



**Salaries and Remuneration Commission v Kenya Union Commercial Food and Allied Workers & 2 others (Civil Appeal E489 of 2020) [2025] KECA 402 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KECA 402 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E489 OF 2020  
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA  
FEBRUARY 28, 2025**

**BETWEEN**

**SALARIES AND REMUNERATION COMMISSION ..... APPELLANT**

**AND**

**KENYA UNION COMMERCIAL FOOD AND ALLIED  
WORKERS ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL SOCIAL SECURITY FUND ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal against the Judgment and decree of the Employment and Labour Relations Court (Hon. Nderi Nduma, J.) dated and delivered on 28th August 2016 in ELRC Pet. No. 30 of 2014)*

**Employees of the National Social Security Fund are public officers subject to the jurisdiction of the Salaries and Remuneration Commission**

*The appeal related to a challenge on the Salaries and Remuneration Commission’s (SRC) circular requiring State corporations to seek its advice before entering into collective bargaining agreements. The trial court held that National Social Security Fund (NSSF) was outside SRC’s mandate. On appeal, the instant court found that NSSF was a State corporation established by statute, funded by public contributions authorised by Parliament, and was thus a public office. Consequently, its employees were public officers, and thus the SRC had jurisdiction to advise on their remuneration and benefits.*

Reported by Kakai Toili

**Constitutional Law** – public offices - State corporations - National Social Security Fund (NSSF) - whether NSSF was a State corporation and therefore a public office within the meaning of the Constitution - whether employees of NSSF were public officers and thus their salaries and emoluments were subject to the jurisdiction of the Salaries and Remuneration Commission – Constitution of Kenya, articles 206, 230(4) and 260; State Corporation Act (cap 446), section 2; National Social Security Fund Act (cap 258), sections 3, 50(1) and (2); Salaries and Remuneration Commission Act (cap 412D), section 11.



**Constitutional Law** – constitutional commissions – Salaries and Remuneration Commission (SRC) – mandate of SRC - review of remuneration and benefits of State officers and advising National and County Governments on the remuneration of public officers – what were the requirements for the salaries and remuneration of employees of a body or organization to fall within the ambit of the SRC – Salaries and Remuneration Commission Act (cap 412D), section 26.

### **Brief facts**

The 1<sup>st</sup> respondent filed a petition at the Employment and Labour Relations Court (trial court) against the appellant, the Salaries and Remuneration Commission (SRC) seeking among other orders; an order of *mandamus* quashing the appellant's circular dated July 4, 2012 (the Circular). It was the 1<sup>st</sup> respondent's case that pursuant to the Circular from the SRC addressed to the Chief Executives of State corporations and statutory executives of State corporations and statutory bodies which included the 3<sup>rd</sup> respondent, National Social Security Fund (NSSF), its mandate, as a trade union, to make representation as a free and voluntary association to regulate the relations between it and NSSF for the interests of all unionsable employees, was ousted.

The 1<sup>st</sup> respondent claimed to have a valid collective bargaining agreement (CBA) with NSSF and that the SRC had since stopped the parties from either signing or implementing it. The 1<sup>st</sup> respondent also claimed that by purporting to have the mandate to set and regularly review the remunerations and benefits of its members, the SRC violated its members' rights to fair labour practices; the right to freedom of association; and the right to collective bargaining.

The trial court held that commercial State corporations such as NSSF in which the Government was a trustee, investor or borrower lay beyond the mandate of the SRC and therefore, the Circular was not applicable to the CBA in so far as the determination of terms and conditions of employment between the 1<sup>st</sup> respondent and NSSF were concerned. Aggrieved, the appellant filed the instant appeal.

### **Issues**

- i. Whether employees of NSSF were public officers and thus their salaries and emoluments were subject to the jurisdiction of the SRC.
- ii. Whether NSSF was a State corporation and therefore a public office within the meaning of the Constitution.
- iii. What were the requirements for the salaries and remuneration of employees of a body or organization to fall within the ambit of the SRC.

### **Relevant provisions of the Law**

#### **Constitution of Kenya**

#### **Part 2 – Other public funds**

#### **Article 206 – Consolidated Fund and other public funds**

*(1) There is established the Consolidated Fund into which shall be paid all money raised or received by or on behalf of the national government, except money that—*

*(a) is reasonably excluded from the Fund by an Act of Parliament and payable into another public fund established for a specific purpose; or*

*(b) may, under an Act of Parliament, be retained by the State organ that received it for the purpose of defraying the expenses of the State organ.*

*(2) Money may be withdrawn from the Consolidated Fund only—*

*(a) in accordance with an appropriation by an Act of Parliament;*

*(b) in accordance with Article 222 or 223; or*

*(c) as a charge against the Fund as authorised by this Constitution or an Act of Parliament.*



(3) Money shall not be withdrawn from any national public fund other than the Consolidated Fund, unless the withdrawal of the money has been authorised by an Act of Parliament.

