



NATIONAL SOCIAL SECURITY FUND

PUBLIC STATEMENT

Clarification on the Status of NSSF Contributions

Article 43 (1) (e) of the Constitution of Kenya 2010 recognizes social security as a human right for every person. Article 21(2) of the same Constitution bestows the State with the responsibility to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of this right. In line with this requirement, the National Social Security Fund Act, 2013 was enacted with the objective of providing basic social security to workers in formal, informal, public and private sectors and self-employed persons.

The importance of saving for retirement cannot be overstated looking at how old-age poverty is rampant across the country. In Kenya today, only **20%** of workers have a retirement saving Plan. Due to the inadequacy of savings in previous years, only 6% depend on pension, over **1.2 million elderly Kenyans sleep hungry** while over 0.8 million elderly persons live alone fighting abject poverty.

This old-age poverty has been aggravated by low levels of saving while Kenyans are in active employment where they saved a meagre Ksh.200 and the employer matched with another Ksh.200. Kenyan workers need to know that their employers match what they save. The NSSF Act 2013, is progressive and has facilitated increased savings resulting to increased benefits to members. This is paramount in supporting dignified livelihoods in retirement.

This is to clarify to our members and stakeholders that the NSSF Act is still in force on account of the Judgement of the Court of Appeal rendered on 3rd February 2023. The issues pending determination by the Court do not in any way affect contribution rate by employers and employees which remains that of the year four (4) cycle in accordance with the Third Schedule of the NSSF Act.

All employers and workers are reminded to comply to avoid denying their employees a benefit that has already crystalized and unwarranted penalties.

As at 30th March 2026, the Fund had grown to approximately Ksh.715 billion (unaudited) reflecting the trust and commitment of Kenyan employers and workers in fighting old-age poverty. This means better retirement benefits to workers as Kenya strives to catch up with its peers in the region having trailed in saving for retirement in the East Africa region.

In 2023/2024 Financial Year the Fund declared a net return to members of 11% while in the following year 2024/2025, a net return of 17% was declared to members. The Fund appreciates the continued confidence, support and cooperation of all employers, members and stakeholders that has propelled it to achieve these tangible milestones.

The Board of Trustees of the National Social Security Fund and the management team remain steadfast in their commitment to safeguarding members' contributions, delivering sustainable returns and complying with all Court decisions and statutory requirements.

We advise all employers, employees and stakeholders to disregard the misleading opinions alluding to reverting contributions to Ksh.200 and to remain steadfast as we allow the Court of Appeal to give directions on the issues that are still pending determination and which do not affect the enhanced contribution rates.

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CASE SUMMARY OF THE NSSF PETITION

National Social Security Fund Board of Trustees vs Kenya Tea Growers' Association & 14 Others

1. Nature of the Application

- The Applicant sought a **stay of execution** of a judgment delivered by the Employment and Labour Relations Court (ELRC) on 19th September 2022.
- The ELRC judgment had declared the **National Social Security Fund (NSSF) Act No. 45 of 2013 unconstitutional, null, and void.**

2. Background and ELRC Findings

- The underlying dispute involved a consolidated constitutional challenge against the 2013 Act.
- The ELRC nullified the Act based on several key findings:
 - **Legislative Process:** The Act was declared void because the **Senate was not involved** in its enactment.
 - **Market Monopoly:** The Act heavily favoured the NSSF over private insurance providers, violating the Competition Act.
 - **Usurpation of Mandate:** Section 13 of the Act, which gave the Cabinet Secretary for Labour power to set remuneration from public funds, was ruled a violation of the **Salaries and Remuneration Commission's (SRC)** sole authority.
 - **Social Exclusion:** Section 19 (2), which barred unregistered citizens from public services, was struck out for violating fair administrative action and equal protection laws.
 - **Violation of Choice:** The court found that mandatory NSSF enrollment despite existing superior private pension arrangements was an unjustifiable limitation on freedom of choice.

3. Arguments for the Stay (Applicant)

- The NSSF Board of Trustees argued that a stay was necessary because:

- **Governance Quagmire:** The managing trustee and the entire board were appointed under the now-nullified 2013 Act, creating a leadership vacuum.
- **Financial Impact:** Reverting to the old law (**Cap. 258**) would cut monthly individual contributions from a 6% matched model to a flat **Kshs. 200**, potentially leading to catastrophic financial hardship and a reduction in national savings.
- **Paralysis of Services:** The judgment would freeze vital allocations like burial and emigration grants and jeopardize the "*Haba na Haba*" scheme for informal sector workers.

4. Arguments Against the Stay (Respondents)

- The Respondents contended that no legal vacuum existed because:
 - **Existing Framework:** Employers and employees had already been contributing under the old **Cap. 258** rates for nine years, due to previous interim court orders issued in 2014.
 - **No Irreparable Damage:** The NSSF failed to provide documentary proof or accounts to support its claims of imminent financial destabilisation.

