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LEGAL ALERT

COURT STRIKES DOWN NATIONAL SOCIAL
SECURITY FUND ACT, 2013 AS
UNCONSTITUTIONAL





Background

On 19th September 2022, in [Petition No. 38 of 2014 – Kenya Tea Growers Association & 8 others v. National Social Security Fund Board & Others](#) a three Judge bench of the Employment and Labour Relations Court (ELRC) declared the National Social Security Fund Act, 2013 ([the NSSF Act](#)) to be unconstitutional. In their Judgment, the learned Judges held that the NSSF Act fell short of the dictates espoused in the Constitution majorly on the grounds that the NSSF Act: (i) was inconsistent with the Competition Act; (ii) compelled mandatory contribution into the National Social Security Fund ([the Fund](#)) for both the employees and the employers despite one's membership in alternative social security schemes; (iii) was improperly enacted for flouting the legislative procedures, among others. The decision comes at interesting times when the country's leadership is pushing for a more robust social security framework for its citizens.

It is apposite, so as to put the matter into context, to briefly delve into the history of the Fund. The Fund was established under the National Social Security Fund Act (Cap. 258) Laws of Kenya ([the old NSSF Act](#)) in the year 1965. The old NSSF Act was established as a mandatory national social security scheme whose foremost objective was to provide basic financial security benefits to Kenyans. The Fund was designed to give upon retirement, a lump sum, with all Kenyans over the age of 18 obligated to register with the Fund whether or not employed in the formal or informal sectors of the Economy.

In an attempt to revitalize the Fund, a new statute, the NSSF Act was enacted in 2013 which made the participation for both employers and employees compulsory. Under the NSSF Act, employees were required to contribute six percent (6%) of their pensionable earnings while the employer contributed an equivalent amount for each employee. In the event, various petitions were filed challenging the constitutionality of the NSSF Act, with the question before the ELRC was whether the NSSF Act passed Constitutional muster.

Why the ELRC found the Act to be Unconstitutional

A. Mandatory Registration and Contribution to the Fund

The ELRC declared the NSSF Act to be null and void and ordered a prohibition of mandatory registration or contribution from employees or employers. The ELRC ordered NSSF to refrain from compelling or requiring mandatory listing of employers or employees whether or not registered as members of any alternative retirement benefit scheme.

The ELRC reasoned that it was contrary to freedom of association under Article 36 of the Constitution to compel employees and employers who have adequate and alternative pension or social security schemes to register and contribute to the Fund. The ELRC found that this amounted to the State shifting its obligation under Article 43 (3) of the Constitution to provide social security for the less fortunate.

B. Approval of Payment of Allowances and Fees by the Cabinet Secretary for Labour

The ELRC held that section 13 of the NSSF Act which mandated the Cabinet Secretary to approve payment of allowances, remuneration or fees to the members of the NSSF Board or its Committees rather than the Salaries and Remuneration Commission (SRC) pursuant to Article 230 (4) of the Constitution which provides for functions of the SRC was a nullity for being contrary to and inconsistent with the Constitution.

The ELRC noted that the SRC was the Constitutional institution mandated to determine the amount and the nature of remuneration, fees or allowances for the public servants and other employees of government agencies and institutions.

C. Monopoly in the Provision of Social Security Services

The Petitioners also raised issue as to whether the NSSF Act violated the provisions of the Competition Act. The Court's pronouncements on this issue were that the NSSF Act went against the objectives of promoting effective and fair competition set out in section 3 of the Competition Act. The NSSF Act seemed to favour the Fund, thus making it monopolise pension services as other social security providers are compelled to register with the Fund, which stifles competition.

The ELRC opined that the national values and principles of governance encapsulated under Article 10 of the Constitution bind all State organs and the Fund was not an exception.

D. Making Membership with the Fund a Pre-condition for Access to Public Services

Section 19 (2) of the NSSF Act made access to public services conditional upon mandatory registration and membership of the Fund. This section sharply conflicted with various Articles in the Constitution including Article 47 (1) on fair administrative actions, Article 232 (1) on values and principles of public service, Article 21(1) on the State's obligation to ensure the protection and fulfilment of the fundamental freedoms in the Bill of Rights and Article 27 (4) on non-discrimination.

E. Lack of Legislative Concurrence with the Senate on a Money Bill & Matters Concerning County Governments

The ELRC also cited violation of key provisions of the Constitution during the enactment of the law, including failure by the National Assembly to refer the legislation to the Senate for concurrence.

Under Articles 205 (1) and 110 of the Constitution, the National Assembly must consult the Senate on Money Bills and when considering Bills concerning County Governments. The concurrence of the bicameral Parliament is a precondition for the validity of any legislation concerning county governments. Hence, the unilateral passing of the NSSF Act by the National Assembly was an affront of the law.

Conclusion and Way Forward

With the NSSF Act having been declared null and void for unconstitutionality, it means that remittances to the Fund will for the time being, be governed by the old



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NSSF. However, we are aware that there is a pending application for stay of execution of the said Judgment pending Appeal filed by the Attorney General, which is likely to be determined in the coming weeks. We note to keep you updated on the progress of the application for stay pending Appeal as well as the intended Appeal.

Disclaimer

This alert is for informational purposes only and should not be taken or be construed as a legal opinion. If you have any queries or need any clarifications as to how any aspect of the judgment might affect you, please do not hesitate to contact John Mbaluto, FCI Arb, Partner, FCI Arb (john@oraro.co.ke), Daniel Kiragu, Senior Associate (dkiragu@oraro.co.ke) or Ajak Jok Ajak, Advocate (ajak@oraro.co.ke) your usual contact at our firm.



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