(4) Money shall not be withdrawn from the Consolidated Fund unless the Controller of Budget has approved the withdrawal.

#### **Held**

1. The mandate of the court on a first appeal as set out in rule 31(1)(a) of the Rules of the court required it to reappraise the evidence and to draw its own conclusions.
2. The SRC was a constitutional commission established under article 230 of the Constitution. It was mandated to set and regularly review the remuneration and benefits of all State officers and to advise National and County Governments on the remuneration of public officers. That constitutional imperative was more particularly elaborated upon under section 11 of the Salaries and Remuneration Commission Act which set out the functions of the appellant.
3. To carry out its obligations, section 26 of the Salaries and Remuneration Commission Act and the Regulations made thereunder, established the protocols and procedures to be followed, in circumstances where public sector employers engaged in collective bargaining with employee unions. In order for the salaries and remuneration of employees of a body or organization to fall within the ambit of the SRC, the concerned body or organization must be a State corporation or public office employing or appointing State officers or public officers.
4. Article 260 of the Constitution was succinct that a public office under the Constitution comprised an office of the National Government, a county government or the public service, where the remuneration and benefits were payable either from the consolidated fund or directly out of money provided by Parliament.
5. As to the nature of a State corporation, section 2 of the State Corporation Act identified public entities established by the State for achievement of various State objectives. Those entities were referred to as State corporations. A State corporation under the State Corporation Act was one that,
  1. was an entity defined *inter alia*, as a body corporate established before or after the commencement of the Act by or under an Act of Parliament or other written law;
  2. it was funded through public funds; and
  3. it was by law required to be audited by the Auditor General.
6. From section 3 of the National Social Security Act, the NSSF was a creation of statute having been established by an Act of Parliament. Furthermore, being a State entity charged with the responsibility of managing pension contributions, its accounts were liable to audit by the Auditor General in accordance to article 229 of the Constitution. On the basis of that assessment, NSSF clearly fell within the category of a State corporation as defined under the State Corporation Act.
7. The trial court's interpretation of article 260 of the Constitution was narrow and tantamount to a derogation from the principles governing interpretation of the Constitution. That was because when construing the Constitution, it was a constitutional imperative that a harmonious interpretation should be applied to the provisions. In effect, when interpreting the Constitution, courts were called upon to import a wide meaning into the words and phrases and to construe the provisions on a particular issue together so that no one provision destroyed any other provision.
8. On account of the constrained and narrow interpretation without reference to the other related provisions of the Constitution, the trial court misconstrued article 260 of the Constitution to mean that only State organs for which Parliament directly approved their annual budgets were public offices, while those, whose operations were funded through Acts of Parliament were not. Construing the phrase "...directly out of monies provided by Parliament," in that way, occasioned a distinction without a difference between State organs that relied on public funds, for their operations. That was because, when considering the meaning and effect of article 260, it was necessary to also have cognizance of article 206 at Part 2 of the Constitution entitled other public funds.



9. Though the Constitution did not specifically define public funds, article 206 of the Constitution recognized public funds as monies set aside by an Act of Parliament. The reference to the consolidated account and other public funds meant that, besides monies that were paid into or out of the consolidated fund there were other monies, referred to as public funds, which were excluded from the consolidated fund, but pursuant to Acts of Parliament were set aside for utilisation by the concerned State organ.
10. When article 206 of the Constitution was read in conjunction with article 260 of the Constitution, a distinct correlation could be drawn between monies directly provided by Parliament and monies provided by an Act of Parliament, both of which resulted in the provision of public funds to State organs by Parliament. If in accordance with article 206(3) no money could be withdrawn from any national public fund unless the withdrawal of the money had been authorised by an Act of Parliament, the phrase “money provided by Parliament,” connoted provision of monies through an Act of Parliament, and it did not matter the nature of the enactment undertaken.
11. Whether under an Appropriation Act or by enactment in specific legislation or such other provision made by Parliament, the phrase “monies provided by Parliament” simply boiled down to Parliament’s role in enacting legislation allowing public funds to be made available to a State entity or for a designated purpose.
12. Sections 50(1) and (2) of the National Social Security Fund Act allowed for one and a half per cent of the total assets to go towards NSSF’s operational, including staff salaries and other emoluments. Consequently, since, NSSF was a State corporation whose operations were funded by public funds set aside through an Act of Parliament, NSSF was a public office within the meaning of article 260 of the Constitution.
13. Article 260 of the Constitution defined a public officer. Given that NSSF was a State corporation or indeed a public office whose funds were payable from money provided by Parliament for purposes of defraying expenses pursuant to article 206(1)(b) of the Constitution, the 1<sup>st</sup> respondent’s members employed by NSSF and whose remuneration and emoluments were derived from such public funds were public officers whose salaries and emoluments were subject to the jurisdiction of the SRC under article 230(4)(b) of the Constitution and section 11 of the Salaries and Remunerations Commission Act.

