

Advisory to Members of the ASSOCIATION OF PENSION TRUSTEES AND ADMINISTRATORS OF KENYA (APTAK) on your relationship with the National Social Security Fund (NSSF)

Dear Member of APTAK.

1. This advisory has been necessitated by a myriad of questions from the Members and sponsors of pension schemes following:-

(1) The judgment in Consolidated Petition Number 38 of 2014 delivered on 19th September 2022 by the Employment and Labor Relations Court at Nairobi; and

(2) A publication on 7th October 2022 in the Business Daily by an author, JAINDI KISERO titled "**How court erred in NSSF case**".

2. The inquiry centers on three issues:-

(1) Whether NSSF is a Social Security Provider;

(2) Whether NSSF is a Retirement Benefits Scheme; and

(3) Whether it is compulsory to contribute to the NSSF.

3. We have read both the judgement and the publication stated above, researched on the issues and are able (without prejudice to any appeal, if any) to give this advisory.

4. After hearing Consolidated Petition Number 38 of 2014 the Court on 19th September 2022 declared the NSSF Act No.45 of 2014 unconstitutional, null and void.

5. The effect of a declaration that a statute is unconstitutional is severe as such a declaration renders the statute inapplicable.

6. In decided cases, courts have consistently stated that:- (1) An unconstitutional act is not a law; (2) It confers no rights; (3) It imposes no duties; (4) It affords no protection; (5) it creates no office; and (6) It is, in legal contemplation, as inoperative as though it had never been passed.

7. Bearing allegiance to paragraphs 4, 5 and 6 above, we will not consider, comment or place in judgement the provisions of the annulled NSSF Act No.45 of 2014.

8. We believe that the National Social Security Act (Chapter 258 of the Laws of Kenya) is the law presently regulating the NSSF.

9. Guided by paragraph 8 above we shall answer the issues in their order.



(1) Whether NSSF is a Social Security provider

10. According to the International Labor Organization (ILO) "Social Security" is the protection of a society and provides to individuals and households to ensure access to health care and to guarantee income security particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner.

11. Going by the Black's Law Dictionary, "Social Security" is a system funded by tax and payroll contributions that provides the money for government programs to assist the unemployed, disabled, retired and disadvantaged.

12. The Social Security (Minimum Standards) Convention, Number 102 of 1952, is the flagship of all ILO Social Security Conventions, which establishes minimum standards for all NINE branches of Social Security.

13. The NINE ILO branches of Social Security are:-

- (1) Medical Care; (2) Sickness Benefit;
- (3) Unemployment Benefit; (4) Old age Benefit;
- (5) Employment Injury Benefit; (6) Family Benefit;
- (7) Maternity Benefit; (8) Invalidity Benefit; and
- (9) Survivor's Benefit.

14. Concerning the benefits set out in paragraph THIRTEEN above, it is noteworthy that:-

(1) In the National Social Security Act (Chapter 258 of the Laws of Kenya) which established the NSSF, Parliament did not make provision for the NSSF to provide the benefits itemized;

(2) In the annulled NSSF Act Number 45 of 2014, Parliament did not make provision for the NSSF to provide the benefits enumerated;

(3) The government has not allocated NSSF any funds (tax collection) for provision of the benefits listed; and

(4) The NSSF does not provide the benefits recorded.

15. In the circumstances, therefore, we find that the NSSF is not a Social Security Provider.

(2) Whether NSSF is a Retirement Benefits Scheme.

16. The National Social Security Fund Act (Chapter 258 of the Laws of Kenya) became law on 23rd November 1965.



17. This law established the National Social Security Fund (NSSF).

18. The objective for which the NSSF was established is to receive contributions and to pay out of the funds received to the beneficiaries the benefits promised.

19. The contributions are a determined sum of money by the employees and employers in the Republic of Kenya.

20. The benefits promised are:-

(1) Age benefits; (2) Survivor's benefits; (3) Invalidity benefit; (4) Withdrawal benefit; and (4) Emigration grant.

21. Concerning the benefits set out in paragraph TWENTY above, it is noteworthy that:-

(1) There are no funds appropriated by the government and allocated to the NSSF to provide the benefits; and

(2) The benefits are EARNED following deductions made from the monthly salary of an employee by an employer under a contract of service together with an employer's private funds paid to the NSSF.

22. The Retirement Benefits Act is the basic law under which Retirement Benefits Schemes are established, registered, regulated and supervised in Kenya.

23. The Retirement Benefits Act directs that a Retirement Benefits Scheme be also established under an Act of Parliament.

24. In the same law, a "Retirement Benefits Scheme" (relevant parts) means:-

(1) Any arrangement (other than a contract for life assurance); (2) Established by a written law for the time being in force; (3) Under which persons are entitled to benefits in the form of payments; (4) Determined by:-

(i) Age; (ii) Length of service; (iii) Amount of earnings; or

(iv) otherwise and payable primarily upon retirement; or

(v) Upon death; (vi) Termination of service; or (vii) Upon the occurrence of such other event as may be specified in such written law.

