REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram:Koome; CJ & P, Mwilu; DCJ & V-P, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

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

—BETWEEN—

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

—AND—

THE NATIONAL SOCIAL SECURITY
FUND BOARD OF TRUSTEES.....1ST RESPONDENT
THE CABINET SECRETARY FOR LABOUR
SOCIAL AND SECURITY SERVICES.....2ND RESPONDENT
THE RETIREMENT BENEFITS AUTHORITY.....3RD RESPONDENT
THE COMPETITION AUTHORITY.....4TH RESPONDENT
THE HON. ATTORNEY GENERAL.....5TH RESPONDENT
KENYA COUNTY GOVERNMENT
WORKERS UNION.....6TH RESPONDENT
KENYA UNION OF ENTERTAINMENT
AND MUSIC INDUSTRY EMPLOYEES.....7TH RESPONDENT

KENYA BUILDING CONSTRUCTION
TIMBER, FURNITURE AND ALLIED
TRADERS EMPLOYEES UNION.....8TH RESPONDENT
UNION OF NATIONAL RESEARCH INSTITUTES
STAFF OF KENYA (UNRISK).....9TH RESPONDENT
KENYA GLASS WORKERS UNION.....10TH RESPONDENT
NKAURAKI EDWIN LESIDAI & 89 OTHERS.....11TH RESPONDENT
CENTRAL ORGANIZATION OF
TRADE UNIONS (COTU).....12TH RESPONDENT
FEDERATION OF KENYA EMPLOYERS (FKE).....13TH RESPONDENT
KENYA QUARRY AND MINE
WORKERS UNION.....14TH RESPONDENT

(*Being an Appeal from the Judgment of the Court of Appeal at Nairobi* ***(Okwengu, Warsame & Mativo, JJ.A.)*** *delivered in Civil Appeal No. E656 of 2022 on 3rd February 2023*)

Representation

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

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

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

Mr. Oscar Eredi and Ms. Scholastica Mbilo.....for the 2nd, 4th and 5th respondents
(State Counsel Office of the Attorney General)

Mr. Charles Agwara and Mr Kimathi..... for the 3rd Respondent
(Prof. Albert Mumma & Company Advocates)

Ms. Tamari Katana.....for the 6th Respondent
(Kithi & Company Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Two petitions were filed before the Court, namely, Petition No. E002 of 2023 dated 16th February 2023 and filed on 17th February 2023; and Petition No. E004 of 2023 dated 24th February 2023 and filed on 28th February 2023. By a Consent Order of this Court issued on 31st March 2023, Petition No. E002 of 2023 was consolidated with Petition No. E004 of 2023 for determination. It was further agreed that Petition No. E004 of 2023 be the lead file.

[2] The consolidated appeal is against the Judgment of the Court of Appeal at Nairobi in Civil Appeal No. 656 of 2022 *(Okwengu, Warsame & Mativo, JJ. A)* which overturned the Judgment of the Employment and Labour Relations Court (the ELRC) *(Nduma, Wasilwa, and Mbaru, JJ.)*. Petition No. E004 of 2023 is filed pursuant to *inter alia* Article 163(4) (a) of the Constitution and Rules 38 and 39 of the Supreme Court Rules, 2020 while Petition No. E002 of 2023 is filed pursuant to Rule 39 of the Supreme Court Rules, 2020.

B. BACKGROUND

[3] This litigation arises from the enactment of the National Social Security Fund Act, 2013 (hereinafter the NSSF Act, 2013) which was assented to by the President on 24th December 2013 and came into operation on 10th January 2014. The enactment of the Act triggered the institution of five constitutional petitions before the Constitutional and Human Rights Division of the High Court at Nairobi, and in various stations of the ELRC. The Petitions, all of which challenged the constitutionality of the NSSF Act, 2013 included:

a) *High Court (Nairobi) Constitutional Petition No. 249 of 2014:* ***Kenya County Government Workers Union v. The National Social Security Fund Board of Trustees & 3 Others;***

b) *High Court (Nairobi) Constitutional Petition No. 270 of 2014:* ***Kenya Tea Growers Association & Agricultural Employers' Association v. The Attorney General & The National Security Fund Board of Trustees;***

c) *Industrial Court (Nakuru) Petition No. 9 of 2014:* ***Nkauraki Edwin Lesidai & 89 Others v. the Attorney General & 3 Others;***

d) *Employment and Labour Relations Court (Nairobi) Petition No. 34 of 2014:* ***Kenya Quarry and Mine Workers Union & 4 Others v. the Attorney General & Others;*** *and*

e) *Industrial Court (Nakuru) Petition No. 11 of 2014:* ***Kenya Plantation and Agricultural Workers Union v. Board of Trustees, National Social Security Fund & Another.***

(i) At the Employment and Labour Relations Court

[4] Upon reviewing the pleadings before her, in *High Court (Nairobi) Constitutional Petition No. 249 of 2014; and High Court (Nairobi) Constitutional Petition No. 270 of 2014,* ***Mumbi Ngugi, J.*** *(as she then was)* of the Constitutional and Human Rights Division of the High Court, transferred the petitions to the ELRC on 16th June 2014, stating that the matter pertains to issues related to social security and employment and properly falls within the jurisdiction of the ELRC. Before the trial court, the 1st and 2nd appellants sought the following Orders:

a) *A declaration that Sections 18, 19, 20, 21, 22, 29 and 71 of the NSSF Act, 2013 are inconsistent with Articles 24, 26, 28, 27, 36, 41 and 43 of the*

Constitution by obliging employers to register employees with alternative pension and social security schemes with the NSSF Board of Trustees, or pension and social security schemes operated by them;

b) *A declaration that Sections 18, 19, 20, 21, 22, 29 and 71 of the NSSF Act, 2013 are unconstitutional by discriminatorily targeting only employers and employees in the registration, membership and making of contributions to the 1st respondent, and not the entire Kenyan population as required of a scheme intending to offer universal social security under Article 43 of the Constitution;*

c) *A declaration that Sections 18, 19, 20, 21, 22, 29 and 71 of the NSSF Act, 2013 are unjustifiable in a free, modern, open, transparent and democratic society by giving the Cabinet Secretary for Labour, Social and Security Services (CS Labour) wide discretionary powers in the management of the NSSF Board of Trustees (NSSF Board); and in the manner of dealing with the petitioners' members contributions and accrued benefits in total disregard of the statutory regulatory role of the Retirement Benefits Authority (RBA);*

d) *A declaration that Sections 18, 19, 20, 21, 22, 29 and 71 of the NSSF Act, 2013 are unconstitutional in compulsorily appropriating the petitioners' members' private property in violation of their rights under Articles 40(2) and 41(2) of the Constitution;*

e) *A declaration that Sections 47 and 68 of the NSSF Act, 2013 are oppressive, irrational and unreasonable by giving regulatory powers to the NSSF Board instead of the RBA which is the independent sector regulator;*

f) *An order directing the RBA to subject the NSSF Board to all prudential regulatory requirements set out in the Retirement Benefits Act, 1997;*

g) *An order directing the Competition Authority to review and advise the Government and all key stakeholders on the compatibility of the NSSF Act, 2013 with the country's competition policy as read with the principles under Article 10(1)(c) of the Constitution;*

h) *An order precluding the NSSF Board and the CS Labour from applying the NSSF Act, 2013 to the petitioners' members or any other employees with adequate alternative pension or social security schemes;*

i) *A declaration against the NSSF Board and the CS Labour, that the deduction of 6% from the earnings of employees, requiring the employers' corresponding contribution of 6% of the employees' pensionable earnings, and remitting the same to the NSSF Board in terms of the NSSF Act, 2013 is void and unconstitutional;*

j) *A declaration that the NSSF Act, 2013 is null and void ab initio as its passage into law violated Articles 110 and 205 of the Constitution;*

k) *In the alternative, determination of the constitutional validity of the following sections of the NSSF Act, 2013: 13; 17(6)(b); 18(4); 19(2); 10 and the third schedule; 20; 21; 27; 35(4); 37(1); 18(2), 72 and the second schedule; and 49(2).*

[5] At the ELRC, parties dispensed with the hearing of interlocutory applications by consent in favour of determination of the substantive petitions. Shortly after, *Nderi Nduma, J.* declined a request to certify the petitions as raising substantial questions of law requiring empanelment of a bench *of an uneven number of Judges* for their disposal under Article 165(4) of the Constitution. Consequently, he directed that the matter be heard by a single Judge.

[6] Notwithstanding the consent and the court's denial of certification, the 1st and 2nd appellants filed an application dated 23rd June 2014, seeking certification under Article 165(4) of the Constitution and a conservatory order staying operation

of the NSSF Act, 2013. The application was partly heard when parties recorded a consent on 5th August, 2014, consolidating Nakuru Petition Nos. 49 and 50 of 2014 with Nairobi Petition Nos. 35, 34 and 38 of 2014; certifying the matter as raising substantial questions of law under Article 165(4) of the Constitution and directing that the file be forwarded to the Chief Justice to empanel a bench of an uneven number of Judges; and that the matter be mentioned before the bench for directions.