*Appeal allowed.*

### **Orders**

- i. *The judgment of the trial court that declared the SRC’s Circular dated July 4, 2012 inapplicable to the 1<sup>st</sup> and 3<sup>rd</sup> respondent was set aside, in its entirety.*
- ii. *The respondent’s petition dated May 23, 2014 was dismissed with costs to the appellant.*
- iii. *The appellant shall also have the costs of the instant appeal.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Kenya Union of Domestic, Hotels, Education And Allied Workers (Kudhebia Workers) v Salaries and Remuneration Commission* Constitutional Application 294 of 2013; [2014] KEHC 8148 (KLR) - (Explained)
2. *Odera, Abok James T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates* Civil Appeal 161 of 1999; [2013] KECA 208 (KLR) - (Explained)
3. *Salaries and Remuneration Commission v National Hospital Insurance Fund, Management Board & 2 others* Civil Appeal 156 of 2016; [2024] KECA 419 (KLR) - (Mentioned)
4. *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others* Civil Appeals 196, 195 & 203 of 2015; [2015] KECA 239 (KLR) - (Explained)

#### **Uganda**



*Kigula & others v Attorney General* [2005] 1 EA 132; Constitutional Petition No. 6 of 2003; [2005] UGCC 8 - (Explained)

#### **United States**

*South Dakota v North Carolina* (192 US 268) (1940) L ED - (Explained)

#### **Regional Court**

1. *Olum & another v Attorney General* [2002] 2 EA 508 - (Explained)

2. *Peters v Sunday Post Limited* [1958] EA 424 - (Explained)

#### **Statutes**

##### **Kenya**

1. Banking Act (cap 488) In general - (Cited)

2. Building Societies Act (cap 489) In general - (Cited)

3. Cabinet Secretary to the Treasury (Incorporation) Act (cap 101) In general - (Cited)

4. Central Bank of Kenya Act (cap 491) In general - (Cited)

5. Co-Operative Societies Act (cap 490) In general - (Cited)

6. Companies Act (cap 486) In general - (Cited)

7. Constitution article 2(6); 19; 20; 36; 41; 229(5); 230; 260(Interpreted)

8. Court of Appeal Rules, 2022 (cap 9 Sub Leg) rule 31(1)(a) - (Interpreted)

9. Local Government Act (Repealed) (cap 265) In general - (Cited)

10. National Social Security Fund Act (cap 258) sections 3, 49, 50, 51, part IV- (Interpreted)

11. Public Audit Act (cap 412B) section 35 -(Interpreted)

12. Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013 (cap 412D) regulation 4, 5 - (Interpreted)

13. Salaries and Remuneration Commission Act (cap 412D) section 11; 13(1)(d); 26 - (Interpreted)

14. State Corporations Act (cap 446) section 2, 14 - (Interpreted)

#### **Instruments**

1. ILO Convention No 87

2. ILO Convention No 98

#### **Advocates**

None mentioned

## **JUDGMENT**

1. The 1<sup>st</sup> respondent, Kenya Union of Commercial Food and Allied Workers filed a petition dated May 23, 2014 supported by verifying affidavit of Mr Boniface M Kavuvi dated May 27, 2014 against Salaries and Remuneration Commission, (the Commission) the appellant seeking:

- a. That an order of mandamus do issue to quash the appellant's circular dated July 4, 2012.
- b. That an injunction do issue to prevent the appellant from implementing its circular to the 1<sup>st</sup> respondent dated July 4, 2012.
- c. That an injunction do issue to prevent the appellant from interfering with its members' salaries and benefits in any way other than statutory deductions allowed by the law.
- d. That a declaratory (*sic*) be made that the appellant violated the constitutional rights of 1<sup>st</sup> respondent contrary to article 41 of the [Constitution of Kenya](#), 2010.



