

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. E187 OF 2022

***(Before Hon. Lady Justice Anna Ngibuini
Mwaure)***

KENYA NATIONAL UNION OF NURSES
APPLICANT

VERSUS

**BUNGOMA COUNTY PUBLIC
SERVICE BOARD**

.....RESPONDENT

**SALARIES AND REMUNERATION
COMMISSION1ST**
INTERESTED PARTY

**MINISTRY OF LABOUR AND
SOCIAL PROTECTION2ND**
INTERESTED PARTY

RULING

Introduction

1. The Applicant filed a Notice of Motion dated 1st November 2022 under certificate of urgency on the following orders that:

1. Spent

2. An ex-parte order be and is hereby issued summoning the Respondents to appear in court for registration of the Collective Bargaining Agreement

- 3. Any other order that this court deems just and fit in the circumstances**
- 4. Costs of this application.**

2. The application is brought under **section 60(3) of the Labour Relations Act.**

Applicant's supporting affidavit

3. The application is supported by the affidavit of David Omulama, the Applicant's Industrial Relations Officer Union, dated even date as the application.
4. The Applicant avers that it is aware that it had signed a Collective Bargaining Agreement (CBA) dated 21st February 2022 with the Respondent herein, where the interested party advised it to take up the issue of CBA negotiation with the respective employer vide a letter dated 24th November 2022.
5. The Applicant avers that the CBA has not been filed in court pursuant to section 60(3) of the Labour Relations Act, which provides recourse if an employer or employers' organization fails to submit the CBA to the Industrial court as specified in subsection (1).
6. The Applicant urged the court to allow the application as prayed.

Respondent's grounds of opposition

7. In opposition to the application, the Respondent filed grounds of opposition dated 25th April 2023 on the following grounds that:

- 1. The Collective Bargaining Agreement is inchoate, still born, and not registrable at this stage as the 1st Interested party is yet to give its advice as required under Article 230 of the Constitution of Kenya, 2010, section 11 of the Salaries and Remuneration Commission Act, 2011 and the Circular Ref No: SCR/ADM/CIR/1/12 VOL. IV (28) dated 14th October 2019 from the 1st Interested party capable of giving rise to any registrable Collective Bargaining Agreement.***
- 2. The Collective Bargaining Agreement will only become registrable by this Honourable Court once all the constitutional and statutory process are complete and upon advise of the 1st Interested party and harmonization of the said Collective Bargaining Agreement with the advice of the 1st Interested party.***

3. Without the input of the 1st Interested party, the Collective Bargaining Agreement is inchoate and its registration at this stage is in contravention of Article 230 of the Constitution, 2010, section 11 of the Salaries and Remuneration Commission Act 2011, and the circular Ref No: SRC/ADM/CIR/1/12 VOL. (28) dated 14th October 2019 from the 1st Interested party; and;

4. It is met and in furtherance of the overriding objective of Article 159(2) of the Constitution for the timely disposal of proceedings that this court peremptorily dismiss put in abeyance this application to await the completion of the process required under Article 230 of the Constitution of Kenya, 2010, section 11 of the Salaries and Remuneration Commission Act, 2011 and the Circular Ref No: SRC/ADM/CIR/1/12 VOL IV(28) dated 14th October 2019 before registration of the Collective Bargaining Agreement.

1st Interested Party replying affidavit

8. The 1st Interested Party filed a replying affidavit sworn by Mrs Anne R. Gitau MBS, its Chief Executive Officer and the Commission Secretary, dated 8th March 2023.
9. The 1st Interested Party avers that it is an independent commission established under Article 230 of the Constitution and operationalized by the Salaries and Remuneration Commission Act, No. 11 of 2011.
10. The 1st Interested party avers that its mandate, as outlined in Article 230(4) of the Constitution, includes setting and regularly reviewing the remuneration and benefits of State officers, as well as advising both the national and county governments on the remuneration and benefits of all other public officers.
11. The 1st Interested Party avers that under Article 230(5) of the Constitution and Section 12 of the SRC Act, it must ensure fiscal sustainability, fairness, productivity, and equal pay in public compensation.
12. The 1st Interested Party avers that it issued guidelines on Collective Bargaining in 2019 requiring employers to seek its advice, submit union demands with supporting documents, and negotiate within parameters provided.

