

# **SUPREME COURT JUDGMENT ON THE NSSF ACT, 2013**

*Kenya Tea Growers Association and 2 Others Vs. The National  
Social Security Fund Board of Trustees and 13 Others, SC  
Petition No. E004 of 2023 as consolidated with Petition No. E002  
of 2023*

## A. BACKGROUND

With the enactment of the National Social Security Fund (NSSF) Act, 2013, the Act sought to increase the contribution rates from Kshs. 400 to 12% of an employee's monthly earnings, with a 6% deduction from the employee and an equivalent 6% deduction from the employer.

Further, the Act sought to impose a mandatory registration and contribution. With the said provisions in place, several petitions were filed at the High Court in Nakuru and Nairobi challenging the constitutionality of the NSSF Act.

These petitions were consolidated into one for determination by the Employment and Labour Relations Court (ELRC) in Nairobi. The ELRC in its judgment of 19th September 2022 held that the NSSF Act 2013 was unconstitutional, null, and void and issued orders prohibiting its implementation. Aggrieved by the judgment, the National Social Security Fund Board of Trustees appealed to the Court of Appeal.

The Court of Appeal subsequently rendered its judgment on 3rd February 2023 setting aside the judgment together with all the consequential orders of the ELRC and held that the ELRC lacked jurisdiction to determine the petitions as filed as such the judgment and orders arising from its proceedings were a nullity.

Aggrieved by the Court of Appeal's judgment, the petitioners filed an appeal at the Supreme Court with the crux of the appeal revolving around the jurisdiction of the ELRC vis-a-vis the jurisdiction of the High Court to entertain the dispute at hand.

Below we analyze the arguments made before the Supreme Court and the consequent judgment of the apex court as delivered on **21st February 2024**.

### B. ISSUE FOR DETERMINATION

We note that several issues were raised for determination by the Supreme Court. However, the main issue for determination was the question of jurisdiction which had the utmost impact on the ELRC and Court of Appeal judgment. Below we analyse the parties' arguments on the issue of jurisdiction of the ELRC as provided under Article 162 of the Constitution and Section 12 of the ELRC Act.

#### Arguments by the Petitioners

On the question of the jurisdiction of the ELRC as provided under Article 162 of the Constitution and Section 12 of the ELRC Act, the appellants argued that: -

The aforementioned provisions extended the jurisdiction of ELRC to matters relating to employment and labour relations and the list of matters identified under Section 12 (1) (a) to (g) of the ELRC Act was not exhaustive. Moreover, that the word “including” as used in the Section could not be taken to contextually limit the jurisdiction of the ELRC;

- The dispute at hand was an employment issue since it was on the determination of the constitutionality of a law that intended to alter the obligations of employers and employees;
- The Kenyan law was derived from the Convention and Recommendations of the International Labour Organization (ILO), which covers social security, and Kenya being a member was obligated to observe the same under her membership;
- The restricting of the interpretation of Article 162 of the Constitution and Section 12 of the ELRC Act strictly between employers and employees defeated the intention of the Kenyans to have a specialized Court to eliminate the friction that existed between the Industrial Court and the High Court; and

- Pursuant to a directive by the Chief Justice, the ELRC was a court of the same status as the High Court, had a Judicial Review and Labor Rights Division mandated to handle constitutional petitions for the enforcement of fundamental freedoms as well as other relevant provisions of the Constitution
- The Appellants reiterated that they were bound to and had been contributing NSSF payments for the benefit of employees which they intended to continue doing. However, they were opposed to the contribution of pension and gratuity concurrently.

#### Arguments by the Respondents

In response, the Respondent relied on the provisions of Article 165 (3) (d) of the Constitution which gives the High Court jurisdiction to determine whether any law is inconsistent with or in contravention of the Constitution and argued that: -

- To protect the 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;
- When weighed against Section 12 of the ELRC Act, the dispute at hand was for the determination of the Constitutionality of a statute whose determination was beyond the purview of the ELRC; and
- The dispute at hand was a pension dispute and not categorized as a trade dispute.