- e. That a declaratory (*sic*) be made that the appellant's action violated their right as set out under article 41 of the [Constitution of Kenya](#).
  - f. That a declaratory (*sic*) be made that the [Salaries and Remuneration Commission Act](#), 2011 is void to the extent of its inconsistency with the [Constitution of Kenya](#), 2010.
  - g. An order for compensation of the 1<sup>st</sup> respondent hereof.
2. It was the 1<sup>st</sup> respondent's case that pursuant to a circular dated July 4, 2012 (the Circular), from the appellant addressed to the Chief Executives of State Corporations and Statutory Executives of State Corporations and Statutory Bodies which included the National Social Security Fund, (NSSF) the 3<sup>rd</sup> respondent, the Commission directed that it:
- “... will undertake a review of remuneration and benefits of state and public officers every four years and has provided the procedure and factors to be considered in preparing and submitting proposals of salary review to SRC; SRC has further provided guidelines for negotiations between public service organizations with trade unions as follows;
- a. the Public Service Organizations shall seek advice of the commission before commencing collective bargaining process with the respective union;
  - b. where the collective bargaining process is successful, the management shall, before the signing of the agreement, confirm the fiscal sustainability of the negotiated package with the Commission;
  - c. a CBA concluded before the commencement of these regulations shall be deemed to have been concluded under these regulations.”
3. The 1<sup>st</sup> respondent claimed that the Circular ousted its mandate to make representation as a free and voluntary association to regulate the relations between it and NSSF for the interests of all unionsable employees. The 1<sup>st</sup> respondent claimed to have a valid Collective Bargaining Agreement (CBA) with NSSF and that over the years they negotiated and concluded several CBA's that were reviewable every two years; that in respect of the agreement for the period July 1, 2013 to June 30, 2015, the Commission had since stopped the parties from either signing or implementing it, and in support of the directive, the Commission cited Article 230 of the [Constitution](#); that this forced the 1<sup>st</sup> respondent to issue a 14 days strike notice to the NSSF on January 7, 2014 to expire on January 20, 2014 and that the strike was called off on April 10, 2014.
4. The 1<sup>st</sup> respondent also claimed that by purporting to have the mandate to set and regularly review the remunerations and benefits of its members, the Commission violated its members' rights to fair labor practices in contravention of article 2(6), 19, 20 and 41 of the [Constitution](#); the right to freedom of association in contravention of article 36 of the [Constitution](#); and the right to collective bargaining under articles 36 and 41 of the [Constitution](#) and the [ILO Convention Nos. 87](#) and [98](#).
5. In response, the Commission filed a replying affidavit sworn on June 25, 2014 by Anne R Gitau, the Secretary of the Commission in which she deponed that the Commission as established under article 230 of the [Constitution](#) had the mandate, *inter alia*, to set and regularly review the remuneration and benefits of the state officers, and to advise the National and County Government on the remuneration and benefits of all public officers; that the powers augmented under sections 11(4) and 13(1)(d) [Salaries and Remuneration Act](#), which authorized it to take any measures it considers necessary to ensure the harmonization of salaries and remuneration and ensure that equity and fairness is achieved in the public sector; that therefore it was within their mandate to issue the Circular. It was deponed that, the



- NSSF being a state corporation generating revenues from public funds, allowed for intervention in the salaries and remuneration of its employees by the Commission.
6. Upon considering the issue, the trial Judge held that commercial State corporations such as NSSF in which the Government is a Trustee, investor or borrower lies beyond the mandate of the Commission and therefore, the Circular dated July 4, 2012 was not applicable to the CBA in so far as the determination of terms and conditions of employment between the 1<sup>st</sup> respondent and NSSF were concerned.
  7. Aggrieved, the appellant has filed an appeal to this court on the grounds that the learned Judge was in error in law and in fact:
    - i) in misconstruing the provisions of article 230 of the Constitution on the powers of the appellant;
    - ii) in curtailing the constitutional mandate of the appellant to review the remunerations and benefits of state officers and to advise the National and County Government on remuneration and benefits of all public officers;
    - iii) in failing to find that the appellant has authority to inquire into and advise on the salaries and remuneration of officers of NSSF who are public officers and whose salaries and remuneration are paid out of public funds;
    - iv) in convoluting the twin issues of state organ and state corporation and thereby arrived at a decision devoid of merit;
    - v) in finding that the NSSF does not derive its funding from public funds;
    - vi) in making a finding that the NSSF's employees are not public officers;
    - vii) in finding that the NSSF lies beyond the mandate of the appellant; and
    - viii) in granting prayers not sought in the petition.
  8. When the appeal came up for hearing on a virtual platform, learned counsel Mr Wakwaya appeared for the appellant while learned counsel Mr. Eredi appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. There was no appearance for the 1<sup>st</sup> respondent though served with the hearing notice, and neither did it file written submissions.
  9. In his written submissions, counsel for the appellant submitted that the 3<sup>rd</sup> respondent is a public entity and it was patently clear that its employees fell within the category of public officers; that the Employment and Labour Relations Court was in error in finding that the 3<sup>rd</sup> respondent was not a state corporation and that its employees did not fall within the definition of public officers and that the appellant did not have the requisite authority to advise on the salary and benefits of the 3<sup>rd</sup> respondent's employees.
  10. Counsel further submitted that the trial court was in error in law in finding that the Circular directed to Chief Executives of all State bodies did not apply to NSSF's employees, and that, not only did the court misinterpret the Constitution and the law, it granted an order that was not sought by the 1<sup>st</sup> respondent.
  11. Submitting orally, Mr. Eredi informed us that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents supported the appeal, and stated that the issue had been settled by this court in the case of Salaries and Remuneration Commission v National Hospital Insurance Fund, Management Board & 2 others Civil Appeal 156 of 2016) [2024] KECA 419 (KLR); that the Commission had a role to play in advising on the remuneration of public



officers, and therefore the Collective Bargaining Agreement of the 1<sup>st</sup> respondent and NSSF ought to comply with the requirements of the [Salaries and Remuneration Commission Act](#).

12. The mandate of this court on a first appeal as set out in rule 31(1)(a) of the [rules of this court](#) requires us to reappraise the evidence and to draw our own conclusions. In *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this court, the Court of Appeal for Eastern Africa, stated that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”

13. See also [Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates](#) [2013] eKLR, where this Court held:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

14. We have considered the appeal, the submissions, and the law and find that the central issue for determination is whether the Commission is authorized to inquire into and advise on the salaries and remuneration of officers of NSSF subject to the directives set out in the Circular. So as to holistically determine this question, it will be necessary to ascertain whether NSSF is a State corporation and therefore a public office within the meaning of the [Constitution](#) and whether it employs public officers whose salaries are eligible for oversight by the Commission.

15. In discerning the Commission’s mandate, it will be worthwhile to begin by setting out the provisions of the [Constitution](#) and the ensuing legislation that outline the Commission’s role. It is not in dispute that the appellant is a constitutional Commission established under article 230 of the [Constitution](#). It is mandated to set and regularly review the remuneration and benefits of all state officers and to advise national and county governments on the remuneration of public officers. This constitutional imperative is more particularly elaborated upon under section 11 of the [Salaries and Remuneration Commission Act](#) which sets out the functions of the appellant, which are to:

- a. Inquire into and determine the salaries and remuneration to be paid out of public funds to State Officers and other public officers.
- b. Keep under review all matters relating to the salaries and remuneration of public officers.
- c. Advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector.
- d. Conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public officers.
- e. Determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation.



- f. Make recommendations on matters relating to the salary and remuneration of a particular State or public officer”.
16. To carry out its obligations, section 26 of the *Salaries and Remuneration Commission Act* and the *regulations* made thereunder, establish the protocols and procedures to be followed, in circumstances where public sector employers engage in collective bargaining with employee unions. For instance, rules 4 and 5 of the *Salaries and Remuneration Commission regulations* mandates the Commission to undertake a review of salaries and remuneration of state and public officers every four years, which review will be determined by a study on labour market efficiency and dynamics, prevailing economic situations and comprehensive job evaluation; which information is then compiled into a report.
17. The mandate of the Commission was restated by this court in the case of *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others* [2015] eKLR where it was held that no valid salary or benefit of a state or public officer, shall ensue from a process that ignores the role of the Commission, and that the Commission’s advice under article 230(4)(b) of the *Constitution* is binding, as a consequence of which, it has a role to play in collective bargaining agreements in so far as the remuneration and benefits of the public officers who are its members are concerned.
18. Bearing in mind the foregoing, it is evident that in order for the salaries and remuneration of employees of a body or organization to fall within the ambit of the Commission, the concerned body or organization must be a state corporation or public office employing or appointing state officers or public officers. In ascertaining whether the employees of NSSF fall into the category of public officers requires us to interrogate what is meant by public office, and in relation to this, whether the employees are public officers.
19. Article 260 of the *Constitution* defines a “public officer” as,
- (a) any State Officer; or
  - (b) any person, other than a State Officer, who holds a public office.
- The *Constitution* also specifies that a “public office” is an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or “...directly out of money provided by Parliament”.
20. In other words, the provision is succinct that a “public office” under the *Constitution*, comprises an office of the national government, a county government or the public service, where the remuneration and benefits are payable either from the Consolidated Fund or directly out of money provided by Parliament.
21. In concluding that the employees were not public officers, the trial Judge stated thus:
- ...the employees of NSSF are also members of the petitioner are not public officers within the meaning of article 260 of the *Constitution* their remuneration and benefits are not payable directly from consolidated fund or directly from money provided by parliament. As Justice Abuodha added, Neither the National Treasury nor Parliament in the government budget cycle appropriate public funds for the direct payment of salaries and remuneration for the employees of NSSF.”
32. NSSF is entirely responsible for the wage bill of its employees which money is generated from the operations and investment of NSSF or borrowing from financial institutions and or National Government.



33. This is notwithstanding that the initial capital to establish the parasol may have come from government. This court holds as Justice Abuodha held: commercial state corporations such as NSSF in which the Government is a Trustee investor or borrower lie beyond the mandate of the Salaries and Remuneration Commission”.
22. So as to appreciate the status of NSSF, a brief historical background, on its establishment is befitting. NSSF was established in 1965 as a department of the Ministry of Labour to administer a provident fund scheme for all workers in Kenya. As its membership grew and its operations became more complex, the National Social Security Fund Act under which it was established was amended in 1987 thereby transforming it into an autonomous State Corporation. The current legislation, the National Social Security Fund Act No 45 of 2013, created NSSF as it exists today under section 3.
23. Part IV of the same Act, entitled “Finance, Administration and Management of the Fund” provides for the funds for utilization and management of NSSF. In particular, Section 49 states that, the funds of NSSF shall comprise-
- “ a) monies received as contributions under this Act;
  - b) fees, charges, monies or assets as may accrue to or vest in the Fund in the course of the exercise of its powers or the performance of its functions under this Act or under any written law; or
  - c) all monies from any other sources provided for or donated or loaned to the Fund”.
24. More particularly, section 50 of the Act stipulates:
- “ 1) There shall be paid out of the Fund expenses not exceeding two per cent of the total Fund assets for the administration of the Fund.
  - 2) The percentage provided in subsection (1) shall apply in the first year from the commencement date and the Board shall thereafter take necessary measures to ensure that the percentage reduces and is capped at one and a half per cent in the sixth year following the commencement date.
  - 3) In estimating expenses for the purposes of this section there may be included—
    - (a) an amount representing the accruing liability of the Fund in respect of any emoluments, pensions, staff medical insurance or other benefits to which any officers or servants employed for the purposes of this Act may become entitled in respect of that employment;”
25. Additionally, section 51 states that NSSF will be audited by the Auditor General.
26. In other words, the above provisions demonstrate that monies received by NSSF are derived from contributions from the public, fees, charges, monies or assets as may accrue to or vest in the NSSF in the course of the exercise of its powers, and also includes monies from any other sources whether donated or loaned. Out of monies collected, sections 50(1) and (2) makes provision for about one and a half per cent of the total assets for the administration of NSSF. Given the manner of funding, the next question for determination is whether NSSF is a state corporation, and consequently a public office.



27. As to the nature of a state corporation, section 2 of the *State Corporation Act* identifies public entities established by the State for achievement of various state objectives. These entities are what are referred to as state corporations. Section 2 specifies that an organ is a state corporation if it is:

- “(a) a state corporation established under section 3;
- (b) a body corporate established before or after the commencement of this *Act* by or under an Act of Parliament or other written law but not—
  - i. the Permanent Secretary to the Treasury incorporated under the *Permanent Secretary to the Treasury (Incorporation) Act* (cap 101);
  - ii. a local authority established under the *Local Government Act* (cap 265);
  - iii. a co-operative society established under the *Co-operative Societies Act* (cap 490);
  - iv. a building society established in accordance with the *Building Societies Act* (cap 489);
  - v. a company incorporated under the *Companies Act* (cap 486) which is not wholly owned or controlled by the Government or by a state corporation;
  - vi. the Central Bank of Kenya established under the *Central Bank of Kenya Act* (cap 491);
  - vii. deleted by Act No 2 of 2002, Sch.;
- (c) a bank or a financial institution licensed under the *Banking Act* (cap 488) or other company incorporated under the *Companies Act* (cap 486), the whole or the controlling majority of the shares or stock of which is owned by the Government or by another state corporation;
- (d) a subsidiary of a state corporation;”

Section 14 of the *Act* provides that:

- “(1) Every state corporation shall keep or cause to be kept proper books recording all the property, undertakings, funds, activities, contracts, transactions and other business of the state corporation.
- (2) The Minister for the time being responsible for finance may prescribe the form of any book required to be kept under subsection (1) and unless a form has been prescribed, a form suitable for the purpose shall be used.
- (3) The accounts of every state corporation shall be audited and reported on annually in accordance with the *Public Audit Act*, 2003.”



28. Contemporaneously with section 14 (3) above, article 229(5) of the Constitution states that:
- “The Auditor-General may audit and report on the accounts of any entity that is funded from public funds.”
29. And pursuant to article 229(5), section 35 of Public Audit Act 2003 provides that:
- “The Auditor-General shall conduct audits of financial statements under article 229 of the Constitution for State Organs and public entities and report annually to Parliament and relevant county assembly.”
30. It can therefore be surmised that a State corporation under the Act is one that, firstly, is an entity defined *inter alia*, as a body corporate established before or after the commencement of the Act by or under an Act of Parliament or other written law, secondly, it is funded through public funds, and thirdly, it is by law required to be audited by the Auditor General.
31. Once the above factors are applied to NSSF, undoubtedly, it can be seen from section 3 of the National Social Security Act that NSSF is a creation of statute having been established by an Act of Parliament. Furthermore, being a state entity charged with the responsibility of managing pension contributions, its accounts are liable to audit by the Auditor General in accordance to article 229 of the Constitution. On the basis of this assessment, we find that NSSF clearly falls within the category of a state corporation as defined under the State Corporation Act.
32. That said, what appears to be the area of controversy is that though NSSF may be a state corporation, the Employment and Labour Relations Court held that it is not a public office because the remuneration and benefits of NSSF’s employees are not paid directly out of monies provided by Parliament. In the Judgment, the learned Judge took the view that since the remuneration of its employees did not fall within the description of funds annually budgeted and approved by Parliament, NSSF could not be construed as a public office.
33. With respect, we find the learned Judge’s interpretation of article 260 to be narrow and tantamount to a derogation from the principles governing interpretation of the Constitution. This is because when construing the Constitution, it is a constitutional imperative that a harmonious interpretation should be applied to the provisions. In the case of South Dakota v North Carolina (192 US 268) (1940) L ED it was observed that:
- “It is an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others to be considered alone, but all the provisions bearing on a particular subject are to be brought into view and to be interpreted as to effectuate the general purpose of the instrument.”
34. This was also emphasized in the case of *Olum & another v Attorney General* [2002] 2 EA 508 where it was held that,
- “... the constitutional principles of harmonization which was to the effect that all the provisions of the Constitution concerning an issue should be considered together...”



35. And in the case of *Kigula & others v Attorney General* [2005] 1 EA 132, the Uganda Constitutional court summarised the principles of interpretation of a constitution thus:

“The principles applicable in interpretation of the *Constitution* include the widest construction possible in its context, should be given according to the ordinary meaning of the words used, the entire Constitution should be read as an integrated whole and no one particular provision destroying the other, all provisions bearing on a particular issue should be construed together to give effect to the purpose of the provision, the *Constitution* should be given a generous and purposive interpretation to realise the full benefit of the guaranteed rights...”

36. In effect, when interpreting the *Constitution*, courts are called upon to import a wide meaning into the words and phrases and to construe the provisions on a particular issue together so that no one provision destroys any other provision.

37. In this case, on account of the constrained and narrow interpretation without reference to the other related provisions of the *Constitution*, the trial Judge misconstrued article 260 to mean that only State organs for which Parliament directly approves their annual budgets are public offices, while those, whose operations are funded through acts of Parliament are not. Construing the phrase “...directly out of monies provided by Parliament,” in this way, occasioned a distinction without a difference between State organs that rely on public funds, for their operations.

38. We say this because, when considering the meaning and effect of article 260, it is necessary to also have cognizance of article 206 at part 2 of the *Constitution* entitled “Other public funds”. The provision that is concerned with the “Consolidated Account and other public funds” specifies:

“(1) There is established the Consolidated Fund into which shall be paid all money raised or received by or on behalf of the national government, except money that—

(a) is reasonably excluded from the Fund by an Act of Parliament and payable into another public fund established for a specific purpose; or

(b) may, under an Act of Parliament, be retained by the State organ that received it for the purpose of defraying the expenses of the State organ.

(2) ...

(3) Money shall not be withdrawn from any national public fund other than the Consolidated Fund, unless the withdrawal of the money has been authorised by an Act of Parliament.

(4) ...”

39. Though the *Constitution* does not specifically define “public funds”, article 206 recognizes public funds as monies set aside by an Act of Parliament. The reference to the Consolidated Account and other public funds means that, besides monies that are paid into or out of the Consolidated Fund there are other monies, referred to as public funds, which are excluded from the Consolidated Fund, but pursuant to Acts of Parliament are set aside for utilisation by the concerned State organ.



40. So that, when article 206 is read in conjunction with article 260, it is significant to note that, a distinct correlation can be drawn between moneys directly provided by Parliament and monies provided by an Act of Parliament, both of which result in the provision of public funds to state organs by Parliament. And if in accordance with article 206(3) no money can “...be withdrawn from any national public fund... unless the withdrawal of the money has been authorised by an Act of Parliament”, to our minds, the phrase “...money provided by Parliament,” connotes provision of monies through an Act of Parliament, and it matters not the nature of the enactment undertaken. Whether under an *Appropriation Act* or by enactment in specific legislation or such other provision made by Parliament, the phrase “...monies provided by Parliament.” simply boils down to Parliament’s role in enacting legislation allowing public funds to be made available to a state entity or for a designated purpose.
41. In this regard, the persuasive decision of the High Court in the case of *Kenya Union of Domestic, Hotels, Education And Allied Workers (Kudbehia Workers) v Salaries and Remuneration Commission* [2014] eKLR, Lenaola, J, (as he then was) is instructive:
- “Although these institutions do not receive monies from the Consolidated Fund, they are empowered by Parliament through legislation to raise income through levies and other commercial ventures. Further, state corporations receive funds from Parliament through their respective Ministries and fit the description in article 260 regarding funds from Parliament”.
42. In upholding the above position, this court, in the recent case of *Salaries and Remuneration Commission v National Hospital Insurance Fund, Management Board & 2 others* (*supra*) held:
- “State Corporations, including the 1<sup>st</sup> respondent, collectively fell within the Government of the Republic of Kenya, and as captured under the definition of “public service”, under article 260 of the *Constitution*. Hence, the 1st respondent could not separate itself from the public sector. In addition, the remuneration of officers in State Corporations such as the 1st respondent was payable either from money provided by Parliament through the annual national budget or funds retained by the State Corporation under the provisions of article 206(1)(b) which empowered State organs to retain money that they received for purposes of defraying expenses as empowered by an Act of Parliament”
43. As seen above, sections 50(1) and (2) of the *National Social Security Fund Act* allows for one and a half per cent of the total assets to go towards NSSF’s operational , including staff salaries and other emoluments. Consequently, it follows that since, NSSF is a state corporation whose operations are funded by public funds set aside through an Act of Parliament, the only conclusion that can be reached is that NSSF is a public office within the meaning of article 260 of the *Constitution*.
44. Having so found, next for consideration is whether, the employees of the NSSF are public officers and therefore their remuneration and benefits are subject to the Commission.
45. Under article 260, a “public officer” means—
- “(a) any State officer; or
- (b) any person, other than a State Officer, who holds a public office.”



Having found that NSSF is a public office, it cannot be gainsaid that any person holding an office in NSSF is a public officer. Furthermore, in respect of salaries and emoluments payable to NSSF's officers, section 50(3)(a) of the Act is explicit. It stipulates:

“In estimating expenses for the purposes of this section there may be included—

- a. an amount representing the accruing liability of the Fund in respect of any emoluments, pensions, staff medical insurance or other benefits to which any officers or servants employed for the purposes of this Act may become entitled in respect of that employment;
- b. office stationery, equipment and machines, motor vehicles and insurance
- c. an amount representing maintenance and repairs of the Fund's buildings, grounds, facilities, and the rental value of any premises used for the purposes of this Act; and
- d. an amount representing fees for Fund management, custodial, actuarial, and audit.”

46. This court in the case of *Salaries and Remuneration Commission v National Hospital Insurance Fund, Management Board & 2 others* (*supra*) further held:

“40. Further, it is clear that the remuneration of officers in State Corporations such as the 1<sup>st</sup> respondent is payable either from money provided by Parliament through the annual national budget or funds retained by the State Corporation pursuant to the provisions of article 206(1)(b) which empowers State organs to retain money that they receive for purposes of defraying expenses as empowered by an Act of Parliament...”

The court concluded:

“It is our view that the convergence is that officers and persons serving/working in state corporations are public officers within the meaning of article 260 of the Constitution.”

47. We agree and adopt the conclusions reached in the afore-cited case. Given that NSSF is a state corporation or indeed a public office whose funds are payable from money provided by Parliament for purposes of defraying expenses pursuant to article 206(1)(b), we find that the 1<sup>st</sup> respondent's members employed by NSSF and whose remuneration and emoluments are derived from such public funds are public officers whose salaries and emoluments are subject to the jurisdiction of the Commission under article 230(4)(b) of the Constitution and section 11 of the *Salaries and Remunerations Commission Act*.”

48. In reaching the conclusion that the employees of the NSSF are not subject to the requirements of the *Salaries and Remunerations Commission Act* and regulations, we find that the Employment and Labour Relations Court misapprehended the Constitution and the law and in so doing arrived at the wrong decision, as a consequence of which it is necessary to interfere with that decision.

49. In sum, the appeal is merited and is allowed, with the result that the Judgment of the Employment and Labour Relations Court that declared the Salaries and Remunerations Commission's Circular dated July 4, 2012 inapplicable to the 1<sup>st</sup> and 3<sup>rd</sup> respondent, be and is hereby set aside, in its entirety. The



respondent's petition dated May 23, 2014 is accordingly dismissed with costs to the appellant. The appellant shall also have the costs of this appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**S. OLE KANTAI**

.....

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

*signed*

**DEPUTY REGISTRAR**