[7] Instead of constituting a bench as requested, the former Chief Justice; *Hon. Justice (Dr.) Willy Mutunga* directed that the issue of jurisdiction be argued before the Principal Judge of the ELRC. In his view, it could be argued that the Constitutional and Human Rights Division of the High Court had the requisite jurisdiction to determine the matter or that the Chief Justice was required to constitute a hybrid bench of three from the ELRC and the High Court. Pursuant to these directions, *Nderi Nduma, J.* heard the parties and in a Ruling dated 27th February 2015, held that: the issues in the consolidated petition raised substantial issues of law of a "mixed grill" concerning the interpretation of the Constitution; legality of a substantial portion of the NSSF Act, 2013; and the legality of a fund premised on both an employer and employee relationship and on self-employment in terms of contributions to, and benefits from the Fund. Accordingly, he concluded that both the High Court and ELRC had jurisdiction to determine issues raised in the consolidated petition and requested the Hon. Chief Justice to consider empanelling a bench of an uneven number of Judges, being not less than three from the High Court and ELRC but sitting as the ELRC to determine the consolidated petition.

[8] Notably, the directions and *Nderi Nduma, J.'s* Ruling were informed by the practice established by the former Chief Justice*; Hon. Justice (Dr.) Willy Mutunga,* who had declared through a Gazette Notice that he could empanel a bench constituting Judges from both the special jurisdiction courts and the High Court to determine criminal appeals. This practice was later extended to civil and

constitutional cases. Subsequently, on 2nd March 2015, the Chief Justice empanelled a mixed bench with two Judges from the ELRC and one from the High Court to hear the case. However, after a few sessions, the Court of Appeal delivered its Judgment in ***Karisa Chengo & 2 Others v. Republic;*** Malindi Criminal Appeal No. 44, 45 and 76 of 2014; [2015] eKLR declaring empanelment of a mixed bench of Judges from the High Court and courts of equal status unconstitutional. In light of the foregoing, the Chief Justice constituted a bench of three Judges from the ELRC comprised of *Nderi Nduma, Wasilwa* and *Mbaru, JJ*. to determine the consolidated petition.

[9] In their petition, the 1st and 2nd appellants urged that pursuant to statutory and subsidiary legislation, policy documents, employment contracts and collective bargaining agreements (CBAs) in place, their members had long standing adequate pension and social security schemes with their employers such as public and private gratuity, provident funds and pension schemes which were more advantageous than that proposed by the NSSF Act, 2013. They were apprehensive that the proposed pension scheme would overburden them due to their various financial commitments and that they would lose the contributions already made to their subscribed pension schemes.

[10] The 1st and 2nd appellants further argued that they were not consulted, the NSSF Act 2013, was not subjected to public debate and the Kenya Revenue Authority had been nominated to collect its contributions, which move they deemed irregular. They also took issue with: the compulsory registration of employees under the Fund, unlike the National Social Security Fund Act Chapter 258 (repealed) (the repealed NSSF Act) which exempted their members from registration; unconstitutionality of compulsory registration and contribution by employees since the Fund does not qualify as a retirement benefit body; the requirement for their members to register with the Fund as a prerequisite for accessing public services; compulsion to join parallel and duplicate schemes which would double administrative costs potentially leading to massive job cuts across

the country to the detriment of employees; failure to involve the Senate in the enactment of the NSSF Act 2013, under Articles 110 to 113 of the Constitution, yet all County Governments were obliged to make payment to the Fund without corresponding budgetary allocation; giving of regulatory powers to the NSSF Board instead of the RBA; enhancing social security benefits of employed persons only and therefore discriminating against the unemployed, the old and their dependants; and setting of the Board's remuneration by the CS Labour which ought to be determined by the Salaries and Remuneration Commission (SRC).

[11] In the course of the proceedings, the 3rd appellant was joined to the consolidated petition as an interested party on behalf of its members of over 6000 retirees who were contributors to the Local Authorities Pensions Trust (Laptrust). Having been so joined, the 3rd appellant argued that the NSSF Act 2013, was inconsistent with the right to social security for reasons that: it would deny Laptrust and other defined benefits pension schemes the cash flow necessary to finance actuarial deficits and make pension payments to retirees; jeopardize the livelihoods of the County Pensioners Association's members and their dependants, and grant the NSSF Board a monopoly in the provision of pension and social security services to the detriment of other providers in the industry.

[12] The respondents opposed the consolidated petition. Through the Attorney General, the NSSF Board denied the contention that the NSSF Act 2013, compelled employees to contribute 6% of their salaries, urging that contribution rates are capped at Kshs. 6000 for the lower earnings limit and Kshs. 18,000 for the upper earnings limit. Additionally, they urged that the National Assembly was alive to these deductions when it unanimously passed the Act. It was further contended that the Competition Act, 2010 does not apply to the NSSF because the Fund does not engage in any trade. On its part, the RBA asserted that contrary to allegations of inadequate public participation, it effectively participated in the formulation of the NSSF Act 2013. However, it advised against the high level of contributions imposed and recommended exclusion of members of existing pension schemes

from compulsory registration; as collapse of many successful pension schemes would complicate its mandate as a regulator of the pensions industry.

[13] On his part, the CS Labour argued that: the enactment process of the NSSF Act 2013, involved full public participation and sensitization; the NSSF Act 2013, made sufficient provision towards benefits of surviving family members upon the demise of a contributor; both the NSSF Board and the CS Labour are obliged to consult the SRC in determining remuneration of board members; the NSSF Act 2013, gives the self-employed the opportunity to register with the Fund; Section 19(2) of the NSSF Act 2013, is meant to minimize or eliminate evasion of NSSF contributions; Section 21 gives employees the right to opt out of Tier II to join private pension schemes; Section 27 provides that interest charged on members' late payments is credited to members' accounts and Section 35(4) does not give the NSSF Board absolute power to decline to pay or vary payments to a nominated beneficiary as alleged. Further, it was urged, the NSSF Act, Chapter 258, was repealed by the coming into force of the NSSF Act 2013, and therefore stay of operation of the new Act would mean that there would be no law regulating the Fund.

[14] The Federation of Kenya Employers (FKE) and the Central Organization of Trade Unions (COTU), who were interested parties at the ELRC, reiterated the appellants' stance. They urged that the provisions of the NSSF Act 2013, violated Articles 10 and 43 of the Constitution. In addition, they asserted that gratuity and pension schemes operated for the benefit of their members under registered CBAs were not recognized by the Act nor were their members exempted from mandatory contribution. They claimed that there was inadequate consultation, with FKE having been invited to attend only one meeting on 26th March 2014 which was insufficient for effective discussion of their concerns about the Act. Moreover, they asserted, their members would suffer irreparable financial loss if the NSSF Act, 2013 was implemented in its present form.

[15] After hearing the parties, the trial court framed six questions for determination *viz: whether there was sufficient public participation as envisaged under Article 10 of the Constitution prior to the enactment of the NSSF Act 2013; whether the NSSF Act 2013, had 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; whether the NSSF Act 2013, violated the constitutional rights of the petitioners' members as set out in the consolidated petition; whether the NSSF Act 2013, was in conflict with the provisions of the Competition Act; whether the petitioners were entitled to reliefs sought; and who should have borne the costs of the petition*.

[16] Ultimately, in its Judgment dated 19th September 2022, the ELRC held that the NSSF Act 2013, was unconstitutional, null and void, and issued the following Orders:

a) *A declaration that the NSSF Act 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;*

b) *A declaration that the provisions of the NSSF Act 2013, 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;*

c) *Section 13 of the NSSF Act 2013, is in conflict with Article 230(4) of the Constitution to the extent that it requires the payment of allowances and fees approved by the CS Labour, a mandate of the SRC;*

d) *Section 19(2) of the NSSF Act 2013, predicating access to public services on NSSF membership, is in conflict with Articles 21(1), 47(1) and 232(1) of the Constitution;*

e) *Section 20 of the NSSF Act, 2013 making contribution to the Fund mandatory and obliging employees with adequate alternative pension or social security schemes to join those operated by the NSSF Board violates rights of employees and employers' free choice contrary to Article 49 of the Constitution;*

f) *An order restraining the 1st and 2nd respondents from applying the NSSF Act 2013, on employees with adequate alternative pension or social security schemes unless they opt in; and*

g) *An injunction prohibiting and restraining the respondents from demanding, compelling 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 and contribute their earnings or any part thereof in terms of the NSSF Act, 2013.*

[17] On the issue, *whether there was sufficient public participation as envisaged under Article 10 of the Constitution of Kenya prior to the enactment of the NSSF Act 2013,* the trial court held that there was no evidence adduced by the appellants demonstrating that the method used for public participation was wanting. The Court noted that the appellants represented the formal sectors involved in the legislative process and that the informal sectors they complained on behalf of, did not place objections to the enactment process.

[18] As pertains the issue *whether the NSSF Act 2013, had implications on County Finances, therefore necessitating the Bill to be tabled before the Senate prior to its enactment in terms of Articles 205(1) and 110 of the Constitution,* it was the Court's determination that the Act dealt with matters over which the Senate and National Assembly had concurrent jurisdiction. According to the Court, the NSSF Act 2013, imposed mandatory and optional pension schemes for public officers in both National and County Governments. Therefore, failure to involve the Senate in its enactment was fatal to the Act.

