



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, KOOME, MWILU, AZANGALALA & ODEK, J.J.A)**

**CIVIL APPEAL NO. 196 OF 2015**

**BETWEEN**

**TEACHERS SERVICE COMMISSION (TSC)..... APPELLANT**

**AND**

**KENYA UNION OF TEACHERS (KNUT).....1<sup>ST</sup> RESPONDENT**

**KENYA UNION OF POST PRIMARY**

**EDUCATION TEACHERS (KUPPET).....2<sup>ND</sup> RESPONDENT**

**SALARIES AND REMUNERATION COMMISSION (SRC).....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (M. Nduma Nderi, J.) delivered on 30<sup>th</sup> June, 2015*

*in*

**Petition No. 3 of 2015**

**\*\*\*\*\***

**CONSOLIDATED WITH**

**CIVIL APPEAL NO. 195 OF 2015**

**SALARIES AND REMUNERATION COMMISSION (SRC).....APPELLANT**

**AND**

**KENYA UNION OF TEACHERS (KNUT).....1<sup>ST</sup> RESPONDENT**

**KENYA UNION OF POST PRIMARY**

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**Petition No. 3 of 2015**

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**CONSOLIDATED WITH**

**CIVIL APPEAL NO. 203 OF 2015**

THE HON. ATTORNEY GENERAL.....APPELLANT

AND

THE TEACHERS SERVICE COMMISSION (TSC).....1<sup>ST</sup> RESPONDENT

KENYA UNION OF TEACHERS (KNUT).....2<sup>ND</sup> RESPONDENT

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**Petition No. 3 of 2015**

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**JUDGMENT OF GITHINJI, J.A**

[1.] The three consolidated appeals are brought against the judgment of **Mathews Nduma Nderi, J.** given on 30<sup>th</sup> June 2015 sitting in the **Employment and Labour Relations** Court wherein he allowed the 1<sup>st</sup> and 2<sup>nd</sup> respondents' (**Unions**) claim against Teachers Service Commission (**TSC**) for increase of basic salary and allowances. The proceedings were instituted by TSC against the unions as Petition No. 3 of 2015 against the unions seeking various orders and declaration in respect of a strike commenced by the unions and the teachers with effect from 5<sup>th</sup> January 2015. TSC had also filed an application for interlocutory injunction pending the hearing of the petition. However, when the application for injunction came for hearing, the petition was converted to **economic dispute** (basic pay and allowances increment) in which the unions became the claimants and TSC the respondent. The Salaries and Remuneration Commission (SRC) and the Attorney General became 1<sup>st</sup> and 2<sup>nd</sup> interested parties respectively. After the adjudication process the court (which I will henceforth refer as the **labour court** for convenience) awarded the teachers a basic salary increment of between 50% – 100% and allowance with effect from 1<sup>st</sup>

July 2013. The consolidated appeals involve, in essence, the competency of the adjudication proceedings, the court's jurisdiction to adjudicate on the economic dispute and the justification for the award of basic salary and allowances. Several Articles of the Constitution of Kenya, 2010 have been cited in these proceedings. I will refer to each simply as "**Article**".

## **CHRONOLOGY**

[2.1] The **Kenya National Union of Teachers (KNUT)** was founded on 4<sup>th</sup> December 1958 and entered into a recognition agreement with the **Teachers Service Commission (TSC)** on 15<sup>th</sup> May 1968. It represents unionisable public school teachers employed by the government in primary schools. The **Kenya Union of Post Primary Education Teachers (KUPPET)** was founded in 1998 and entered into a recognition agreement with TSC on 2<sup>nd</sup> June 2010. As its name shows, it represents unionisable teachers employed by the government in Post Primary Public institutions. There were 288,000 registered teachers as at the time the dispute arose. The relevant events for purposes of this judgment started in 1996 which are summarized below.

