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NSSF contributions: Retain or Revert to old rates?
Uncertainty Persists Following Court of Appeal Ruling and NSSF Directive

The Court of Appeal ("CoA"), in National Social Security Fund Board of Trustees v Kenya Tea Growers' Association & 14 Others (Civil Application No. E656 of 2022) ("the ruling") delivered on 29 May 2026, dismissed an application seeking stay of execution of the Employment and Labour Relations Court ("ELRC") judgment delivered on 19 September 2022 in ELRC Petition No. 38 of 2014 (consolidated with related petitions), which declared the National Social Security Fund Act, 2013 unconstitutional.

Following the ruling, the National Social Security Fund ("NSSF") has since issued a public notice directing employers to continue applying enhanced contribution rates and to disregard interpretations suggesting a reversion to the KES 200 monthly contribution framework. This position has been communicated notwithstanding the subsisting ELRC judgment declaring the NSSF Act, 2013 unconstitutional and the Court of Appeal's refusal to grant a stay of that judgment. These developments have resulted in a misalignment between judicial outcomes and administrative guidance, creating uncertainty as to the correct legal and tax position and highlighting the urgent need for clear judicial direction.

In this alert, we analyse the Court of Appeal ruling, subsequent developments, and the resulting implications for employers from a tax and payroll compliance perspective.

Background

The National Social Security Fund Act, 2013 ("the Act") was assented to on 24 December 2013 and gazetted for implementation from 10 January 2014. Its objective was to modernise Kenya's social security architecture by replacing the old fixed monthly contribution model of KES 200 contribution by both the employer and employee with a contribution rate of 12% of pensionable wages, split equally between employer and employee.

The Act was suspended shortly after enactment in 2014 following constitutional challenges, with multiple petitions consolidated before the Employment and Labour Relations Court ("ELRC").

On 19 September 2022, the ELRC ruled that the NSSF Act, 2013 was unconstitutional and therefore null and void for multiple substantive reasons, including incompatibility with the Competition Act, imposition of mandatory contributions irrespective of membership of other pension schemes, and defects in the legislative process, notably Senate non-involvement where county finances were implicated.

The Court of Appeal subsequently set aside that decision on 03 February 2023 on grounds that the ELRC did not have jurisdiction to hear and determine the matter.

On 21 February 2024, the Supreme Court overturned the Court of Appeal decision, holding that the ELRC had jurisdiction and directing that the appeal be heard on its merits, thereby reinstating the ELRC judgment pending determination of the appeal.

The substantive appeal, which will determine the constitutionality of the NSSF Act, 2013, remains pending hearing and determination before the Court of Appeal. The application before the Court sought to stay execution of the ELRC judgment pending that determination.



The Applicant's Case

- The Applicant, NSSF, argued the ELRC incorrectly treated the Fund as social assistance rather than a contribution-based pension scheme.
- NSSF contended nullification of the 2013 Act would create an immediate governance and operational vacuum, jeopardise the "*Haba na Haba*" informal-sector scheme, freeze statutory allocations such as grants and cause irreversible loss of investment value, making a successful appeal nugatory unless preserved.

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The Respondents'/ Interested Parties' Case

- The Respondents' and Interested Parties relied on earlier interim orders and submitted that the prior statute – NSSF Act Cap. 258 – fills any legislative gap.
- They disputed catastrophic effects and averred that NSSF provided no reliable documentary proof such as audited accounts or transaction records of the alleged risks.
- It was submitted that preserving the status quo by staying the ELRC judgment would be tantamount to protecting an unconstitutional statute.

Court of Appeal determination

In its ruling delivered on 29 May 2026, the CoA:

- Confirmed that the intended appeal is arguable; but
- Held that the applicant did not demonstrate that the appeal would be rendered nugatory absent a stay.

The Court was not satisfied that sufficient evidence had been provided to demonstrate operational or financial disruption and noted that the prior statutory framework could continue to apply.

Accordingly, the application for stay was dismissed.

Post-ruling developments

Following the Court of Appeal ruling, a number of developments have further complicated the compliance landscape:

a) NSSF administrative position:

- The NSSF has issued a public notice directing employers to continue applying enhanced contribution rates, and to disregard interpretations suggesting a reversion to the KES 200 framework.
- The Fund has indicated that the issues pending before the Court of Appeal do not affect the enhanced rates currently in force.

b) Challenge to the ruling:

- The advocates of the applicant, NSSF have formally written to the Court of Appeal seeking that it recalls and expunges the ruling, on the basis that the Court determined a motion that was neither live nor properly before it.

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Our view and conclusion

The ruling and subsequent developments highlight a clear lack of alignment and legal uncertainty on the applicable compliance position.

In particular, uncertainty persists because while the ELRC judgment declaring the NSSF Act, 2013 unconstitutional remains in force and the Court of Appeal has declined to stay that judgment, NSSF continues to administratively enforce enhanced contribution rates.

From a technical perspective, our reading of the COA ruling delivered on 29 May 2026 is that in the absence of a stay, the ELRC judgment declaring the Act unconstitutional remains operative and binding, which would ordinarily imply that the Act is not enforceable pending determination of the substantive appeal. Accordingly, this would suggest a reversion to the KES 200 monthly contribution framework per the NSSF Act, Cap 258.

However, the above position is not reflected in practice, as most employers have taken a conservative view and have been remitting the enhanced contributions even after the Supreme Court Ruling of 2024. Additionally, NSSF continues to implement and enforce enhanced contribution rates under the Act.

The above divergence creates a high-risk compliance environment in which employers must navigate competing considerations of legal interpretation and regulatory enforcement.

There is therefore an urgent need for the Courts to provide clear and definitive direction on:

i. which statutory framework governs contributions pending determination of the appeal, and

ii. The legal status of the enhanced contribution rates in light of the ELRC decision

In the interim, considering this is a saving for the employees, a conservative approach would be for employers to continue remitting the enhanced contributions, maintain appropriate documentation to support positions taken but monitor developments closely in anticipation of further judicial guidance.



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