[19] On *whether the NSSF Act 2013, violated the constitutional rights of the petitioners' members as set out in the consolidated petition,* the trial court held that the State remained the ultimate duty bearer in providing social security under Article 43(3) of the Constitution through resource allocation. Accordingly, the court stated that these resources should emanate from the State hence the Fund's attempt to remove this duty from the State to registered members of the Fund was an overreach.

[20] Further, basing its determination on the purposive interpretation principle, the court declared various provisions of the NSSF Act 2013, unconstitutional as follows; Section 19(2) of the Act which imposed registration with the scheme as a pre-condition to access public services was held to serve no legitimate purpose. Additionally, it was held to be unreasonable and unjustifiable in an open and democratic society, contrary to Articles 20(4)(a), 21(1) and 24 of the Constitution. The court also declared Section 13 of the Act unconstitutional for usurping the SRC's mandate to approve remuneration payable to the NSSF Board and Committee members, and vesting the same upon the CS, Labour.

[21] As regards *the conflict between the NSSF Act 2013, and the provisions of the Competition Act,* the ELRC held that the NSSF Act 2013, favours the NSSF over other pension providers in the entire country as social security providers, which would kill or stifle such schemes, therefore precipitating conflict between the former and the Competition Act.

(ii) At the Court of Appeal

[22] Aggrieved, the 1st respondent moved the Court of Appeal vide Civil Appeal No. E656 of 2022 premised on 14 grounds of appeal. Conversely, the appellants filed a Notice of Cross Appeal and a Notice affirming the ELRC's Decision.

[23] In a nutshell, the 1st respondent urged that: the ELRC wrongfully assumed jurisdiction over a matter falling within the High Court's domain under Article 165(3)(d)(i) of the Constitution; the consolidated petition concerned the

constitutionality of the NSSF Act 2013, or its specific sections; the petition did not disclose any employer-employee relationship to trigger the jurisdiction of the ELRC; Article 162(2)(a) of the Constitution and Section 12(1) of the Employment and Labour Relations Court Act (the ELRC Act) limit the Court's jurisdiction to disputes relating to employment and labour relations; none of the petitions raised a constitutional issue ancillary or incidental to matters contemplated under Section 12(1) of the ELRC Act; and the allegations of unconstitutionality of the NSSF Act 2013, or its impugned sections did not arise from an employment and labour relations dispute.

[24] The CS Labour, the Competition Authority, the Attorney General and the RBA associated themselves with the submissions of the NSSF Board. In addition, they contended that the NSSF Act 2013, related to the entire populace and was not limited to employers and employees as shown by its objectives under Section 4(b) of the Act.

[25] In opposing the appeal, the 1st and 2nd appellants submitted that the consolidated petition was initially filed at the High Court then transferred by the court to the ELRC on grounds that social security and employment issues fall within the jurisdiction of the ELRC, which transfer was not opposed. They argued that the bulk of the contributors to the Fund established by the NSSF Act 2013, were employers and employees subject to the Employment Act and that contributions to the Fund were based on the existence of a Contract of Service. Further, it was urged that pursuant to Article 162(2)(a) of the Constitution, Parliament enacted the ELRC Act which at Section 12(1) granted the court original jurisdiction to determine employment and labour disputes. Moreover, that the term "employment and labour" entailed any dispute emanating from an employer such as the requirement to make NSSF deductions. According to the 1st and 2nd appellants, matters falling under ELRC jurisdiction listed in Section 12(1) of the ELRC Act were not exhaustive as demonstrated by use of the word "including."

[26] The 1st and 2nd appellants cited the case of ***Republic v. Karisa Chengo & 2 Others*** Supreme Court Petition No. 5 of 2015; [2017] eKLR ***(The Karisa Chengo Case)*** which stated that the Constitution sets out in broad terms the jurisdiction of the ELRC while Section 87(2) of the Employment Act extends the Court's jurisdiction to issues disclosed in the petitions. They contended that the constitutionality of the impugned Act and the violations of the fundamental rights and freedoms cited in the petitions are ancillary to the core mandate of the ELRC. Further, they relied on two South African decisions; ***GCABA v. Minister of Safety and Security and Others*** CCT 64/08[2009]ZACC26 and ***Solidarity and Others v. South Africa Broadcasting Corporation*** Case no. J 1334/16, in their submission to the effect that the ELRC has concurrent jurisdiction with the High Court on matters touching on violation of fundamental rights arising from employment and labour relations; and any dispute over the constitutionality of any executive or administrative act, threat or conduct by the State in its capacity as an employer.

[27] In their cross appeal, the 1st and 2nd appellants urged that there was no proper and reasonable public participation. They urged the court to allow their Cross Appeal and remit the matter to the High Court in the event that they determined that the ELRC had no jurisdiction, because they ought not to suffer due to the High Court's decision to transfer the petitions to the ELRC. The FKE and Kenya County Government Workers Union associated themselves with the 1st and 2nd appellants' submissions. In addition, they faulted the 1st respondent for raising the objection on jurisdiction for the first time on appeal. It is instructive to note that the 3rd appellant did not participate in the proceedings before the Court of Appeal.

[28] After hearing the parties, the Court of Appeal delineated two issues for determination. It began by interrogating *the issue of jurisdiction* stating that it was a threshold matter which went to the competence of a court to hear and determine a suit. It stated that a court of law is invested with jurisdiction to hear a matter when: it is properly constituted as regards numbers and qualifications of

members of the bench; the subject matter of the case is within its jurisdiction and there is no feature in the case preventing the court from exercising its jurisdiction; and the case comes before the court initiated by due process of law, upon fulfilment of any condition precedent in the exercise of its jurisdiction.

[29] The Court of Appeal observed that the germane issue identified by the ELRC in paragraph 1 of its Judgment was the constitutional validity of the legislative process of the NSSF Act 2013, and in the alternative, of some specific provisions of the Act. It held that the ELRC therefore fell into error when it failed to appreciate that the issue before it fell within the jurisdiction of the High Court as prescribed by Article 165(3)(d)(i) of the Constitution. According to the Appellate Court, for the ELRC to assume jurisdiction, constitutional issues must have arisen from an employer-employee dispute. The Court underscored that this was clear from the intention of Parliament in the preamble and scenarios listed in Section 12 of the ELRC Act. Contrary to the appellants' argument that the word 'including' was wide enough to cover the dispute before the ELRC, the Court of Appeal held that it ought to be construed with reference to its legal and factual context. Consequently, the Court determined that since the constitutional validity of the NSSF Act 2013, or its targeted provisions did not arise from an employer-employee dispute, the matter did not fall under Section 12 (1)(a)-(f) of the ELRC Act.

[30] On the second issue, *whether the enactment of the NSSF Act 2013, required participation of the Senate as provided under Article 110 of the Constitution*, the Court of Appeal noted that all parties agreed that under part 1 of the Fourth Schedule, standards for social security and professional pension plans is a function expressly conferred upon the National Government. It posited that in order to determine whether the Bill leading to the enactment of the NSSF Act 2013, fits the condition in Article 110(1)(a) of the Constitution as affecting functions and powers of the County Government, the ELRC ought to have applied the "pith and substance" test, to determine the subject matter or substance of the legislation, its true purpose and legal effect. The Appellate Court concluded that the ELRC failed

to analyse Articles 109 to 114 of the Constitution, and provisions of parts 1 and 2 of the Fourth Schedule so as to satisfy itself that the legislation affected functions of the County Government. Therefore, the ELRC erred in law by holding that the concurrence of the Senate and the National Assembly was required in enacting the NSSF Act 2013.

[31] Consequently, in a Judgment delivered on 3rd February 2023, the Court of Appeal allowed the appeal and set aside the Judgment and all consequential Orders of the ELRC in its entirety. The Court held that the ELRC lacked jurisdiction and as such, the Judgment and Orders arising from its proceedings were a nullity. It stated that the plea by the appellants for the consolidated petition to be remitted to the High Court was undesirable. This is because parties were given an opportunity to address the jurisdiction question but fiercely defended their respective positions, leading to the protracted battle the Chief Justice had cautioned against. The Court of Appeal also faulted the ELRC for granting both the main and alternative prayers pleaded. In its view, it was not proper for the bench to determine the constitutional validity of provisions of a statute that it had already nullified.