5. Court of Appeal Determination

- The Court applied the "*twin principles*" required for a stay under Rule 5(2)(b): whether the appeal was **arguable** and whether it would be rendered **nugatory** (worthless) if a stay were not granted.
 - **Arguability (Satisfied):** The Court found the appeal was not frivolous. It noted that issues regarding the proper classification of the NSSF (as a contribution-based pension fund versus a state-funded social assistance program) and the requirement of Senate involvement were bona fide points for consideration.
 - **Nugatory Aspect (Not Satisfied):** The Court ruled that the Applicant failed to prove the appeal would be rendered worthless without a stay. It agreed with the Respondents that **Cap. 258 automatically filled the legislative void** and noted that the Applicant provided no evidence, such as financial accounts, to support its "destabilisation theory".

6. Final Order

- Because the Applicant satisfied only one of the two mandatory limbs, the Court **dismissed the application for a stay of execution** with costs to the Respondents and the Federation of Kenya Employers.

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: W. KARANJA, M'INOTI & NYAMWEYA, JJ.A.)

CIVIL APPLICATION NO. E656 OF 2022

BETWEEN

**NATIONAL SOCIAL SECURITY FUND
BOARD OF TRUSTEES.....APPLICANT**

AND

**KENYA TEA GROWERS' ASSOCIATION
& 14 OTHERS.....RESPONDENTS**

(Being an application for conservatory orders staying the Judgment and Decree of the Employment and Labour Relations Court of Kenya, at Nairobi (Nduma, Wasilwa & Mbaru JJ.) dated 19th September 2022

in

ELRC Petition No 38 of 2014

consolidated with

***Petitions Nos. 35 of 2014, 34 of 2014,
49 of 2014 and 50 of 2014)***

RULING OF THE COURT

1. Before us is an application dated 14th October 2022, brought under **Rule 5(2)(b)** of the **Court of Appeal Rules, 2022**. The applicant, National Social Security Fund Board of Trustees, seeks an order of stay of execution and/or implementation of the judgment and decree delivered on 19th September 2022 by the ELRC in **ELRC Petition No. 38 of 2014** consolidated with **Petitions Nos. 35 of 2014, 34 of 2014, 49 of 2014 and 50 of 2014**.

2. The subject matter of the consolidated petitions was a collective constitutional challenge against the restructuring, mandatory nature, and statutory monopoly introduced by the **National Social Security Fund (NSSF) Act No. 45 of 2013**. The core grievances raised across the consolidated petitions revolved around: infringement on freedom of choice and existing property; market monopoly and anti-competitiveness; procedural and legislative illegality; punitive overreach on public services and institutional usurpation and social exclusion.
3. The impugned judgment partially allowed the consolidated petitions as follows: the court ruled that the **NSSF Act** applies to county finances and planning because county governments, like the National Government, are employers bound to match worker contributions from local revenue funds. The court found that the Senate was not involved in the legislative track, consequently, the **Act** was declared unconstitutional, null, and void.
4. The trial court also found that the **Act** heavily favoured the NSSF over third-party insurance providers, violating the **Competition Act** and threatening to stifle existing pension frameworks.
5. On the usurpation of the SRC's Mandate, the trial court found that under **Article 230(4)**, the SRC retains the sole authority to

set and review remuneration drawn from public funds. **Section 13**, of the **Act**, which granted this power to the Cabinet Secretary for Labour, was declared null and void.

6. On the overreaching restraints on public services, the Court found no legitimate purpose for **section 19(2)**, which barred unregistered citizens from accessing public services. This section was struck out for violating fair administrative action and equal protection laws.
7. With regards to violation of choice, the court found that the mandatory requirement to enroll in the NSSF despite having superior private arrangements was an unjustifiable limitation on free choice.
8. Aggrieved, the applicants lodged a notice of appeal dated 26th September 2022 against the said decision and followed it with this application seeking to stay execution of the judgment.
9. In this application, which is supported by the grounds appearing on the face thereof and the depositions contained in the affidavit in support sworn by Gen. (Rtd) Dr. Julius W. Karangi, the chairman of the applicant's board of trustees, it is contended that the Employment and Labour Relations Court (ELRC) lacked the jurisdiction to determine the constitutionality of the **NSSF Act**

because the petition did not stem from an active employer-employee relationship and that the ELRC wrongly confused the contribution-based NSSF pension model with the state-funded social assistance programs envisioned under **Article 43(3)** of the **Constitution**.