### **C. COURT'S DETERMINATION**

In its determination of whether the ELRC lacked jurisdiction to determine the constitutional validity of the NSSF Act 2013, the Supreme Court considered the parties' arguments and noted that: -

- Under Article 162(2) (a) of the Constitution, the ELRC was operationalized by the Employment and Labour Relations Court Act whose purpose was to establish the ELRC to hear and determine disputes relating to employment and labor relations;
- Section 12 (1) of the ELRC Act delineated the jurisdiction of the ELRC;
- From the provision of the Constitution and the ELRC Act, the jurisdiction of the ELRC was limited in terms of the type of disputes and the parties; and
- Article 165(3)(d)(i) of the Constitution stipulated the jurisdiction of the High Court to determine the constitutional validity of a statute;

The Court thus sought to establish whether, under the jurisdictional scheme as effected by the Constitution between the High Court and the ELRC, the ELRC could determine the constitutional validity of a statute.

### **D. COURT'S JUDGMENT**

At the end the Supreme Court was of the view that: -

- There was nothing in the Constitution or the ELRC Act to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC Court was precluded from determining the constitutional validity of a statute especially where the statute in question lay at the center of the dispute;
- The Court of Appeal adopted a 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 provision of the NSSF Act requiring the employers and employees to contribute specific amounts of money to a Social Security Fund could not be said to have nothing to do with the employer-employee relationship; and
- The ELRC had the jurisdiction to determine the constitutional validity of a statute in matters of employment and labor.

Consequently, in reliance to the provisions of Section 22 of the Supreme Court Act 2011, the Supreme Court remitted the case back to the Court of Appeal to determine the substantive merits of the ELRC judgment on an urgent basis.

### **E. IMPACT OF THE DECISION**

We note that the Supreme Court judgment overturns the Court of Appeal judgment on the basis that the ELRC had jurisdiction to declare the NSSF Act unconstitutional.

Therefore, this means that the unconstitutionality status of the Act as initially declared by the ELRC remains until the redetermination of the case by the Court of Appeal. This also halts the mandatory registration and contribution at the 12% rate as envisaged under the NSSF Act.

### **F. CONTROVERSY**

We are cognizant that vide public notice issued by the NSSF on 22nd February 2024, the NSSF advised the public that following the judgment of the Supreme Court, the NSSF Act still remained in force. In the said notice, the NSSF noted as follows; -

- That the Supreme had not lifted the Court of Appeal orders delivered on 3rd February 2023. Consequently, the NSSF Act No. 45 of 2013 remained in force.
- It affirmed the Notice to Employers on 12th January 2024 on remittance of the NSSF contributions in line with the NSSF Act No. 45 of 2013.

However, with due respect to the NSSF, we beg to differ with the said position noting as follows; -

At the Court of Appeal, the main contention was the jurisdiction of the ELRC to hear and determine the case at the first instance. At the time, the Court of Appeal ruled that the ELRC did not have jurisdiction to hear and determine the matter and subsequently upholding the constitutionality of the NSSF Act.

However, by the Supreme Court issuing its judgment to the effect that indeed the ELRC had jurisdiction to determine the matter, it follows that the decision of the Court of Appeal is overturned. Further, the substratum of the court of appeal case, that is jurisdiction of ELRC, failed and hence resultant orders thereto unenforceable.

To this effect, the NSSF having enjoyed orders effecting the implementation of the NSSF Act as at then and emanating from the ruling of the Court of Appeal touching on the substratum cannot now purport to argue that the NSSF Act is in force and yet the Supreme Court has ruled that indeed the ELRC had jurisdiction to determine the Appeal.

As such any resultant orders emanating from the Court of Appeal ruling that ELRC did not have jurisdiction cannot be termed as now being in force as alleged by NSSF. This in our opinion is a deliberate and intentional adoption of wrong interpretation of law by NSSF in a bid to ensure continued remittance of the contributions

### G. CONCLUSION

We note that the dispute is now back at the Court of Appeal. We shall keep an eye on the issue for further developments. We are happy to provide further assistance on the issues arising from the judgment on the NSSF Act 2013 and how it will affect your business. Should you require further clarification on the above, please contact us.

### LET'S TALK

For further information on how the enacted tax provisions will affect your business or assistance on any other matter kindly contact your regular Taxwise Africa analyst or the contacts below.

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