(iii) At the Supreme Court

[32] Aggrieved by the Court of Appeal's decision, the appellants have filed the instant consolidated appeal premised on grounds summed up as follows, that the learned Judges of the Court of Appeal erred by:

i. *Nullifying the proceedings and judgment of the ELRC on the grounds that the ELRC was not a court of competent jurisdiction to entertain the suit;*

ii. *Holding that the jurisdiction to determine disputes relating to the constitutionality of statutes and fundamental rights is exclusive to the High Court and thus cannot be exercised by the ELRC;*

iii. *Failing to appreciate a dispute as to the constitutionality of a statute that fundamentally alters the pension obligations of 'every employer and employee' in the country is a dispute relating 'relating to' employment and labour relations within the meaning of Article 162(2)(a) of the Constitution;*

iv. *Failing to appreciate that the obligation to deduct pension contributions from salaries and remit such contributions to the NSSF (or any other pension scheme) cannot arise in a vacuum and specifically in the absence of an employer-employee relationship;*

v. *Failing to appreciate that the mandatory obligations created by the impugned Act (of registration, deduction and remittance of monthly contribution to the NSSF) only apply to employers and employees (to the extent that registration and contributions of other potential members of the NSSF are 'voluntary');*

vi. *Misdirecting themselves by proceeding to determine whether the Bill preceding the Act should have been referred to the Senate, after declaring the ELRC proceedings and judgment a nullity;*

vii. *Failing to refer the matter to the High Court as sought by the 1st and 2nd appellants in the cross appeal;*

viii. *Pre-empting the High Court's decision on substantive issues raised in the consolidated petition by making substantive findings on them;*

ix. *Failing to appreciate the role of the Senate as provided under Article 96 of the Constitution;*

x. *Misinterpreting and misapplying Articles 109 to 114 of the Constitution by maintaining that the National Assembly was free to enact laws encroaching on matters over which the Senate should have a say,*

without seeking the concurrence of the Senate, and that the NSSF Act 2013, did not affect the finances of the county government;

xi. *Misapplying Article 46 of the Constitution by failing to appreciate that the NSSF Act 2013, conflicted with the Competition Act to the extent that its effect was to give the NSSF a monopoly, which would stifle and kill the pensions industry by favouring the NSSF over other pension providers; and*

xii. *Failing to consider and render judgment on the constitutionality of sections 13, 19(2) and 20 of the NSSF Act, 2013 declared by the ELRC to be null and void.*

[33] Consequently, they seek the following reliefs, that:

a. *The consolidated appeal be allowed;*

b. *The Judgment of the Court of Appeal at Nairobi* ***(Okwengu, Warsame and Mativo, JJ.A)*** *in Civil Appeal No. 656 of 2022 delivered on 3rd February 2023 be set aside;*

c. *The Judgment delivered by the Employment and Labour Relations Court at Nairobi* ***(Nduma Nderi, Wasilwa and Mbaru, JJ.)*** *in Constitutional Petition No. 38 of 2014 (consolidated with Constitutional Petition Nos. 34, 35, 49 and 50 of 2014) on 19th September 2022 be restored and affirmed;*

d. *The 1st and 5th respondents reimburse the appellants the costs of the proceedings before the Employment and Labour Relations Court, the Court of Appeal and the Supreme Court.*

e. *Alternatively, and without prejudice to prayers (a) to (d):*

i. *The dispute raised in the Employment and Labour Relations Court (Nairobi) Constitutional Petition No. 38 of 2014*

(consolidated with Constitutional Petition Nos. 34, 35, 49 and 50 of 2014) be remitted to the High Court for hearing and determination;

ii. *A conservatory order be issued restraining the 1st, 3rd and 5th respondents and their respective agents, subordinates and proxies from implementing sections 18, 19, 20 and 71 of the NSSF Act, 2013 pending the hearing and determination of the consolidated petition by the High Court; and*

iii. *Such other, further, additional, alternative or incidental relief(s) as this Honourable Court may deem just and expedient in the interest of justice.*

[34] In opposing the consolidated appeal, the 1st respondent filed replying affidavits sworn on 7th March 2023 and 25th March 2023 and grounds of objection dated 25th March 2023 and filed on 27th March 2023. The 2nd, 4th and 5th respondents similarly filed their replying affidavit and grounds of objection dated 13th and 17th March 2023, while the 3rd respondent filed grounds of objection dated 10th March, 2023 and 17th March 2023.

[35] The respondents argue *inter alia* that the ELRC had no jurisdiction to determine the constitutionality of the NSSF Act 2013, because it was enacted pursuant to Article 43(1)(e) of the Constitution to provide social security nationwide. Therefore, the dispute did not fall under Article 162(2)(a) of the Constitution and Section 12(1) of the ELRC Act which only cover disputes between employers and employees. They also contend that the Senate was precluded from involvement in the enactment of the NSSF Act 2013, because it was a nationwide legislation. Furthermore, the respondents are of the view that remitting the case to the High Court would be an unnecessarily costly affair; and urge that the Act is meant to include NSSF contributions from casual and seasonal employees, hence its non-implementation amounts to discrimination.

[36] In response, the 1st and 2nd appellants filed an affidavit in rejoinder to the 1st, 2nd, 4th and 5th respondents' grounds of objection and the 1st respondent's replying affidavit to the petition; and grounds in support of the 3rd appellant's appeal dated 13th March 2023 and filed on even date. The 3rd appellant filed a rejoinder to the 1st to 5th respondents' responses on 15th March 2023; while the 6th and 13th respondents filed an affidavit and their respective grounds in support of the petition dated 24th February 2023, 14th March 2023 and 15th March 2023.

C. THE PARTIES' RESPECTIVE SUBMISSIONS

(i) Appellants' and the 6th Respondent's Submissions

[37] The 1st and 2nd appellants' submissions are dated 14th April 2023 and filed on even date; and the 3rd appellant's submissions are dated 24th March 2023 and filed on 27th March 2023. By its submissions dated 7th April 2023, the 6th respondent associates itself with the appellants' case. Their joint case is condensed into the following issues: *whether the ELRC had jurisdiction to entertain the consolidated petition; whether the ELRC had jurisdiction to determine if the NSSF Bill 2013 should have been debated by the Senate; whether the Court of Appeal had jurisdiction to determine the merits of the case if the ELRC lacked jurisdiction; whether the case should have been remitted to the High Court; and whether the 3rd appellant has locus standi to prosecute the present appeal.*

[38] On the issue of *jurisdiction of the ELRC under Article 162 of the Constitution, and Section 12 of the ELRC Act*, the appellants submit that these provisions extend the jurisdiction of the ELRC to matters relating to employment and labour relations including those listed in Section 12(1)(a)-(g). They reiterate that the list is not exhaustive and that Parliament donated additional jurisdiction over disputes referred to the Court connected to employment and involving labour relations.

[39] Moreover, the appellants posit that it is inconceivable that the constitutionality of a law fundamentally altering obligations of employers and

employees, is not a dispute relating to employment and labour relations within the meaning of Article 162(2)(a) of the Constitution. They assert that the present proceedings are distinguishable from the case of ***Albert Chaurembo Mumba & 7 Others v. Maurice Munyao & 148 Others*** SC Petition No. 3 of 2016; [2019] eKLR ***(the Albert Chaurembo Case)*** in which the Court indicated that the ELRC has no jurisdiction over pension. It is further submitted that our employment laws are derived from the Conventions and Recommendations of the International Labour Organization (ILO), which also cover social security; and that Kenya is obliged to observe the same by virtue of her membership.

[40] It is the appellants' case that a restrictive interpretation of Article 162(2) of the Constitution and Section 12 of the ELRC Act strictly between employers and employees defeats the intention of the Kenyan people who wanted a specialized Court to eliminate the friction that existed between the Industrial Court and the High Court. It is urged that this was prompted by the narrow jurisdictional provision in Section 12(1) of the Labour Institution Act 2007 applicable prior to the new constitutional dispensation. Consequently, the word "including" in Section 12(1) of the ELRC Act cannot be taken to contextually limit the jurisdiction of the ELRC, as stated by the Court of Appeal.

[41] Furthermore, the appellants underscore that pursuant to a directive by the Chief Justice, the ELRC being a Court of the same status as the High Court, currently has a Judicial Review and Labour Rights division mandated to handle constitutional petitions for the enforcement of fundamental freedoms as well as other relevant provisions of the Constitution and to deal with judicial review applications. According to the appellants, this is in line with the gravamen of the consolidated appeal which challenges violation of the petitioners' rights through enactment of the NSSF Act, 2013.

[42] As regards *the jurisdiction of the ELRC as interpreted in certain cases*, the appellants submit that in the case of ***United States International University (USIU) v. Attorney General*** HC Petition No. 170 of 2012 [2012] eKLR,

Majanja, J. observed that the expression 'courts of the status of the High Court' was borrowed from Section 166 of the South African Constitution which equates the Labour Court with the High Court of South Africa. They postulate that by parity of reasoning, Article 162(2) of the Constitution of Kenya 2010 should be interpreted in the context of the South African Constitution, which in Section 172 gives all courts inclusive of the Labour Court the power to declare any law or conduct inconsistent with the South African Constitution invalid. The same position applies to the National Industrial Court of Nigeria which Court is granted exclusive jurisdiction on *inter alia* interpretation of Chapter IV of the Constitution of Nigeria as it relates to any matter over which the Court has jurisdiction as well as matters relating to ILO conventions and standards. Notably, it is submitted, both the Nigerian and South African Labour Courts have exercised their jurisdiction in determining matters over pension disputes.

[43] Additionally, the appellants denounce the 1st respondent's allegation that they are opposed to the NSSF Act 2013, because they do not wish to make contributions on behalf of casual and seasonal employees. They submit that they are bound to and have been contributing NSSF payments for the benefit of such employees which they will continue doing under any requisite regime of law. Further, they clarify that what they are opposed to, is contribution of "pension" and "gratuity" concurrently. The 3rd appellant specifically highlighted that its members belong to a superior pension scheme in which they contribute 27% of their earnings. In the same vein, the appellants contend that Article 43(1)(e) which the respondents argue was a precursor to the impugned Act was meant to benefit persons who were unable to support themselves as envisaged by the preamble to the Social Assistance Act No. 24 of 2013. Therefore, they surmise that Article 43(1)(e) and (3) introduced nothing new with respect to social security benefits tied to employment.