13. However, regarding the 2017 to 2021 CBA, the 1st Interested party avers that the Respondent failed to seek prior advice or furnish the requisite documents, instead forwarding a signed CBA for registration.
14. The 1st Interested party avers that there was a violation of constitutional and statutory procedures, advised submission of financial and organizational data, and warned that without compliance, it cannot discharge its mandate.
15. The 1st Interested party avers that attempts to register the CBA without its input circumvent mandatory requirements, cannot be cured by **section 60 of the Labour Relations Act**, and risk unsustainable ripple effects in the health sector.
16. Consequently, the 1st Interested party avers that the signed CBA does not meet legal requirements for registration.
17. The 1st Interested party avers that the application is deemed frivolous and an abuse of court process, thus should be dismissed with costs.
18. Parties canvassed the application by way of written submissions.

Applicant's submissions

19. The Applicant submitted that the Respondent is obligated to provide nurses with a uniform allowance to enable them to acquire attire that complies with Nursing Council standards. In the harmonized CBA draft, the applicant proposed an allowance of Kshs.15,000/=, a figure drawn from the 1st Interested Party's advisory letter to Kenyatta National Hospital dated 8th September 2024, which recommended negotiating a uniform allowance for nurses up to a maximum of Kshs.15,000/= annually.
20. The Applicant submitted that the 1st Interested party advised the Ministry of Health and Kenyatta National Hospital to negotiate a uniform allowance of up to Kshs.15,000/= per year for nurses; it is recommended only Kshs.10,000/= for the respondent in a separate matter, based on an older advisory letter from 2015. This inconsistency highlights a disparity in the treatment of uniform allowance negotiations across different institutions under the Ministry of Health.
21. The Applicant submitted that nurses in both National and County governments provide services of equal value, yet the 1st Interested Party disregarded its own job evaluation results by advising the adoption

of an inferior 21-tier grading structure instead of the recommended 17-tier system. This advice, according to the Applicant, created unequal and unfair employment terms for county nurses compared to their national counterparts, undermining the principles of harmonization, equity, and fairness required under section 11(iii) of the Salaries and Remuneration Commission Act, 2011. Furthermore, the Applicant noted that attempts to engage the 1st Interested Party on these issues were dismissed on the grounds that it does not negotiate with unions, a stance viewed as contrary to section 13(ii) and (iii) of the SRC Act. As a result, the Applicant contends that the lack of dialogue deprived the Respondent of critical information that could have guided fair advice on salaries, grading structures, and other remuneration items in the draft CBA.

22. However, in its advice to the respondent dated 30th January 2024, the 1st interested party did not give any advice in regard to remuneration for a personal guide for public officers living with disability, commenting on the above allowance and hence, without its comment, the respondent cannot allow it to be included in the CBA. Further, the Respondent has not served us with a counter-proposal on the same item as in the case of all other items. Failure

of the 1st interested party to advise on the remuneration for a personal guide for public officers living with disability is unlawful, as it might be used to exclude Nurses from this allowance in the event of a disability if it is not in the collective bargaining agreement. The applicant submits that failure to advise the respondent to include remuneration for a personal guide for public officers living with disability is contrary to its circular of ref SRC/ADM/11(19) dated 7th March 2024 and in contravention of Article 230(5) of the Constitution and section 12 of the SRC Act, 2011.