25. The Retirement Benefits Act recognizes the NINE circumstances set out below as authorized for payment of benefits in a Retirement Benefits Scheme:-

(1) Early Retirement; (2) Normal Retirement;

(3) Late Retirement; (4) Resignation; (5) Dismissal; (6) Ill health; (7) Emigration;

(8) Mortgage Loan; and (9) Death.

26. The ILO recognizes a Retirement Benefits Scheme as providing the benefits set out below:-



APTAK

Association of Pension Trustees and
Administrators of Kenya

- (1) Pension Benefits; (2) Early Retirement;
(3) Normal Retirement; (4) Late Retirement;
(5) Emigration; (6) Ill health; and (7) Death Benefit.

27. It is noteworthy that the benefits set out in paragraph TWENTY above and provided by the NSSF are similar to those authorized under the Retirement Benefits Act and recommended by the ILO.

28. By reason of the matters stated above, we are satisfied the NSSF is a Retirement Benefits Scheme.

(3) Whether it is compulsory to contribute to the NSSF.

29. By the indent of Section 7(1)(a), (2) and (3) the Second Schedule gives a description of the persons who are not required compulsorily to register and contribute to the NSSF.

30. The persons exempted are:-

(1) Paragraph 1. Persons eligible to receive any pension benefits under (**broken sentence**):-

(a) Any scheme (statutory or non-statutory) approved by the Minister in writing as a scheme providing comparable benefits; and

(b) Being persons in the public service, local government authority or any corporation or body established for public purposes.

(2) Persons not ordinarily resident in Kenya who are employed in Kenya for period not exceeding three years at any one time (or such longer periods as the Minister may allow in any particular case or class of case), being persons who are liable to contribute to or are or will be entitled to benefit from:-

(a) The social security scheme of any country other than Kenya approved by the Minister in writing; or

(b) Any scheme associated with their employment under which the benefits are comparable to the benefits provided by the NSSF, and approved by the Minister in writing.

31. In TWO distinguished cases, the High Court of Kenya has separately interpreted the National Social Security Act (Chapter 258 of the Laws of Kenya) more particularly in relation to the supposed compulsory contributions to the NSSF by the employees and employers and made the same decision.

32. The cases are:-

(1) High Court of Kenya at Nairobi = judicial review no. 81 of 2013 Town Council of Kikuyu –versus - The National Social Security Fund Board of Trustees and The Board of Trustees of the Local Authorities Pension Trust; and



APTAK

Association of Pension Trustees and
Administrators of Kenya

(2) High Court of Kenya at Machakos Civil Misc. Application Number 24 of 2012 = Republic – Applicant -versus - The Board of Trustees of the National Social Security Fund – 1st Respondent; Director of Public Prosecutions - 2nd Respondent; and The Board of trustees of the Local Authorities Pension Trust - Interested Party; and The Mavoko Municipal Council - Ex-parte Applicant.

33. In both cases, the courts in separate days employed the holistic and purposive approach to interpretation of the law and in their judgements delivered on 20th January 2014 and 15th July 2015 respectively concluded that:-

(1) Section 7(3) under which a Gazette notice is required only applies to situations where the Minister intends to add to, delete from or vary any class or description of exempt person in the Second Schedule.

(2) Where the Second Schedule has already provided that a certain class of persons are exempt, it is no longer necessary that the already exempted persons be gazetted;

(3) Members of a pension scheme (***any scheme associated with employment under which the benefits are comparable to the benefits provided by the NSSF***) falling in the class or category stated in the Second Schedule to the NSSF Act (unless they opt otherwise) are exempted from being contributors to the NSSF.

(4) It was not the intention of the legislature in enacting section 7 of the Act that even those who had in place schemes, which sufficiently catered for their social security interests, would still be compelled to contribute to the NSSF.

34. The holistic and purposive approach to interpretation of law examines the historical, economic, social, cultural and political background of the provision in question and how the courts have been consistent in affirming it.

35. The two judgements are part of our law in Kenya that require obedience because they have not been stayed, overturned or set aside.

35. We have reached the irresistible conclusion that where an employer has established a Retirement Benefits Scheme under which benefits are comparable to those given under the NSSF, the employer and the employees who are members of the scheme associated with employment will not offend the law if they choose not to contribute to the NSSF.

36. We believe that the author, JAIDI KISERO in the Business Daily of 7th October 2022 had then not received accurate information on the matter he published.

37. The way forward:-



APTAK

Association of Pension Trustees and
Administrators of Kenya

- (1) NSSF is not a Social Security Provider.
- (2) NSSF is a Retirement Benefits Scheme.
- (3) The statutorily permitted contributions to the NSSF is Kshs. 200.00 by an employee and Kshs. 200.00 by an employer;
- (4) The above statutory contribution is compulsory more particularly when you are not a member of a Retirement Benefits Scheme giving comparable benefits as the NSSF;
- (5) You are not compelled to contribute to the NSSF when you are member of a Retirement Benefits Scheme, which sufficiently caters for your retirement benefit interests.

DATED at NAIROBI this 18th Day of December 2022.

Boniface M. Mwangangi (ACILEx; CPM)
SECRETARY-GENERAL