[44] As regards *concurrence between the Senate and the National Assembly in the enactment of the NSSF Act, 2013*, the appellants submit that the functions to

be performed by County Governments under the Fourth Schedule are performed through human capital in form of labour. Their wages are derived from revenue allocation sourced by the Senate on behalf of the County Governments. Therefore, the NSSF contributions from those wages must be budgeted for and financed. To this end, the appellants contend that the Senate should have been consulted on the matter which falls directly within its mandate, especially in light of the fact that County Governments have their own pension schemes, Laptrust, and the County Pension Fund.

[45] Concerning the issue *whether the Court of Appeal had jurisdiction to consider the merits of the consolidated petition having decided that the ELRC proceedings were a nullity*, the appellants submit that the Court of Appeal assumed original jurisdiction by considering issues amounting to nothing. According to the appellants, this was in contravention of Article 164(3) of the Constitution and Section 3 of the Appellate Jurisdiction Act. Therefore, the proceedings of the Court of Appeal beyond the determination of the jurisdiction of the ELRC were conducted devoid of jurisdiction and are null and void. In support of their submission, the appellants cite the Court of Appeal Ruling in ***Suleiman Said Shabal v. Independent Electoral Boundaries Commission*** Civil Appeal No. 42 of 2013 [2014] eKLR.

[46] *As regards remitting of the case*, the appellants submit that having made its finding on jurisdiction, the Court of Appeal was duty bound to remit the consolidated petition to the High Court for determination, since it did not have original jurisdiction over the matter. They reiterated that the High Court itself initially stated that it had no jurisdiction over the consolidated petition which decision was not challenged. It is further submitted that by determining the issue of concurrence only to the exclusion of all other aspects of the impugned Act's unconstitutionality, the Court of Appeal Judgment denied the appellants justice contrary to Articles 48 and 50 of the Constitution.

[47] Lastly, as regards its ***locus standi*** *to prosecute its case before the Court having been an interested party before the trial court and having failed to participate in proceedings before the Court of Appeal;* the 3rd appellant attributed its non-involvement to the 1st to 5th respondents' failure to serve it with the Notice and Memorandum of Appeal as well as hearing notices in Civil Appeal No. E656 of 2022. It is urged that this was in violation of the *audi alteram partem* rule rendering the resultant judicial decision null and void. To that end, the 3rd appellant concludes that the challenge of its standing before this Court is unwarranted and unavailable to parties that refused, failed or omitted to serve it.

(ii) 1st Respondent's Submissions

[48] In its submissions dated 6th and 27th April 2023, the 1st respondent contends that the appellants' submissions are a distortion of the facts leading to the present appeal and that they misapprehended the Court of Appeal's Judgment. It gave a synopsis of the repealed Act which set out a scheme providing for a mandatory provident fund to which employers and employees were obligated to remit monthly contributions. However, the repealed Act excluded casual workers from compulsory registration as members of the Fund. The 1st respondent urged that the Constitution of Kenya 2010 made social security a fundamental right to which 'every person' is entitled under Article 43. Therefore, the NSSF Act, 2013 was enacted for realization of social security which is entirely different from social assistance as alleged by the appellants. Further, it is urged that social security is defined by three pillars, namely: Pillar I, which is basic and mandatory social security for all persons equated to contributions under Tier I; Pillar II which is a complementary contribution component under Tier II, and Pillar III which is a voluntary personal savings pillar. The 1st respondent submits that social security has inbuilt financial contributions from members in formal employment, self – employment and in the informal sector.

[49] It is the 1st respondent's further submission that the 1st and 2nd appellants are owners of vast tea and coffee estates who employ hundreds of casual or seasonal workers during the harvest period. Accordingly, they represent the commercial interests of their members whose position is that gratuity payment is sufficient social security for permanent workers. For casual workers, compulsory registration was not required, however under the repealed Act, seasonal workers were mandatorily registrable. According to the 1st respondent, gratuity does not suffice as social security for the reasons that: it is an award based on merit and length of service payable at the employer's discretion; it applies to continuous length of service excluding casual workers who work only during the high season; gratuity conditions vary from employer to employer based on the specific employment agreement or CBA; and finally, gratuity is not a funded scheme, leaving employees at the mercy of employers and may not be payable in cases of insolvency.

[50] The 1st respondent then submits on the following issues; *whether the ELRC had jurisdiction to determine the constitutional validity of an Act of Parliament with no nexus to a contest involving employers and employees; whether the NSSF Bill 2013, was a Bill concerning counties; whether the Court of Appeal had powers to remit the dispute to the High Court* and *the* ***locus standi*** *of the 3rd appellant before the Court.*

[51] As pertains *the jurisdiction of the ELRC to determine the constitutional validity of the NSSF Act 2013*, the 1st respondent cited Article 165(3)(d) which gives the High Court jurisdiction to determine whether any law is inconsistent with or in contravention of the Constitution. It is submitted that to protect jurisdictional integrity of specialized courts, Article 165(5) precludes the High Court from determining matters falling within the jurisdiction of specialized courts, and vice versa. The 1st respondent also relied on the ***Karisa Chengo Case*** in which the Supreme Court stated that parity of hierarchical structure does not imply that either the Environment and Land Court or the ELRC is the High Court or vice

versa. Further, submitted the 1st respondent, when weighed against Section 12 of the ELRC Act, it is evident that the present action whose dominant purpose is adjudication of the constitutionality of a statute is beyond the purview of the ELRC. The 1st respondent also cited the ***Albert Chaurembo Case*** in urging that pensions disputes are not categorized as trade disputes.

[52] On *whether the NSSF Bill 2013, was a Bill concerning counties,* the 1st respondent set out the definition of bills concerning County Governments under Article 110 of the Constitution. Namely, bills containing provisions affecting the functions and powers of County Governments as set out in the Fourth Schedule; relating to elections of County Assembly or a County Executive or referred to in Chapter Twelve affecting the finances of County Governments. Consequently, the 1st respondent surmises that the NSSF Bill did not affect county finances which classification applies specifically to sharing of revenues between both levels of Government. The 1st respondent reiterates that the NSSF Act 2013, was in furtherance of the right to social security under Article 43(1)(e) of the Constitution, as opposed to the provision of welfare assistance to vulnerable persons under Article 43(3) of the Constitution and the Social Assistance Act 2013. Therefore, it falls squarely under the functions of the National Government stipulated in part 1, paragraph 14 of the Fourth Schedule which provides for consumer protection, including standards for social security and professional pension plans. In support of its submission, the 1st respondent cited the Court of Appeal decision in ***Pevans East Africa Limited & Another v. Chairman, Betting Control & Licensing Board & 7 Others*** Civil Appeal No. 11 of 2018; [2018] eKLR.

[53] As regards *remitting of the case to the High Court*, the 1st respondent relies on Section 75 of the Civil Procedure Act and Order 42 Rule 24 of the Civil Procedure Rules, in its submission that the power to remand a dispute is a discretionary power to be exercised by an Appellate Court; the power can be exercised where the Appellate Court has disposed of the suit on a preliminary point; and the Court from which the appeal originated should have had

jurisdiction. Based on these considerations, it is urged, discretion to remand was not available to the Court of Appeal because the ELRC had no jurisdiction to hear the dispute.

[54] As pertains *the **locus standi** of the 3rd appellant before the Court*, the 1st respondent submits that the 3rd appellant applied to be joined as an interested party before the trial court on grounds that it represented the interests of over 6000 pensioners of Laptrust. However, the 1st respondent argues that the Laptrust Defined Benefit Pension Scheme is a closed fund. Therefore, it does not admit new members but exists solely for the purpose of paying out provident funds until the last retiree is paid, at which point, it will be wound up. For this reason, it is submitted, the scheme is not within the purview of the NSSF Act 2013. To this end, the 1st respondent urges that the 3rd appellant has no identifiable stake in the consolidated petition, more so in its peripheral role as an interested party before the trial court. Further, the 1st respondent urges that the 3rd appellant was served with the requisite pleadings and was aware of the proceedings before the Court of Appeal.

(iii) 2nd, 3rd, 4th and 5th Respondents' Submissions

[55] The 2nd, 4th and 5th respondents' submissions dated 10th and 25th April 2023 and the 3rd respondent's submissions dated 11th and 27th April 2023 are largely similar to those of the 1st respondent. The additional aspects they have submitted on are *whether the NSSF Act 2013, creates a monopoly in the consumer market* and *whether a law can be declared unconstitutional for being inconsistent with another law*.

[56] As regards the issue, *whether the NSSF Act 2013, creates a monopoly in the consumer market*, it is submitted that the alleged superiority or monopoly of the NSSF scheme is merely speculative and not backed by evidence. They argue that the retirement program established under the NSSF Act 2013, is a primary programme that does not deter employees and businesses from negotiating better programmes. Moreover, Tier I of the scheme acts as a safety net in the event that

alternative schemes fail; and the fund fosters healthy competition among retirement plans. Therefore, the NSSF Act 2013, was enacted in an effort to fulfil progressive realization of rights guaranteed under Article 43 of the Constitution.