23. The Applicant submitted that, apart from contested financial matters, namely basic salary, grading/salary structure, uniform allowance, and allowances for persons with disabilities, all other provisions in the signed CBA are undisputed and acceptable. The Applicant argued that while the shift from the 21-tier to the 17-tier grading structure brought minimal differences in house and commuter allowances, it generally supports faster career progression for nurses. However, the 1st Interested Party failed to provide proper advice on the contested items in line with constitutional and statutory principles, resulting in unfair and

discriminatory treatment of county nurses compared to their national counterparts. This flawed advice has stalled the conclusion of negotiations on the harmonized CBA draft. Although the Applicant acknowledges that SRC's advice is ordinarily binding, the Applicant contended that it cannot stand where it is discriminatory and inequitable. Consequently, the Applicant urge the court to exercise its jurisdiction to uphold laws prohibiting employment discrimination, noting that the 1st Interested Party's advice contravenes provisions of the **section 12(1) and 13 (iii), (iv) of the SRC, section 5 (2) (3)(b) & (5) of the Employment Act and Article 230(c) of the Constitution of Kenya.**

24. The Applicant submitted that since the 1st Interested Party issued inconsistent advice to the Ministry of Health and the respondent on matters affecting nurses, section 26 of the Employment Act should apply alongside sections 12 of the SRC Act and sections 5 and 6 of the Employment Act. In the case of **Kenya Union of Commercial, Food and Allied Workers V Vihiga Teachers Benevolent Fund [2024] KEELRC 2640 (KLR)**, where the court ordered amendment and signing of a CBA within 30

days based on conciliators' findings, the Applicant emphasizes that only lawful, fair, and non-discriminatory advice from SRC is binding. Advice that results in discrimination or unfairness cannot be enforced. Therefore, the authorities relied upon by the 1st Interested Party are irrelevant as they do not address the issues of discrimination and illegality raised here.

25. The Applicant urges the court to adopt its proposals on uniform allowance, grading structure, basic salary, and disability allowance, and to direct the parties to amend and register the CBA within 14 days of the ruling.

Respondent's submissions

26. The Respondent submitted that the 1st Interested party, established under **Article 230 of the Constitution** and **section 11 of the SRC Act, 2011**, has the exclusive constitutional and statutory mandate to set and review the remuneration and benefits of state officers and advise on those of public officers.

27. Courts have consistently affirmed that SRC's advice is binding and cannot be disregarded or substituted by judicial orders. In **Salaries and Remuneration Commission V National Hospital Insurance**

Fund Management Board & 2 KECA 419 (KLR),
the Court of Appeal held that:

“The Constitution set out the principles that SRC had to take into account before advising on the salaries of public officers. It was only SRC that had the mandate under the Constitution to ensure that the total public compensation bill was fiscally sustainable. The advice was guided by set principles; no other Commission was given that mandate; it was only SRC. By advising the 1st Respondent on the remuneration of its employees, SRC did not interfere with the functional and operational independence of the 1st Respondent. The trial court erred when it held that the advice by SRC to the 1st Respondent was not binding. By parity of reasoning, a court could not usurp the role or functions of a constitutional body unless that body had been found to have failed to carry out its functions.”

28. Similarly, in ***Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT), Kenya Union of Post Primary Education Teachers (KUPPET), Salaries and***

Remuneration Commission (SRC) & Hon. Attorney General [2015] KECA 239 (KLR), the Court of Appeal went further and held that:

“With the foregoing in mind, I hereby restate that the advice given by SRC under Article 230 (4) (b) of the Constitution is binding; that the national value of sustainable development embodied in Article 10(2)(d) and the constitutional criterion of fiscal sustainability of the total public compensation bill as stipulated in Article 230(5) (a) of the Constitution are part of the mandatory criteria that must be taken into account in the determination of remuneration and benefits in the public service. The principles of public finance stipulated in Article 201 (c) and (d) of the Constitution are mandatory criteria of relevance in the determination of remuneration in the public service. Remuneration in the public service should not be determined at a level that threatens the sustainability of the national economy to the prejudice of the present and future generations.”