10. Further the applicant contended that there is an imminent governance quagmire because the managing trustee and the entire board of trustees were appointed under the now-nullified 2013 Act and that the judgment creates an immediate legal vacuum in the leadership and running of the multi-billion pension fund.
11. It was contended that the judgment completely paralyzes the “*Haba na Haba*” scheme, leaving 580,480 informal sector members vulnerable and jeopardizing Kshs.975,986,328.55 in accumulated pension funds, and that the judgment will result in reduction in national savings as reverting to the former Cap. 258 law cuts monthly individual contributions back to a meager Kshs. 200 dismantling the progressive 6% matched model which had successfully accrued Kshs. 7,282,604,569.74 in enhanced contributions.

12. Further, it was contended that there would be a loss of returns as in 2021 members earned a compounded 10% interest from authorized investments and that the judgement stops future deployment of funds, causing irreversible loss of investment value. It was also argued that if employers demand refunds for historical contributions paid above the Kshs. 200 threshold, it will trigger catastrophic financial hardship, crippling the Fund's capacity to pay current retirees and finally, that critical statutory allocations established under **section 41** of the **Act** such as immediate emigration and burial grants are instantly frozen, meaning grieving families cannot be compensated retroactively.
13. The application is opposed by the 1st respondent, through a replying affidavit sworn by Apollo Kiarri, the Executive officer of the 1st respondent on 28th October 2022. He deposes that on 25th June 2014, B. Ongaya, J. (as he then was) issued interim orders staying the implementation of core **sections 18, 19, 20, and 71** of the **NSSF Act, 2013** which orders were extended on 14th July 2014 to last until the final determination of the petition. He contends that due to the 2014 stay orders, employers and employees continuously made contributions under the old statute, **NSSF Act, Cap. 258** via a tripartite understanding between employers, employees, and the government.

14. He contends that nullifying the **2014 Act** does not create a crisis or impair constitutional social security obligations and that the applicant has safely received contributions under **Cap. 258** for nine years without complaints. He asserts that the unconstitutional 2013 statute should not be preserved and concludes that the applicant will suffer no irreparable damage if the stay is denied.
15. The application was further opposed by the 2nd interested party, through a replying affidavit sworn by Jacqueline Mugo, the CEO of the Federation of Kenya Employers (FKE) dated 10th November 2022. It is contended that no legal vacuum or crisis exists to justify a stay order as employers and employees have smoothly continued making statutory contributions using the rates from the older repealed **NSSF Act, Cap 258**. Further, that no employers or employees have threatened to stop remittances or demand immediate refunds.
16. When the matter came up for hearing before us on 23rd January 2025, learned counsel Mr. S. Makori appeared holding brief for Mr. Ngatia, senior counsel, for the applicant while learned counsel Mr. Obura appeared for the 1st and 2nd respondents, Ms. Mbilo appeared for the 4th, 5th, 6th and 7th respondents, Mr. Katana appeared holding brief for Mr. Kithi for 3rd respondent, Mr.

Mbarak and Mr. Omulama appeared for the interested parties while Mr. Wanyenji Njoroge appeared holding brief for Dr. Thiankolu, senior counsel, for the County Pensioners Association (the 4th interested party). They both highlighted, albeit briefly, their submissions which are quite detailed and which, in our view cover every aspect of the application before us. We have read and noted the contents of the said submissions.

17. The applicant's submissions are dated 28th October 2022. As to whether there is an arguable appeal, it is submitted that no Senate concurrence was needed as the **Act** does not touch on county functions, elections, or finances under **Article 110(1)** of the **Constitution**.
18. Further, it was submitted that the applicant enjoys no monopoly as numerous employers run independent pension programs alongside NSSF.
19. On the nugatory aspect, it was submitted that if the **2013 Act** remains void, operations revert to the old **Cap. 258** law which has various limitations which cannot register informal sector workers, as it caps monthly contributions at Kshs. 200, and excludes vital emigration and burial benefits. It was contended that it is vital to safeguard the substratum of the appeal by making preservation

orders suspending the invalidation of the Act so as to allow operations to continue pending hearing and determination of the appeal. Reliance was placed on **Teachers Service Commission - vs- Kenya National Union of Teachers & 3 others, SUP. Court Civil Application No 16 of 2015.**

20. We are urged to allow the appeal.
21. The 1st and 2nd respondents' submissions are dated 2nd November 2022. As to whether the appeal is arguable, it was submitted that the ELRC had proper jurisdiction under **Article 162(2)** of the **Constitution** to hear and determine the matter because NSSF contributions constitute an employment dispute.
22. On the nugatory aspect, it was submitted that through a consent order dated 14th July 2014 entered by the parties at the ELRC, there is a stay of the core provisions of the **2013 Act** until final hearing and determination of the petition which includes determination of the appeal the applicant has filed and any further appeal in the Supreme Court.
23. Further, it was submitted that there is no lacuna as the public remains protected because the previous law, **Cap 258** automatically fills the legislative void. It was contended that the

applicant has not provided any documentary proof for its claimed financial collections from contributors.