[57] On *whether a law can be declared unconstitutional for being inconsistent with another law,* the 2nd, 4th and 5th respondents cite the case of ***Juma Nyamawi Ndungo & 5 Others v. Attorney General; Mombasa Law Society (Interested Party)*** Mombasa HC Constitutional Petition No. 196 of 2018; [2019] eKLR, in which the High Court held that when the provisions of a later Act are so contradictory to those of an earlier Act that the two cannot exist, the earlier Act is implicitly repealed by the later Act. Therefore, it is submitted, the mandatory contribution to NSSF as prescribed in the NSSF Act 2013, takes precedence over competition provisions in Section 5 of the Competition Act. In conclusion, they urged that the consolidated appeal be dismissed in its entirety, with costs.

D. ISSUES FOR DETERMINATION

[58] Based on the parties' pleadings and respective submissions, we consider that the following five issues, once determined will dispose of the appeal at hand:

(i) Whether the 3rd appellant is a proper party to participate in the appeal as of right under Article 163(4) (a) of the Constitution;

(ii) Whether the Employment and Labour Relations Court lacked jurisdiction to determine the constitutional validity of the NSSF Act 2013.

(iii) Whether the Court of Appeal exercised original jurisdiction in partially determining the constitutionality of the NSSF Act 2013;

(iv) Whether the case should be remitted to the High Court for determination; and

(v) Reliefs, if any, available to the parties.

E. ANALYSIS

(i) On the 3rd appellant's locus standi before the Court

[59] In its preliminary objection dated 7th March 2023, the 1st respondent has made heavy weather of the 3rd appellant's capacity to institute its appeal as of right before the Court, it having been "simply" an interested party before the trial court and not having participated in the proceedings before the Court of Appeal. The 2nd, 3rd, 4th and 5th respondents associate themselves with the 1st respondent's argument. Collectively, the respondents take issue with the 3rd appellant mutating from an interested party and purporting to take over the role of primary parties, yet it did not have independent claims and remedies before the trial court.

[60] Moreover, the respondents urge that the 3rd appellant's claim that it was not served is immaterial, as it was fully aware of the pendency of the appeal. They assert that the 3rd appellant attended a meeting held on 19th October 2022, and fully participated in discussions on the appeal filed by the 1st respondent, proposing that the appeal be withdrawn. It is also urged that in any event, the 3rd appellant's membership consists of former employees of local authorities who were contributors of a closed scheme, to wit, Laptrust, a Fund being run as a going concern, which will be wound up upon payment of the last contributor. Consequently, it is urged, the impugned Act does not apply to its members, thereby divesting the 3rd appellant of any identifiable stake in the present proceedings.

[61] On the other hand, the 3rd appellant denies that it was served with the Notice and Record of Appeal, or that it was aware of the proceedings before the Court of Appeal. To buttress its denial, the 3rd appellant challenged the respondents, specifically the Attorney General, to prove service by way of an affidavit of service.

The 3rd appellant avers that no such evidence has been placed before the Court and it must follow therefore, that this ground of appeal is not contested. On the allegation that counsel for the 3rd appellant attended the meeting of 19th October 2022 alluded to by the respondents, the 3rd appellant responded that the informal meeting was held long after the expiry of the 7-day deadline prescribed by Rule 79(1) of the Court of Appeal Rules 2022, and could not be a substitute for service. Furthermore, the 3rd appellant urges that contrary to their argument, the respondents signed a consent before the ELRC acknowledging that the 3rd appellant had an interest in the matter. Accordingly, they are now estopped from alleging otherwise. To this end, it is submitted, the Court would be setting a dangerous precedent if it were to indulge a party who refuses, fails or omits to serve another, so as to deny it audience.

[62] Having set out the parties' case, we now proceed to give our determination. It is common ground that the 3rd appellant participated in the proceedings before the trial court as an interested party, and did not participate in the proceedings before the Court of Appeal. However, it is instructive to note that this Court rendered itself on the 3rd appellant's standing in its Ruling dated 16th June 2003 by stating:

> ***"[22] …. Perusal of the prayers/reliefs and the case advanced by the 3rd applicant in its appeal as well as its motion reveals that they are more or less in tandem with the 1st and 2nd applicants' case and reliefs sought in their appeal and motion. As such, it cannot be said that the 3rd applicant's interests have gone over and above that of the primary parties. What is more, we find that the 3rd applicant has not introduced a new issue that was either not canvassed before the superior courts below or did not arise from the impugned judgment. As to whether the 3rd applicant should have filed a review before the Court of***

Appeal as opposed to an appeal before this Court, we find that issue would go to the merit of its appeal and ought to be addressed in the consolidated appeal."

[63] Be that as it may, despite the 5th respondent's insistence that the 3rd appellant was served with both the Notice and Record of Appeal, the State Counsel could hardly prove service from the Record. They identified their Notice of Cross Appeal at Volume 7, page 1028 of the 3rd appellant's Record of Appeal, in support of their assertion that they served the 3rd appellant by email. A perusal of the same reveals that the 3rd appellant's advocates on record are listed under "parties upon whom the Attorney General intended to effect service". However, this falls woefully short of conclusive proof of service.

[64] Having concluded that there is no proof that the 3rd appellant was served, what remedy was available to it? The 3rd respondent suggests that in the circumstances, the only avenue for redress available to it was to apply for review of the Court of Appeal's Judgment. However, we are differently minded. The argument that the 3rd appellant was only an interested party before the trial court with limited participation and is therefore precluded from filing an appeal before this Court does not hold. Notably, it had a demonstrable interest and was active before the trial court. Further, the lapse in service leading to its non-involvement at the Court of Appeal lay squarely with the Attorney General and perhaps, to some extent with the Court of Appeal itself.

[65] We agree with the 5th respondent that the overriding interest is that of a primary party, in accordance with the principles set out in the case of ***Francis Karioki Muruatetu & Another v. Republic & 5 Others*** Petition No. 6 of 2016; [2016] eKLR thus:

"Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal

parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court…

…. Therefore, in every case, <u>whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties</u>." [Emphasis ours]

[66] However, we reiterate that in this case, the 3rd appellant's case and prayers are identical to those of the 1st and 2nd appellants, whose petition is the lead file. The respondents' argument as to the standing of the 3rd appellant is therefore unmerited.

[67] This case is clearly distinguishable from our decision in ***Law Society of Kenya v. Communications Authority of Kenya & 10 Others*** (Petition 8 of 2020) [2023] KESC 27 (KLR), wherein the Court declined to admit an appeal by the intending appellant who had never been a party to the case at both the High Court and Court of Appeal. The Court found difficulty in granting relief at the appellate stage to a party who did not litigate those issues before the superior courts.

(ii) Whether the Employment and Labour Relations Court lacked jurisdiction to determine the constitutional validity of the NSSF Act 2013

[68] It is the appellants' argument that the ELRC had jurisdiction to declare the NSSF Act unconstitutional. They base their argument on Article 162(2)(a) of the Constitution and the opening paragraph of Section 12(1) of the ELRC Act, to urge

that the expression *'relating to employment and labour relations'* cannot be construed to mean only disputes between 'employers and employees.' Similarly, it is urged, the expression *'connected purposes'* in the preamble should be construed to mean any dispute connected with employment and labour relations. As regards the list of scenarios enumerated in Section 12(1) of the ELRC Act, the appellants assert that the expression *'including'* means *"includes but is not limited to"* in accordance with the interpretation in Article 259(4)(b) of the Constitution. They cite the case of ***EG v. Non-Governmental Organization Coordination Board & Others*** HC Petition No. 440 of 2013; [2015] eKLR, on an inclusive construction of the word *'including'*.

[69] Additionally, it is the appellants' case that provision of social security benefits including pensions is an integral component of employment and labour relations both domestically and internationally. The NSSF Act 2013, they submit, falls within that sphere. They urge that pension rights cannot exist outside of employment; and that the drafters of the Constitution intended that the ELRC should have jurisdiction on all matters relating to employment and labour relations.

[70] In this regard, they posit that the interpretation of constitutional provisions is not the preserve of the High Court more so where employment and labour relations are involved. In their estimation, by necessary inference and deduction, a dispute relating to the constitutionality of an Act of Parliament that applies only to employers and employees and deals entirely with pension must be a dispute within the four corners of the jurisdiction of the ELRC. Furthermore, the appellants implore the Court to adopt the practice in the South African and Nigerian Labour Courts which are empowered to nullify laws within their purview.

[71] Conversely, the respondents contend that the first issue as framed by the trial court itself, was that the gravamen of the petition was for the court to find the enactment of the NSSF Act No. 45 of 2013 in violation of the Constitution. They therefore surmise that the trial court assumed jurisdiction over the enactment

process of the Act, which was not an issue incidental to the employer-employee relationship. According to the respondents, the ELRC assumed the jurisdiction of the High Court under Article 165(3)(d).