29. The Respondent submitted that the 1st Interested party under Article 230 of the Constitution and section 11 of the SRC Act, 2011, has the exclusive mandate to set and review salaries and benefits of state and public officers, and its advice is binding. The Supreme Court in ***Justus Kariuki Mate & Another V Martin Nyaga Wambora & Another (2017) eKLR*** emphasized judicial restraint where the Constitution allocates specific mandates to state organs, while the Court of Appeal in ***Pevans East Africa Limited & Another V Chairman, Betting Control and Licensing Board & 7 Others [2013] eKLR*** held that courts must allow constitutional bodies to discharge their functions unless their decisions are shown to contravene the Constitution or are manifestly irrational.

30. Accordingly, the Respondent submitted that the 1st Interested party's advice of 28th May 2024 on the CBA is binding upon the Respondent, and the CBA dated 21st February 2022 cannot be registered in disregard of that advice. Any grievances against the 1st Interested party position must be pursued directly against it in separate proceedings, and not through attempts to incorporate terms contrary to its constitutionally mandated advice.

31. The Respondent urged the court to dismiss the application.

1st Interested party submissions

32. The 1st Interested party submitted that the Respondent failed to seek its advice under **Article 230(4)(b) of the Constitution** before signing the CBA and had not initially provided the necessary financial information to assess fiscal sustainability. Upon later review, the Respondent found that while some allowances, such as nursing service, uniform, commuter, house, basic salary, and extraneous allowances were consistent with its prior circulars and advice, others were not. Specifically, the proposed call allowance, health workers allowance, and blanket hardship allowance contradicted SRC's guidance, as nurses on 24-hour shifts do not qualify for call allowance, the hardship allowance is limited to gazetted hardship areas, and the health workers allowance would create disparities.

33. Although the 1st Interested party accepted the enhanced health risk allowance of Kshs.5,000/=, subject to affordability, it declined to approve other contested items, making it impossible to issue a letter of no objection for CBA registration. The 1st Interested party emphasized that its advice must be

guided by constitutional principles of fiscal sustainability under Article 230(5) and section 12 of the SRC Act, and therefore, both parties are bound to renegotiate the CBA strictly within the parameters set out in its advice.

34. The 1st Interested party relied on **Article 259(11) of the Constitution**, which makes it clear that where a function or power is to be exercised on the advice of another body, such advice is mandatory and binding. Read together with Article 230(4)(b), this provision underscores that it has exclusive authority to advise on remuneration and benefits of public officers, and once given, its advice binds the Respondent.
35. The Court of Appeal in **Teachers Service Commission (TSC) & 2 Others V Kenya Union of Teachers (KNUT) & 8 Others [2015] KECA 239 (KLR)** affirmed that SRC's advice is binding on both national and county governments, with Githinji JA holding that any function exercised without such advice is invalid, while Odek JA emphasized that SRC's advice is *in rem*, binding all persons and institutions. Similarly, Koome JA and Mwilu JA stressed that SRC's advice is fundamental and must be sought and incorporated

in the conclusion of CBAs involving public officers, as this position was reaffirmed in ***KUDHEHIA Workers V SRC (2014) eKLR*** in support of that proposition.

36. In ***Salaries and Remuneration Commission V National Hospital Insurance Fund, Management Board & 2 others [2024] KECA 419 (KLR)***, where the Court of Appeal held that employees of NHIF are public officers under Article 260, and their remuneration falls squarely within SRC's jurisdiction. The court further cautioned that disregarding SRC's advice would render Article 230(5) idle and undermine the constitutional governance structure. In addition, section 15(6) of the Employment and Labour Relations Court Act, 2011 and Rule 37(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016 reinforce the requirement for SRC's input in disputes involving public officers. Accordingly, SRC's advice is a constitutional prerequisite to the negotiation and registration of the CBA herein.

37. The 1st Interested Party submitted that the Respondent is bound by its advice regarding the remuneration and benefits of its employees. Consequently, both the Applicant and Respondent

must renegotiate the Collective Bargaining Agreement strictly within the parameters set out by the 1st Interested Party and thereafter forward the revised CBA for issuance of a letter of no objection to enable its registration.

