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NEWSLETTER

Contextualizing Present Day NSSF Contributions in Kenya

Background

Following the recent decision by the Court of Appeal in the case of ***National Social Security Fund Board of Trustees v. Kenya Tea Growers' Association & 14 Others No. E656 of 2022 (2026)***, the constitutionality of the National Social Security Fund Act, 2013 (the NSSF Act, 2013) and the National Social Security Fund (NSSF) contribution regime is once again the subject of significant legal debate.

As highlighted in our earlier alert on the Supreme Court judgment in consolidated Petitions No. E002 and E004 of 2023 (*which alert can be accessed here*), the constitutionality and enforceability of the NSSF Act 2013 have been the subject of extensive litigation since 2014, with differing decisions at various levels of the courts affecting the applicable contribution rates. In 2024, the Supreme Court confirmed that the ELRC had jurisdiction to determine the constitutionality of the NSSF Act 2013 setting aside the Court of Appeal's earlier decision and referring the matter back for determination on the merits. As noted in our earlier alert, the effect of the Supreme Court's decision was that the NSSF Act 2013 remained unconstitutional pending determination by the Court of Appeal, and NSSF contributions would be governed by the NSSF Act (Cap. 258) which provides for a flat rate of KES 200/= by both employer and employee.

Upon resuming the hearing of the appeal, the Court of Appeal considered an application by the NSSF to stay the judgement by the ELRC issued in 2022 declaring the NSSF Act 2013 unconstitutional. The Court of Appeal dismissed NSSF's application to stay the 2022 ELRC judgment and held that although the intended appeal raised arguable issues, NSSF had not demonstrated that failure to grant a stay would render the appeal nugatory and no prejudice would arise as the prior regime under the NSSF Act (Cap. 258) would apply.

Although there has been correspondence in the media that the Court of Appeal may have dealt with an application that was not before it, the ruling by the Court of Appeal delivered on 29th May 2026 is nevertheless valid, binding and enforceable (*unless it is set aside*). This ruling by the Court of Appeal effectively preserved the prevailing position on pension contributions following the 2024 Supreme Court decision, that is, that the applicable contribution rates are those under the NSSF Act (Cap. 258).

Stakeholder view on the 2026 Court of Appeal Ruling

Stakeholders have issued varied guidance following the 2026 ruling by the Court of Appeal. The NSSF and the Federation of Kenya Employers (FKE) have advised employers to continue applying the rates under the NSSF Act 2013 (*that is, 6% contribution by the employee and 6% contribution by the employer*) on the basis that the NSSF Act 2013 is in force and to minimize operational and administrative challenges arising from adjustments employers had made to comply with the NSSF Act 2013.

The Law Society of Kenya (LSK) held a contrary position. In a notice issued on 13th June 2026, the LSK stated that the effect of the 2026 ruling by the Court of Appeal was that the 2022 ELRC judgment

remained operative, rendering the NSSF Act 2013 unconstitutional and reinstating the previous regime under the NSSF Act, Cap. 258. The LSK cautioned employers against continuing with the contributions under the NSSF Act 2013 thereby risking claims of refunds from employees if the 2022 ELRC judgment is ultimately upheld.

Our Position

As echoed in our previous alert on the 2024 Supreme Court decision, our view is that the dismissal of the stay application by the Court of Appeal leaves the 2022 ELRC judgment operative and enforceable and the deduction and contribution rates therefore remain as prescribed in the pre-2013 NSSF Act which provides for a maximum rate of KES. 200/= for employers and employees. In practice, where a judgment has not been stayed, parties are expected to comply with it unless it is overturned on appeal. The Court of Appeal's observation that the former NSSF framework remains available to govern contributions pending determination of the appeal is instructive to our position.

Pending further directions from the Court of Appeal or a final determination of the substantive appeal, our view is that employers should maintain (or, where appliable, revert to) the rates prescribed under the former NSSF Act (Cap 258).

While we appreciate that the previous implementation of the NSSF Act 2013 may have led some employers to terminate their gratuity and pension schemes or take such other measures that are not compatible with the rates under the previous NSSF Act (Cap 258), employees could challenge the 6% deductions and employers are equally not obligated to contribute the 6% required under the NSSF Act 2013. There is nonetheless no legal restriction against continuing with the 6% arrangements based on a written agreement between an employer and its employees.

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