24. We are urged to dismiss the application with costs.
25. The submissions by the Federation of Kenya Employers, 2nd interested party (F.K.E.) are dated 10th November 2022. It is submitted that there is an existing legal framework and FKE dismisses the applicants claim that nullifying the **NSSF Act, 2013** causes structural turmoil.
26. It is submitted that the prior statutory frameworks which was **Cap 258** remains active. F.K.E. submitted that employers currently remit deductions under the previous **NSSF Act ,Cap. 258** following earlier judicial directives.
27. It is thus submitted that there is no arguable appeal as the applicant's memorandum of appeal fails to raise any *prima facie* arguable grounds with high chances of success.
28. As to whether the appeal will be rendered nugatory, it is submitted that there is no risk of the appeal being rendered nugatory as the **NSSF Act, 2013** was never fully implemented and that denying the stay will not cause loss or render the final appeal nugatory

and that granting a stay would force an unconstitutional law onto employers and employees, risking severe legal prejudice.

29. We are urged to dismiss the application with costs and order the main appeal to proceed to hearing on its merits.

30. The jurisdiction of this Court in applications under **Rule 5(2)(b)** is original, discretionary, and unfettered, though it must be exercised judicially and in the interests of justice. In **Stanley Kangethe Kinyanjui -vs- Tony Ketter & 5 Others [2013] eKLR**, the Court stated:

“The applicant must satisfy both limbs: first, that the appeal is arguable, and second, that the appeal will be rendered nugatory if stay is not granted. An arguable appeal is not one that must necessarily succeed, but one that raises a bona fide point worthy of consideration. The nugatory aspect considers whether, if stay is not granted, the appeal will be rendered worthless, futile, or incapable of being reversed, or whether damages would reasonably compensate the aggrieved party.”

31. The twin principles accordingly guide our determination as to whether the intended appeal is arguable, and whether the intended appeal will be rendered nugatory if stay of execution is not granted.

32. On the limb on arguability, we have come to the conclusion that, the issue of jurisdiction of the ELRC to have heard and determined the petitions before it, is no longer a live issue the same having

been determined by the Supreme Court through the judgment dated 21st February 2024 in **Kenya Tea Growers Association & 2 others -vs- The National Social Security Fund Board of Trustees & 13 others (Petition E004 & E002 of 2023 (Consolidated)) [2024] KESC 3 (KLR)**.

33. However, and without prejudice to the foregoing, the broader context of this dispute cannot be ignored. Our cursory perusal of the memorandum of appeal reveals that the appeal is not frivolous. As variously stated by this Court, an applicant only needs to establish one arguable ground of appeal to pass the test on arguability. Some of the issues raised include whether there was misconception of social security. The applicant contends that the learned Judges wrongly erred by assuming that the **NSSF Act, 2013** was social assistance legislation under **Article 43(3)** for people unable to support themselves, rather than a contribution-based pension fund for employed and self-employed persons and also that the court erred by ruling that the Bill required tabling before the Senate under **Articles 110** and **205**, even though social security and professional pension plans are not functions devolved to county governments. These issues, on their face, are not entirely idle. We are, therefore, satisfied that the intended appeal is arguable.

34. As to the second issue, whether a successful appeal would be rendered nugatory if there is no stay, the applicant suggests that there is a lacuna in the law as the impugned judgment nullified the **National Social Security Fund (NSSF) Act No. 45 of 2013**. The 2nd interested party and 1st and 2nd respondents submit that there is no lacuna as the public remains protected because the previous law the **National Social Security Fund Act, Chapter 258** of the **Laws of Kenya (Cap. 258)** automatically fills the legislative void as it was the operational law. Apart from frequently repeating the assertion of likely destabilisation and the inability of the applicant to perform its functions due to the legal lacuna, the applicant provided no evidence or submissions as to how and to what extent the applicant would be destabilised. No accounts were produced by the applicant to support the destabilisation theory. We are, therefore, not satisfied that the applicant has shown that a successful appeal on judgment and decree will be rendered nugatory if no stay is granted.
35. In the end, and since the applicant has only satisfied one of the two limbs necessary for grant of the orders sought under **Rule 5(2)(b)** of this Court's **Rules**, we find no merit in the Notice of Motion dated 14th October 2022 which is hereby dismissed with costs to the 1st and 2nd respondents and 2nd interested party.

36. Finally, we tender our unreserved apology for the delay in delivery of this ruling. The application escaped the attention of the drafting Judge until a few days ago. Any anxiety or inconvenience occasioned by the delay is regretted.

Dated and delivered at Nairobi this 29th day of May 2026.

W. KARANJA

.....
JUDGE OF APPEAL

K. M'INOTI

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