[72] This appeal turns on the ELRC's jurisdiction as a court of the status of the High Court to determine the constitutional validity of an Act of Parliament. In this regard, this Court in ***the Karisa Chengo Case*** adopted the definition of jurisdiction in the following terms:

> ***"[35] In the above regard, we note that in almost all the legal systems of the world, the term "jurisdiction" has emerged as a critical concept in litigation. Halsbury's Laws of England (4th Ed.) Vol. 9 at page 350 thus defines "jurisdiction" as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision." John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term 'jurisdiction' as follows:***
> ***"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. <u>The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means.</u> If no restriction or limit is imposed, the jurisdiction is said to be unlimited. <u>A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics....</u> Where a Court takes upon itself to***

exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given." [Emphasis added]

[73] For us to dispose of this issue in the face of the two contrasting positions of the parties, it is important to briefly revisit the constitutional reform process that preceded the establishment of the ELRC. In ***the Karisa Chengo Case,*** the Court recounted the history and context in which the Committee of Experts (CoE) conceived of specialised courts. Specifically, that the drafters of the Constitution intended to delineate the roles of specialised courts, for the purpose of achieving specialization while conferring equality of the status of the High Court to the new category of courts. The Court clearly stated thus:

"[51] Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court's operation. Courts can therefore be of the same status, but exercise different jurisdictions. That is why this Court has reaffirmed its position that the jurisdiction of Courts is derived from the Constitution, or legislation *(see In Re the Matter of the Interim Independent Electoral Commission,* ***at paras. 29 and 30;*** *and Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others,* ***Sup.Ct. Civil Application No. 2 of 2011 [para. 68]). In this instance, the jurisdiction of the specialized Courts is prescribed by Parliament, through the said enactment of legislation relating, respectively, to the ELC and the ELRC."*** [Emphasis added]

[74] Pursuant to Article 162(2)(a) of the Constitution, the ELRC was operationalized by the Employment and Labour Relations Court Act No. 20 of 2011, whose purpose is to "*establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations*". By

dint of Section 12 (1) of the Act, the jurisdiction of the Court is delineated as follows:

> ***12. Jurisdiction of the Court***
>
> ***(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —***
>
> ***(a) disputes relating to or arising out of employment between an employer and an employee;***
>
> ***(b) disputes between an employer and a trade union;***
>
> ***(c) disputes between an employers' organisation and a trade unions organisation;***
>
> ***(d) disputes between trade unions;***
>
> ***(e) disputes between employer organizations;***
>
> ***(f) disputes between an employers' organisation and a trade union;***
>
> ***(g) disputes between a trade union and a member thereof;***
>
> ***(h) disputes between an employer's organisation or a federation and a member thereof;***
>
> ***(i) disputes concerning the registration and election of trade union officials; and***

(j) disputes relating to the registration and enforcement of collective agreements.

[75] Section 12 (2) of the Act provides that:

> "***An application, claim, or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employers' organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose."***

From the above provisions of the Constitution and the Act, it is clear that the jurisdiction of the ELRC is limited in terms of the types of disputes and the parties.

[76] On the other hand, the jurisdiction of the High Court to determine the constitutional validity of a statute is clearly stipulated in Article 165(3)(d)(i) of the Constitution in the following terms:

> ***165....***
>
> ***(3) Subject to clause (5) the High Court shall have:***
>
> ***(d) jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of:***
>
> ***(i) the question whether any law is inconsistent with or in contravention of this Constitution...***

[77] The question before us is whether, within the scheme of the jurisdictional virements effected by the Constitution between the High Court and the two specialized courts, the latter can determine the constitutional validity of a statute. In order to answer this question, we have to revisit the relevant provisions of the Constitution as above quoted.

Clause 5 to which Article 165 (3) is subject provides as follows:

> ***"The High Court shall not have jurisdiction in respect of matters-***
>
> ***a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution, or***
>
> ***b. falling within the jurisdiction of the courts contemplated in Article 162 (2).***

[78] Once again, we are guided by this Court's finding in the ***Karisa Chengo Case*** wherein the Court held as follows:

> ***"[52] In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with*** *sui generis* ***jurisdiction, is provided for. <u>We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court</u>***." [Emphasis added]

[79] In our view, there is nothing in the Constitution, the ELRC Act, or indeed in our decision in ***the Karisa Chengo Case*** to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC Court is precluded from determining the constitutional validity of a statute. This is especially so if the statute in question lies at the centre of the dispute. What it cannot do, is to sit as if it were the High Court under Article 165 of the Constitution, and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment and labour relations within the context of the ELRC Act. But, if at the commencement or during the determination of a dispute falling within its jurisdiction, as reserved to it by Article 162 (2) (a) of the Constitution, a question arises regarding the constitutional validity of a statute or a provision thereof, there can be no reason to prevent the ELRC from disposing of that particular issue. Otherwise, how else would it comprehensively and with finality determine such a dispute? Stripping the Court of such authority would leave it jurisdictionally hum-strung; a consequence that could hardly have been envisaged by the framers of the Constitution, even as they precluded the High Court from exercising jurisdiction over matters employment and labour pursuant to Article 165 (5) (b). We are therefore in agreement with the appellants' submissions regarding this issue as encapsulated in paragraph 69 of this Judgment.

[80] Having said so, we have to emphasize that the High Court retains the residual jurisdiction to determine whether any law is inconsistent with the Constitution within the meaning of Article 165, bearing in mind the provisions of Article 165 (5) (b). It must also be restated that the High Court (as between it and Courts established under Article 162 of the Constitution), has the original and exclusive jurisdiction (without exception) to hear and determine applications for redress of denial, violation, or infringement of rights and fundamental freedoms in the Bill of Rights pursuant to Articles 22 and 23 of the Constitution (See Supreme Court Judgment in ***The County Assemblies Forum v. the Attorney General & Others;*** Pet. No. 22 of 2017**,** at Paragraph 56).

[81] We now come to the specific question *whether the ELRC correctly assumed jurisdiction to determine the constitutional validity of the NSSF Act 2013*. Towards this end, we are persuaded by the appellants' argument to the effect that the Court of Appeal adopted a rather restrictive view of the reach of the NSSF Act 2013, in holding that the matter before the ELRC did not emanate from an "employer-employee" dispute. The extensive provisions of the Act, requiring employers and employees to contribute specific amounts of money to a Social Security Fund cannot be said to have nothing to do with an employer-employee relationship. Even if the matter did not emanate from an employer-employee dispute within the confines of the ELRC Act, to the extent that it introduces enhanced and mandatory contributory amounts of employee earnings, the Act has potential to ignite justiciable grievances from certain cadres of employees. No doubt these grievances would end up at the ELRC which would likely be called upon, as it was in this case, to determine the constitutional validity of the same. But even beyond the employer-employee dispute resolution regime, the NSSF Act 2013, seeks to expansively regulate a wide array of labour relations especially the social security of the employed cadre when they finally exit formal employment. Should it then be surprising that an employee should be concerned about what his/her future would look like after salaried employment?

[82] We must ask, who were the parties to this dispute? From the pleadings on record, before and after the consolidation of the various petitions, it is clear that the dispute pitted trade unions, workers associations, employers' associations and certain employees, against the Cabinet Secretary for Labour, the NSSF Board of Trustees, and the Attorney General. The dispute roped in organizations and authorities as diverse as the Central Organization of Trade Unions (COTU), Federation of Kenya Employers (FKE), the Retirement Benefits Authority (RBA), and the Competition Authority. What were the appellants complaining about? From the proceedings as re-enacted in this Judgment, whether rightly or wrongly, they complained among others, about the burdensome nature of the new contributions to the scheme that had been introduced by the NSSF Act 2013. They

complained about the enhanced powers of the Cabinet Secretary for Labour over the management of their Scheme. They complained about the legality of a Fund premised on an employer and employee relationship. They complained about the negative effect the new law would have on the existing Collective Bargaining Agreements (CBAs).

[83] Can it be said that the parties herein are not among the disputants contemplated under Section 12(2) of the ELRC Act? Even where the Act stipulates that a complaint, application or suit may be lodged against the Cabinet Secretary for Labour or any office established by law for that purpose? Or that the nature of the dispute is not one that falls within the jurisdiction of the ELRC, even where, as in this case, both employers and employees, trade unions, and workers associations are decrying what they consider to be the adverse effect of a new law on their working conditions? We are in agreement with the Court of Appeal to the effect that this dispute did not arise strictly from an employer-employee relationship. But what about the other aspects of the dispute? What meaning is to be ascribed to the phrase "labour relations"?