[2.2] In 1996, the government appointed the Teachers Service Remuneration Committee under the repealed Teachers Service Commission Act to negotiate teachers' salaries and allowances with KNUT following a strike by members of KNUT. The negotiations that ensued culminated in salary awards which were published in Kenya Gazette – Legal Notice No. 534 of 1997. The awards were to be implemented in a span of five years from 1<sup>st</sup> of July 1997 to 2011. However, TSC only implemented the first phase leading to a strike by members of KNUT, in 2002. Following an agreement between TSC and KNUT the implementation of the salary awards was rescheduled and was ultimately fully paid, the final payment being in July 2007.

[2.3] In 2008, KNUT engaged TSC in fresh demands over basic pay, allowances and other benefits. In November, 2008 the Minister for Education constituted a Teachers Service (Remuneration) Committee to negotiate with KNUT. The committee reached a stalemate on basic salaries leading to a strike by members of KNUT in January 2009.

On 29<sup>th</sup> January 2009, TSC, Ministry of Education, National Treasury and KNUT reached an agreement to harmonise the teachers' salaries with those paid to civil servants. The increment was implemented by the government in three phases and was fully paid by July 2012.

[2.4] In the meantime, the Constitution of Kenya 2010, established independent commissions and independent offices including TSC and SRC by **Article 248** and, by **Article 253**, each commission and independent office is a body corporate with perpetual succession and seal and capable of suing and being sued in its corporate name. The new TSC was established by **Article 237** as an independent commission. Pursuant to Article 273. Parliament enacted the Teachers Service Commission Act – **Act No. 20 of 2012** which commenced on 31<sup>st</sup> August 2012 (TSC Act). Section 13(5) empowered TSC to constitute a "**consultative committee on the terms and conditions of service of registered teachers employed by the commission.**" By Article 230(1) the SRC was also established as an independent commission. The powers and functions of SRC are spelt in Article 230(4) namely, to;

***“(a) Set and regularly review the remuneration and benefits of all public officers; and***

***(b) advise the national and county governments on the remuneration and benefits of all other public officers.”***

[2.5] By a circular dated 4<sup>th</sup> July 2012, SRC issued guidelines on determination and review of remuneration in the public service which, *inter alia*, stated that public service adopts a four year review cycle with effect from 1<sup>st</sup> July 2013, that all the current collective bargaining agreements would expire on 30<sup>th</sup> June 2013 and that all public service organizations should immediately commence their remuneration analysis, collective bargaining negotiations and make proposals to the commission for analysis, verification and advise.

By a circular letter dated 1<sup>st</sup> October 2012 TSC pursuant to September 2012 agreement between the government and the two unions, aligned the teachers' salaries and some allowances with those of the civil service salaries with effect from 1<sup>st</sup> July 2012 as per the provision of legal notice No. 534 of 1997.

[2.6] In about mid October 2012, the two unions presented a memorandum to the consultative committee for demand for new salaries, allowances and other benefits. In particular, the unions demanded an increase of basic salary from 210% to 300% for various categories of teachers. Consultative meetings were held on several occasions but no settlement was reached. In June 2013, the members of the two unions went on strike called by the two unions. TSC filed Petition No. 23 of 2013 in the Industrial Court to restrain the members of the unions from continuing with the strike. The Industrial Court on 1<sup>st</sup> July 2013 made a finding, *inter alia*, that reconciliation process had not began in earnest and ordered the parties to embark on the negotiations limited to rationalization of remuneration due to union members under L.N. 534 of 1997 and L.N. 16 of 2003. The court further ordered the teachers to report back to work and that such negotiations meetings should be convened by Cabinet Secretary for Labour. As directed, the Industrial Court negotiations resumed resulting into two agreements. The agreement between TSC and KNUT dated 18<sup>th</sup> July 2012 – entitled “RETURN TO WORK FORMULA” provided for increase and payments of some specified allowances to be paid and for a commitment to commence consultations under the aegis of a consultative committee under section 13(5) of TSC Act for purposes of laying a framework for a collective agreement; and that the “**Return to work formula**” would form part of the collective bargaining. By agreement dated 5<sup>th</sup> July 2013 signed between TSC and KUPPET, the parties agreed to negotiate on the terms and conditions of service.

[2.7] The consultative committee convened several meetings where the unions demanded a response from TSC on their demands. TSC made a comprehensive response to the demands. Ultimately, on demand by unions for an offer, TSC prepared a draft “WORKING DOCUMENT”. By the “**working document**” TSC proposed an increase of basic salary of between 50% - 60% and also an increase of some allowances. By a letter dated 12<sup>th</sup> September 2014, TSC asked SRC for advice to enable TSC table a counter proposal at a meeting on 30<sup>th</sup> September 2014.

By a letter dated 23<sup>rd</sup> September 2014, SRC advised TSC that TSC should obtain confirmation from National Treasury on availability of necessary funds to meet the proposed reviews and that review of proposed allowances should be held in abeyance until completion of study on allowances payable to public officers. By a further letter dated 24<sup>th</sup> September 2014, TSC sought clarification from SRC on various issues including “**whether the 50%-60% basic salary increase as proposed by TSC is acceptable to be tabled to the unions**”. By a letter dated 26<sup>th</sup> September 2014, SRC replied in part as follows:

***“Consequently, the commission wishes to clarify as follows:***

***1) The commission does not concur with TSC’s proposal to increase the basic salary by 50% - 60% as the rationale for the proposed increment has not been provided. Further, TSC has not demonstrated affordability of the proposed increment. Any proposal for salary increment in the public sector must take into account the financial impact of the increment and the effect on other sectors of the public service.***

***2) Whereas the allowances are negotiated, the same must be done within policy guidelines and therefore the allowances currently existing be retained at the current level until the study on allowances is completed.***

***3) The SRC circular dated 4<sup>th</sup> July 2012 has clearly stated that CBA’s adopt the four year cycle with effect from July 2013.***

***In view of the above the Salaries and Remuneration Commission wishes to advise that:***

***(1) The TSC should adhere to the SRC Regulations issued on 4<sup>th</sup> July 2012, Labour Relations***

*Act and the existing legal framework while engaging with union.*

*(2) The Items proposed by TSC were harmonized with other Public Sector employees and therefore should not be subject for negotiation.*

*(3) The Teacher Service Commission to demonstrate budgetary provision for the proposed remuneration structure before seeking advice from SRC.*

*The Salaries and Remuneration Commission is however, open to further discussion or clarification of the matter”*

[2.8] By a letter dated 4<sup>th</sup> October 2014, TSC briefed the Cabinet Secretary in the National Treasury of the progress of the negotiations including the fact that it had tabled the “**working document**” at the consultative meeting of 30<sup>th</sup> September 2014 and that the unions in response, had at a meeting of 7<sup>th</sup> October 2014, reviewed their demands of basic salary to a range of 100% to 150% and an increase of medical allowance to 400%. The TSC sought guidance of the National Treasury on the availability of funds to implement the proposed salary and leave allowance increment to enable TSC to table the government’s proposal at a meeting scheduled for 14<sup>th</sup> October 2014.

By a letter dated 24<sup>th</sup> October 2014, the Cabinet Secretary, National Treasury replied in part:

*“The basic salary of teachers has been harmonized with those of the Civil Service. Reviews will be undertaken across the board in the context of advice from the Salaries and Remuneration (SRC) which will take into account principles of equity, fairness, productivity and fiscal sustainability of the public service wage bill as outlined in the Constitution. In addition, we are in the process of implementing the budget and there are no additional resources to accommodate any salary adjustments. Therefore, consideration of any reviews should be undertaken in the context of medium term budgeting cycle to ensure fiscal sustainability of the wage bill...”*

At the consultative meeting held on 27<sup>th</sup> November 2014, TSC presented a report on the financial implications of the revised unions’ demands and the officials of the National Treasury and Ministry of Education reported that the financial implications from the revised unions’ demand were unsustainable and that the government had no offer on basic salary and would have to wait for job evaluation exercise. The next meeting for 3<sup>rd</sup> January 2015 did not materialize.

[2.9] Finally, SRC by a letter dated 9<sup>th</sup> December 2014, addressed to TSC, while approving payment of some allowances advised, *inter alia*, that:

*“The Salaries and Remuneration Commission (SRC) during its 59<sup>th</sup> Special Meeting held on 25<sup>th</sup> November 2014 deliberated on the issue and advised that based on constitutional principles of Remuneration and Benefit Management in Public Service under Article 230(4) of the Constitution, Teachers Service Commission to continue with the process of collective bargaining engagement within the following parameters;*

*1. Due to budgetary constraints and since the basic salary for teachers were harmonized with those of civil servants in July 2012, the same to be retained at the existing harmonized rates. The basic salary therefore, to be reviewed upon the result of the forthcoming job evaluation exercise for the public service.....”*

Eventually, KNUT issued a seven days notice dated 27<sup>th</sup> December 2014 to commence strike on 5<sup>th</sup> January 2015 while KUPPET issued a similar strike notice on 31<sup>st</sup> December 2014.

### **[3.1] COURT PROCEEDINGS**

The TSC responded to the unions' strike notices by filing petition No. 3 of 2015 dated 7<sup>th</sup> January 2015 against the unions joining SRC as an interested party, contending that the strike was illegal and unconstitutional on the grounds specified therein. The reliefs sought in the petition included a declaration that the strike commenced on 5<sup>th</sup> January 2015 was illegal and an order directing the unions to resume negotiations with a view to finalise collective bargaining agreement. The petition was accompanied by an interlocutory application for orders, among other things, a prohibitory injunction restraining officials and members of the unions from continuing with the strike pending the determination of the petition.

[3.2] The application for interlocutory injunction was fixed for *ex parte* hearing on 8<sup>th</sup> January 2015. Apparently, counsel for TSC argued the application but the learned judge only certified the application as urgent, granted leave to serve the petition by way of press advertisement, ordered that the application be mentioned on the following day, i.e. on 9<sup>th</sup> January, 2015 for directions or further orders and that executive officers of KNUT and KUPPET identified by court should attend the court. On that day, only respective counsel for TSC, KNUT, KUPPET attended court. The court noted that parties were willing to engage in constructive engagement in terms of **section 15** of the **Industrial Court Act** and ordered the officials of the unions and TSC to attend court on 14<sup>th</sup> January 2015 for engagement. On that day, officials of TSC, KNUT, KUPPET, SRC, Commissioner for Labour and Cabinet Secretary for Labour attended court. The learned judge directed the officials to participate in the proceedings under section 15 of the Industrial Court Act in the chambers of the judge. The respective officials and their respective counsel addressed the court relating to all aspects of the dispute where it emerged that the only major contentious issue which had impeded the signing of a collective bargaining agreement was the basic salary. Indeed, the Secretary General of KNUT stated that teachers were only contesting the basic salary and that it is the withdrawal of the 50% - 60% basic salary increment offer by TSC that led to the strike. At the meeting **Mr. Muite**, Senior Counsel for KNUT offered two options, either agreement on basic salary on that day, or the court gives timelines for filing memoranda for adjudication of the dispute by the court.

At the end of the proceeding the court recorded the following order:

- “(I) That the parties have agreed to have the economic dispute adjudicated by the court.**
- (II) The KNUT and KUPPET will file their memorandum and serve by 19<sup>th</sup> January 2015.**
- (III) The Employer, TSC to file their memorandum and serve before the 26<sup>th</sup> January 2015.**
- (IV) The Central Planning and Monitoring Unit (CPMU) and SRC to file their report within 10 days from 26<sup>th</sup> January 2015.**
- (V) Meanwhile the unions i.e. KNUT and KUPPET call off the teachers strike commenced on 5<sup>th</sup> January 2015 forthwith.**
- (VI) For avoidance of doubt, all teachers resume teaching by Monday 19<sup>th</sup> January 2015.**
- (VII) TSC undertakes not to victimize any teacher/union officials/unions who may have participated in the strike including payment of salaries.”**

These orders were complied with.

