

Why court declined to stay the Judgement on unconstitutionality of the NSSF Act of 2013

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Millions of Kenyan workers and employers escaped higher pension deductions after the Court of Appeal in ***NSSF Board of Trustees v Kenya Tea Growers' Association & 14 Others, Civil Application No. E656 of 2022*** declined to suspend a ruling that had declared the National Social Security Fund Act No. 45 of 2013 unconstitutional. In a Ruling delivered on 29 May 2026, the Appellate Court found that the stay application was without merit and dismissed it.

The Dispute: Unconstitutionality of the NSSF Act of 2013

The NSSF Act of 2013 (“the 2013 Act”) was assented into law and came into operation on 24 December 2013 and commenced

operations on 10 January 2014. Among the fundamental changes introduced by the Act was the raising of mandatory contributions, requiring workers and employers to each contribute 6% of gross salary into the National Social Security Fund (“the Fund”). This replaced the flat Sh200-per-month model that had existed under the old NSSF Act, Cap. 258.

A coalition of employers and workers, led by the **Kenya Tea Growers' Association**, went to court challenging the 2013 Act on multiple grounds, among them: that the Act had been passed without the involvement of the Senate; that it created an unfair monopoly; that it violated workers' freedom of choice; and that it gave too much power to the Cabinet Secretary

for Labour. This case was filed at the Employment and Labour Relations Court at Nairobi (“the ELRC”).

The Ruling by the ELRC

In September 2022, a three-judge bench of the ELRC partially agreed with the petitioners. The court found that because the Act affects county governments, who like the national government are employers, the Senate should have been involved in passing it. Since it was not, the entire 2013 Act was declared unconstitutional, null and void.

The court also found that forcing workers to join NSSF even when they had better private pension arrangements was an unjustifiable restriction on freedom of choice. In addition, the court established that the 2013 Act also improperly gave the Cabinet Secretary powers belonging to the Salaries and Remuneration Commission (SRC) under Article 230(4) of the Constitution.

Dispute at the Court of Appeal & Supreme Court

The NSSF Board of Trustees appealed the ruling of the ELRC to the Court of Appeal on, among other grounds, that the ELRC did not have jurisdiction to determine the matter. The appeal was successful, with

the appellate court setting aside the judgment of the ELRC. In effect, the 2013 Act was reinstated by that finding. The NSSF Board immediately directed employers to comply with the provisions of the Act.

Unperturbed, the petitioners preferred an appeal to the Supreme Court on the question of jurisdiction. The Supreme Court delivered its judgment on 21 February 2024, reversing the decision of the Court of Appeal. The court held that the ELRC had jurisdiction to determine the dispute because “the key issue in the dispute was the validity of a pension law, which directly touched on the employer – employee relationship.” Having found as it did, the Supreme Court directed the Court of Appeal to urgently rehear the appeal on its merits.

Court of Appeal’s second verdict

While the main appeal remains pending before the Court of Appeal, the pending application for a stay of the ELRC decision, following the directions of the Supreme Court, was reactivated and heard. In that application, the NSSF Board argued that should the decision not be stayed, then there was a risk that 580,480 informal sector workers in the “Haba na Haba” scheme would be left vulnerable, Sh975

million in accumulated funds would be at risk, and Sh7.28 billion worth of enhanced contributions would be dismantled.

The Board argued that reverting to the old Cap. 258 was backward as it lacked the ability to register informal workers, caps monthly contributions at just Sh200, and strips away burial and emigration grants for members.

For their part, the respondents took the position that no crisis had been created by the ELRC's declaration of unconstitutionality, because since 2014, when a court first issued interim orders stopping the 2013 Act's implementation, employers and employees have been smoothly making contributions under the old Cap. 258, and no one has threatened to stop paying or demand refunds.

They argued that Cap. 258 automatically fills any legal gap left by the nullified law, meaning the public remains protected. They also insisted that granting a stay would effectively force an unconstitutional law back onto Kenyans.

What the Court Decided

This being an application under Rule 5(2)(b) of the Court of Appeal Rules, NSSF was obligated to satisfy the twin tests: first, that the appeal was arguable; and second,

that without a stay, a successful appeal would be rendered nugatory.

The court found the appeal met the first test as there are real questions to be debated, including whether the Senate's involvement was truly required for a law dealing with social security rather than devolved county functions.

But NSSF failed the second test on the nugatory aspect. The court noted that despite the Fund's alarming claims, not a single financial document was produced to back the destabilisation argument. Meanwhile, the old Act was already functioning as the operative law. In the judges' words:

"The applicant provided no evidence as to how and to what extent it would be destabilised. No accounts were produced to support the destabilisation theory."

The effect of the decision

For workers and employers: The status quo holds. Monthly NSSF deductions remain at Sh200 under Cap. 258. No employer needs to adjust payroll or make higher deductions until the main appeal and any further appeals are fully determined.

For pension policy: The fate of Kenya's reformed pension architecture remains genuinely uncertain. The 2013 Act's ambitious 6% model, which had begun generating billions in enhanced contributions, stays suspended. The Court of Appeal will have the final say after the main appeal is determined, unless the matter goes further to the Supreme Court.

For constitutional law: The question of when the Senate must be involved in passing legislation, especially laws touching on employers like county governments, remains live and of national importance. The eventual ruling on the merits will be closely watched by

Parliament, constitutional scholars, and public institutions alike.

What Happens Next

The main appeal by the NSSF Board of Trustees against the ELRC's September 2022 judgment continues before the Court of Appeal. The Supreme Court had already confirmed in February 2024 that the ELRC had jurisdiction to hear the matter, so that issue is settled. The core constitutional questions around the Senate, freedom of choice, and the monopoly argument will be the crux of the remaining appeal.

Until the appeal is determined, the old Cap. 258 remains the governing law for NSSF contributions. Employers and employees should continue remitting at current rates and await further guidance.

By:

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