[84] It has been submitted by the respondents herein, that by dint of our decision in ***the Albert Chaurembo Case,*** the ELRC has no jurisdiction over disputes arising from the implementation of the NSSF Act 2013, as the same deals with "Pensions". But what was the decision in ***Chaurembo***? At Paragraph 145, the Court pronounced itself as follows:

> ***"On the other hand, section 2 of the Employment and Labour Relations Court Act defines the term an "an employee" to mean a person employed for wages or salary and includes an apprentice and indentured learner. The provision further defines "employer" to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such***

person, public body, firm, corporation, or company. *Thus, whereas a dispute may well fall within an employment dispute, the meaning of* ***a pensioner*** *is nowhere near the meaning of an employee, neither can the scheme of organisation fit in the meaning of an employer."* [Emphasis added]

[85] Again, at paragraph 146, the Court stated:

> ***"In our view, once a member leaves the employment of a Sponsor, by becoming a pensioner, there is no longer a relationship of employer-employee that exists between such a pensioner and the sponsor. The relationship that exists in that case becomes that of trustee and beneficiaries (members) of a trust and that relationship is governed by the Retirement Benefits Act, Trustees Act, Cap 167 of the Laws of Kenya and the general common law on trusts. It is important to note that nowhere in the Employment and Labour Relations Court Act is there jurisdiction conferred on the Employment and Labour Relations Court to resolve issues between trustees of a pension scheme and members of the scheme (pensioners)."***

[86] It is clear that our decision in ***Chaurembo,*** does not oust the jurisdiction of the ELRC to determine disputes, arising out of the application of the provisions of the NSSF Act 2013, to employees who are yet to become pensioners. What the ELRC lacks, is jurisdiction over disputes between pensioners and trustees of a specific pension scheme as the latter is governed by dedicated statutes and applicable common law. A pensioner is a person who is no longer in employment. He cannot therefore seek any redress arising from a dispute between him and the trustees of a Scheme to which he is a member from the ELRC. The appellants herein are not pensioners but organizations representing employees who are still in active employment. Although the NSSF Board of Trustees is a main protagonist

in the dispute, it has been enjoined due to the fact that it is the one which will administer the Scheme of which the appellants are dissatisfied with.

[87] For the avoidance of doubt, and so as to stop the pendulum of jurisdictional re-jigging that has characterised this case from the beginning, we hereby restate that the ELRC has jurisdiction to determine the constitutional validity of a statute in matters employment and labour. Suffice it to say that the statute in question must be in focus and at the centre of the dispute in question. Having so declared, there remains the question as to whether the ELRC rightly and judiciously, exercised its jurisdiction in declaring the NSSF Act 2013, unconstitutional. It is no longer a question whether the Court had or lacked jurisdiction to so do, but whether it correctly exercised its jurisdiction in declaring the Act unconstitutional. Had the Court of Appeal not found to the contrary, it would have answered this question comprehensively when the appeal came up for hearing before it. But having found that in declaring the NSSF Act 2013, unconstitutional, the ELRC had acted without jurisdiction, the Appellate Court could not pronounce itself on the merits of the trial court's findings. It had to down its tools and remit the matter to the court that had jurisdiction, in this case, the High Court. However, instead of remitting the matter as aforesaid, the Appellate Court went on to determine the merits of one issue, while leaving the others in abeyance. It is this scenario that brings us to the next issue for determination.

(iii) Whether the Court of Appeal exercised original jurisdiction in partially determining the constitutionality of the NSSF Act, 2013

[88] On the one hand, the appellants contend that by pronouncing itself on the substantive merits of the case, (the Senate's concurrence in the enactment of the NSSF Act), the Court of Appeal assumed original jurisdiction, in effect pre-empting trial court level determination. They urge that the court committed a fundamental error. In their opinion, having declared the ELRC proceedings a nullity, there was

no Judgment from the trial court upon which the Court of Appeal could make a determination.

[89] In this regard, they argue that the Court of Appeal ran afoul of the limits of its appellate jurisdiction under Article 164(3) of the Constitution and Section 3 of the Appellate Jurisdiction Act. In effect, the appellants conclude that the Court of Appeal's determination that the enactment of the impugned Act did not require the Senate's concurrence is null and void.

[90] On the other hand, the respondents argue that the Court of Appeal correctly determined that the NSSF Act 2013, being a legislation on social security and professional pension plans, is a National Government function under Part 1 of the Fourth Schedule to the Constitution and consequently, it was not a Bill amenable to concurrent legislation by the National Assembly and the Senate under Article 110.

[91] The respondents also faulted the trial court for misapplying this Court's Advisory in, ***In the Matter of the Speaker of the Senate;*** Advisory Opinion Reference No. 2 of 2013; [2013] eKLR which was clearly distinguishable as it dealt with a Money Bill. Furthermore, they faulted the trial court for failing to apply the correct test to ascertain whether the NSSF Act 2013, dealt with functions, powers and finances of the County Government.

[92] We note that while citing the case of ***Desai v. Warsaw*** (1967) EA 351, the Court of Appeal held that proceedings conducted by a court without jurisdiction, as well as any award, Judgment or Orders arising therefrom are a nullity. Notwithstanding its finding, the Appellate Court proceeded to decide on the concurrence issue. It is instructive to note that in doing so, the Court of Appeal termed it as a threshold issue. The effect of this determination which went to the merits of the claim, to the exclusion of the grounds challenging the validity of the NSSF Act 2013, leaves other factual and constitutional questions of live controversy that are yet to be determined through the requisite appellate process. In the case of ***The Kenya Section of the International Commission of***

Jurists v. Attorney General, Crim. Appeal 1 of 2012, [at p. 4, paras.24-26] this Court stated:

> ***"We recognize that generally, the entry into the sphere of emerging jurisprudence is located at the High Court which bears original jurisdiction to interpret the Constitution and which has an appellate jurisdiction from lower Courts that address the basic scenarios of fact that spawn issues of jural character.***
>
> ***The Supreme Court all by itself and without the benefit of such other Courts would be insufficiently resourced and empowered to develop rich jurisprudence as provided for. The law-making chain indeed goes back to the Subordinate Courts, which constitute the "grassroots" entry-point into the varied intellectual dimensions of law that will guide the process of construction of legal ideas.***
>
> ***It follows that the Supreme Court, to best situate itself so as to address the complexity of the construction of law, must safeguard the proper jurisdiction of the Courts below it."***

[93] In view of our opinion as expressed in the paragraph above, it is our holding that where the Court of Appeal determines that a trial court has acted without jurisdiction in determining a matter, it cannot assume original jurisdiction over the same. Having so found, the Appellate Court has to remit the case to the court that is clothed with jurisdiction to dispose of the same without going into the merits of the dispute, for doing so may prejudice the fair determination of the case by the court with jurisdiction.

(iv) Whether the case should be remitted to the High Court for determination

[94] The appellants urge that in the event that the Court upholds the Court of Appeal, the case ought to be remitted to the High Court for determination on its merits. On the other hand, the respondents' position is that remanding the case back to the High Court was not an avenue available to the Court of Appeal. They relied on Section 75 of the Civil Procedure Act to argue that a case can only be remanded to a court from which it came, that had jurisdiction to determine it in the first place.

[95] In order to make an informed determination on this issue, it behoves us to revisit the procedural environment in which this matter was filed, as well as the chronology of events through the various superior courts. It is common ground that two of the five petitions were initially filed at the Constitutional and Human Rights Division of the High Court. When placed before *Mumbi Ngugi J.* (as she then was), the learned judge directed that the matter be placed before the Employment and Labour Relations Court, as its subject matter involved social security, a matter within the ELRC's jurisdiction. Thereafter, the question of jurisdiction arose at the outset, with the Chief Justice empanelling a mixed bench before the same was declared unconstitutional pursuant to the ***Karisa Chengo Case***. Subsequently, the Court of Appeal set aside the ELRC Judgment and all consequential Orders.

[96] We have already held that, contrary to the Court of Appeal's finding, the ELRC had jurisdiction to determine the constitutional validity of the NSSF Act 2013. It is therefore no longer a live issue as to whether this matter should be remitted to the High Court. In the unique circumstances of this case, the relief that lends itself to us is Section 22 of the Supreme Court Act 2011, which empowers the Court to remit proceedings in the following terms:

> ***22. Power to remit proceedings***
>
> ***The Supreme Court may remit proceedings that began in a court or tribunal to any court that has jurisdiction to deal with the matter.***

[97] In the circumstances, this case is to be remitted to the Court of Appeal to determine the substantive merits of the Judgment of the ELRC. Due to the nature of the matter, the surrounding public interest and the time taken by the case in the corridors of justice, it is prudent that the matter be heard on a priority basis.

(v) Costs

[98] The respondents made submissions on their entitlement to costs. Guided by this Court's holding in the case of ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others*** SC Petition No. 4 of 2014; [2014] eKLR, the general rule is that costs follow the event. However, the Court may in appropriate cases exercise discretion and decide otherwise, to ensure that the ends of justice are met. In this instance, we do not think that there is justification to direct the respondents to bear the costs of this litigation. As it is, this case is yet to be substantively determined by the Court of Appeal, with the possibility that a further appeal may still lie to this Court. Consequently, the Order that commends itself to us is to direct each party to bear its own costs.

F. ORDERS

[99] We make the following consequential 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;

(iii) Each Party shall bear its own Costs; and

(iv) We hereby direct that the sum of Kshs. 6000/- deposited as security for costs in each appeal herein be refunded to the appellants.

It is so Ordered.

DATED and **DELIVERED** at **NAIROBI** this **21st** Day of **February 2024.**

.....

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

.....	.....
P. M. MWILU **DEPUTY CHIEF JUSTICE &** **VICE-PRESIDENT OF** **THE SUPREME COURT**	**M. K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**
.....	.....
S. C. WANJALA **JUSTICE OF THE SUPREME COURT**	**NJOKI NDUNGU** **JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA **JUSTICE OF THE SUPREME COURT**	**W. OUKO** **JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA