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## The Import of the Supreme Court Judgment on NSSF Contributions

On 21<sup>st</sup> February 2024, the Supreme Court delivered its judgment in Petition No. E004 OF 2023 as consolidated with Petition No. E002 OF 2023; KTGA & 2 Others v. The NSSF Board of Trustees & 6 Others. The subject of the dispute concerns the constitutionality of the National Social Security Fund Act, 2013 (“the Act”).

Initially, on 19<sup>th</sup> September 2022, the Employment and Labour Relations Court (“ELRC”) had delivered a judgment declaring the Act unconstitutional on the basis, among others, that the Act had the effect of making

NSSF the sole provider of social and security services.

The Court of Appeal in a judgment delivered on 3<sup>rd</sup> February 2023 overturned the decision of the ELRC finding, among others, that the ELRC did not have jurisdiction to hear the dispute as it did not concern an employer-employee dispute but was rather an issue relating to the constitutionality of statute which, in the Court of Appeal’s view, was within the jurisdiction of the High Court.

As at 3<sup>rd</sup> February 2023 therefore, the Act was declared constitutional, and became operational. Pursuant thereto, employers have been making deductions of pension contributions at the cumulative rate of 12% (6% contribution by the employee and 6% contribution by the employer).

This was an increase from the Kshs.400 contribution under the National Social Security Fund Act No. 28 of 1965 to a maximum of Kshs.2, 160 under the Act for employees whose earnings are more than Kshs.18, 000/- per month.

On 21<sup>st</sup> February 2024, the Supreme Court overturned the Court of Appeal decision, finding that the ELRC had jurisdiction to hear and determine the dispute as presented. The Supreme Court thereby remitted the matter back to the Court of Appeal for hearing on the substantive appeal from the decision of the ELRC on a priority basis.

Our view on the implication of the Supreme Court Judgment is as follows:

- a) The decision of the ELRC delivered on 19<sup>th</sup> September 2022 is the operative position. As such, the Act remains **unconstitutional**, null and void pending the hearing and determination of the appeal by the Court of Appeal;

b) No deductions can be made under the Act until the Court of Appeal renders its decision, there being no stay of the Supreme Court decision. Deductions under the Act will only be made if the Court of Appeal sets aside the decision of the ELRC; and

c) The position with respect to NSSF deductions and contributions reverts to the position before the Act was enacted and became operational, that is, any deductions will be on the basis of the rates under the National Social Security Fund Act No. 28 of 1965.”

In case of any queries, please contact us;



Peter Gachuhi, Partner

[PGachuhi@kapstrat.com](mailto:PGachuhi@kapstrat.com)



Wycklife Oyoo, Associate

[WOyoo@kapstrat.com](mailto:WOyoo@kapstrat.com)