38. In conclusion, the 1st Interested party urged this Honourable Court to direct the parties to conduct their negotiations in full compliance with its binding advice.

39. At the time of writing this ruling, the 2nd Interested party did not enter an appearance nor file any response to the application.

Analysis and determination

40. The court has considered the application, supporting affidavit, grounds of opposition, replying affidavit, together with the rival submissions by both parties;

41. The main issue for determination is whether the parties can sign a collective bargaining agreement without the advice of the 1st Interested Party, The Salaries and Remuneration Commission.

42. ***Section 60 of the Labour Relations Act*** provides as follows:

Every collective agreement shall be submitted to the Industrial Court for registration within fourteen days of its conclusion.

The employer or employer's organisation which is party to an agreement to be registered under this section shall submit the agreement to the Industrial Court for registration.

If an employer or employers' organisation fails to submit the collective agreement to the Industrial Court as specified in subsection (1), the trade union may submit it.

The Industrial Court may request the parties to a collective agreement to supply further information or make oral or written representations to it for the purposes of this section.

The Industrial Court may register an agreement—

- (a) in the form it was submitted by the parties; or**
- (b) with any amendment or modification agreed to by the parties.**

The Industrial Court shall not register a collective agreement that—

(a) conflicts with this Act or any other law;

or

(b) does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister.

The Industrial Court—

(a) may register a collective agreement within fourteen days of receiving it;

(b) may refuse to register a collective agreement unless all parties to the agreement have had an opportunity to make oral representations to the Industrial Court; and

(c) shall give reasons for refusing to register any collective agreement.”

43. In ***Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT), Kenya Union of Post Primary Education Teachers (KUPPET), Salaries and Remuneration Commission (SRC) & Hon. Attorney General (Supra)*** this court reiterates that the Court of Appeal findings stating that the Salaries and Remuneration Commission’s (SRC) advice under Article 230(4)(b) of the Constitution is binding, and that any determination of public service pay must

adhere to constitutional principles. Specifically, decisions on remuneration must consider sustainable development (Article 10), fiscal sustainability of the wage bill (Article 230(5)(a)), and principles of public finance such as equity and responsibility (Article 201). In essence, public sector salaries should be set at levels that do not endanger the national economy or compromise the welfare of present and future generations.

44. The court on 26th April 2023 directed the Applicant to submit proposals of the harmonised Collective Bargaining Agreement (CBA) and the following were not in contention: -

- I. Article 1; Terms of engagement***
- II. Article II; Union rights***
- III. Article III; Appointments***
- IV. Article VI; Employment Conditions***
- V. Article VII; Leave***
- VI. Article VIII; Benefits***
- VII. Disciplinary Procedures***

45. The ones however in contention to wit were the uniform allowances, grading structure, basic salary and remuneration for personal guide for Public officers living with disability.

The court urged the parties on diverse dates to agree on the terms that should be contained in the

collective bargaining agreement but there was no consensus.

46. The unfortunate thing is that the Respondents did sign the CBA without the input of Salaries and Remuneration Commission (SRC) only to realise later that the same could not work. It is unfortunate the Respondents were reckless enough to commit the County Government in total disregard of the clear provision that no government Remuneration for public officers can be passed by the relevant body without the input of SRC.

47. SRC had given the following proposals: -

a) Nursing service allowance: to be retained at the rate of Kshs.20,000 as advised vide **SRC Circular Ref No. SRC/TS/HW 1/3/23 VOL. 11(57)** dated 8th June 2017(Copy attached).

b) Uniform allowance: to be retained at the rate of Kshs.10,000 per annum as advised vide **SRC Circular Ref No. SRC/TS/CGOVT/3/61 VOL. 111(136)** dated 14th September 2015(copy attached) or uniforms to be issued to nurses and the resultant expenditure charged under the operations and maintenance budget.

c) Health Risk allowance: To be within a maximum of Kes.5,000 per month subject to affordability and fiscal sustainability as advised vide **SRC Circular Ref No. SRC/TS/HW1/3/23 VOL. 11(57)** dated 9th June 2017.

d) Call Allowance: the commission notes that nurses are on duty on a twenty-four-hour basis working in shifts and hence do not meet the eligibility criteria set out for payment of call allowance. In view of this, the commission advises that call allowance is not payable to nurses and negotiations should be undertaken with a view to have the allowance not included in the CBA.

e) Hardship allowance: To be retained within the rates advised, through SRC's Circular Ref No. **SRC/ABM/CIR/1/13 VOL. 111(126) dated 10th December 2014**, taking into account the eligibility, criteria and gazette hardship areas provided for in government policies and guidelines.

f) Basic salary, commuter allowance, and House allowance: to be retained within the rates provided vide **SRC Circular Ref No. SRC/TS/29(81) dated 10th August 2023**.

g) Extraneous allowance: to be retained within the rates provided vide **SRC Circular Ref No. SRC/TS/CGOVT/3/61 VOL.111(136)** dated **14th September 2015.**

48. In this case, the Applicant is seeking registration of the CBA with the Respondent dated 21st February 2022, which was duly signed by both parties. Conversely, the Respondent contends that the advice issued by the 1st Interested Party on 28th May 2024 regarding the CBA is binding, and therefore, the CBA dated 21st February 2022 cannot be registered in opposition to that guidance. It argued that any challenge to the 1st Interested Party's position should be directed against it through separate proceedings, rather than attempting to include terms that conflict with its constitutional mandate. The 1st Interested Party maintained that the Respondent is bound by its advice on employees pay and benefits, and thus, the Applicant and Respondent must renegotiate the CBA in accordance with those guidelines before submitting it for approval and registration.

49. It is very unfortunate that the Respondent failed to engage the 1st Interested Party in negotiating

the CBA between itself and Applicant before signing it and did not follow the advice as per the letter dated 30th January 2024. The 1st Interested party's mandate is provided for under **Article 230(4)(b) of the Constitution**, as read together with **section 11(c) of the SRC Act**, which is to advise the national and county governments on the remuneration and benefits of all public officers, which it did not.

50. In the letter dated 30th January 2024, the Respondent was required to renegotiate the terms and thereafter share a draft of the CBA, and if the terms were good, the Respondent was to sign it with the Applicant to reflect as per the SRC advice issued on 10th August 2023.
51. The Applicant says the Respondent has not availed themselves to meet with them and SRC to attempt resolving these issues. The court has been following the proceedings and is regrettable the Respondents have not been proactive to discuss the terms of CBA within the provisions of the law and in consultation of the 1st Interested Party in order to have an acceptable, registrable CBA.

52. The court cannot however overlook the provisions of the law or the role of SRC to advise the National and County Government or the remuneration and benefits of all Public officers. There are numerous case laws cited hereunder among them **Teachers Service Commission -Vs- Kenya Union Of Teachers (Knut) & Others (Supra) And Salaries & Remuneration Commission -VS- National Hospital Insurance Fund Management Board & 2 Others -Supra** which were all emphatic that Public officer's remuneration fall squarely on SRC shoulders to give advice to the relevant institution.

53. The court is well aware the Applicants submit there is discrimination against the nurses working in National Hospitals with those in County Hospitals. There is no proof of the same with facts as well provided in the provision that he who alleges must prove - (**Sections 107, 108 and 109 of the Evidence Act**).

54. Further, the Respondent and the government must be in a position to meet their budget. It would be futile for a court to give orders on remuneration that are contrary to the legal provisions therefore and that would be incapable of enforcement.

55. The court finds the application is therefore not merited and is declined. The parties must go back to the drawing board and conduct their negotiations in compliance with the law and advice of Salaries and Remuneration Commission.

56. This is a Public litigation case. Each party will meet their costs.

Orders accordingly.

Dated, Signed and Delivered virtually at Nakuru this 28th Day of November, 2025.

ANNA NGIBUINI MWAURE
JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by

Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE