 1st and 2nd appellants whose petition is the lead file; and

- iii. Consequently, the 3rd appellant is a proper party to participate in the appeal as of right under Article 163(4)(a) of the Constitution.
2. **Issue 2:**
 - i. The Constitution, the ELRC Act and this Court's decision in **Republic v. Karisa Chengo & 2 Others**; Petition No. 5 of 2015; [2017] eKLR, do not suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC is precluded from determining the constitutional validity of a statute;
 - ii. However, the ELRC cannot sit as the High Court under Article 165 of the Constitution and determine the constitutional validity of a statute where the dispute in question has nothing or little to do with employment and labour Relations within the context of the ELRC Act;
 - iii. Notwithstanding the fact that this dispute did not emanate from an employee-employer relationship, to the extent that the NSSF Act 2013, introduces enhanced and mandatory contributory amounts of employees' earnings, the new law attracts justiciable grievances from certain cadres of employees and involves major players in the employment and labour relations sector, these factors bring the dispute within the purview of the ELRC; and
 - iv. Consequently, the ELRC has jurisdiction to determine the constitutional validity of a statute in matters concerning employment and labour relations under Article 162(2)(a) of the Constitution.
 3. **Issue 3:**
 - i. After declaring the ELRC Judgment and Proceedings a nullity, the Court of Appeal wrongfully assumed original jurisdiction by determining the concurrence issue in exclusion of other grounds challenging the validity of the NSSF Act 2013; and
 - ii. Where the Court of Appeal determines that a trial court has acted without jurisdiction, it has to remit the case to the court with jurisdiction without going into the merits of the dispute.
 4. **Issue 4:**
 - i. Remitting the matter to the High Court is no longer a live issue as the ELRC had jurisdiction to determine the constitutional validity of the NSSF Act 2013; and
 - ii. Pursuant to Section 22 of the Supreme Court Act, the case is remitted to the Court of Appeal to determine the substantive merits of the ELRC Judgment on a priority basis.
 5. **Issue 5:** Consolidated appeal allowed and each party ordered to bear its own costs.

Accordingly, the Supreme Court grants the following Orders:

- i. ***The consolidated appeal is hereby allowed on the narrow ground that the ELRC had jurisdiction to determine the constitutional validity of the NSSF Act 2013;***
- ii. ***The case is hereby remitted to the Court of Appeal to determine the substantive merits of the ELRC Judgment on an urgent basis; and***
- iii. ***Each Party shall bear its own Costs.***