On 23<sup>rd</sup> January 2015, TSC filed an application for setting aside the orders of 14<sup>th</sup> January 2015 for various reasons including lack of jurisdiction by the court to determine remuneration for public officers and that the order was not made with the consent of the parties. However, the court directed that all issues raised in the application be addressed by the parties and be determined by the court during the hearing of the economic dispute. The Attorney General also filed an application to be joined as 2<sup>nd</sup> interested party which application was allowed by consent. Thereafter, the dispute proceeded to hearing by way of written

and oral submission.

In the course of the proceedings SRC applied for leave to call a witness which application was opposed but allowed by the court.

[3.3] The Attorney General particularly relied on the National Treasury Report on Award of Salaries and Allowances to Public Officers dated 20<sup>th</sup> February, 2015 prepared by **Dr. Thuge**; statement by **Dr. Geoffrey Mwau**, Economic Secretary in charge of Budget and Fiscal Economic Affairs at the National Treasury, dated 21<sup>st</sup> April, 2015 and the oral evidence of two witnesses **Charles Nyariki Obuki** – Senior Economist in the Ministry of Labour and Social Services and **Dr. Geoffrey Mwau**.

[3.4] In broad outline, the unions' case was that the demand for basic pay increment was justified by virtue of the nature of their work; that the unions have a right to engage in collective bargaining under Article 41(5) and the court has jurisdiction to enforce labour rights; that TSC is an independent Commission and is not bound by the advice of SRC, that TSC has to negotiate the budget with the National Treasury; that TSC is bound by the “**working document**” which proposed an increase of basic salary by 50% - 60%; that the issue is not whether basic pay increment is sustainable but whether the teachers are entitled to increment and that in considering the issue of affordability, the court should consider the just demand of each individual teacher and not the large number of teachers involved.

[3.5] The TSC case was based on legal and factual issues. The legal issues were framed thus:

(I) The court had no jurisdiction to entertain the economic dispute inter alia as:

(i) The Court lacks the requisite legal mandate, institutional expertise and technical resources.

(ii) The constitutional mandate to determine, set, review and advise on the remuneration of public officers falls solely on SRC under Article 230(4) of the Constitution.

(iii) The adjudication process diminishes the principle of separation of powers and disregards the constitutional and statutory powers of various organs.

(iv) TSC and SRC did not freely consent to the adjudication process.

(v) No institution or organ can set, determine or review the remuneration of public officers except with the advice and concurrence of SRC and the National Treasury.

(II) Section 15(1) of the Industrial Court Act as read with sections 15(3)(4) and Section 77(3) which empowers the court to adopt and implement means of dispute resolution does not contemplate or empower the court to take over and determine wages or remuneration by itself.

(III) Pursuant to Article 259(1) and Section 37(3) of the TSC Act, the Commission is bound to seek a binding advise from SRC on remuneration of teachers which advise TSC has sought from both SRC and National Treasury.

(IV) The current stability and equality of basic pay remuneration in teaching and civil service conforms to constitutional principles of equality, equity harmony fiscal sustainability fairness transparency and non discrimination.

(V) Regarding the first report of CPMU dated 20<sup>th</sup> February 2015, the establishment of SRC has rendered CPMU irrelevant in the process of reviewing remuneration in the public sector.

[3.6] The Attorney General's case rested on expert evidence and three principle legal issues thus:

(i) By dint of Article 259(1), advice to the National Government which in this case is the TSC is a condition precedent to the review of salary and benefits of teachers and court is ill-equipped to carry out a study based on constitutional parameters stipulated in Article 230(5).

(ii) Any consideration of salary award should not create discrimination with the public service contrary to Article 27 of the Constitution and can only be allowed in terms of Article 27.

(iii) Fiscal sustainability is one of the national values and principles of governance and SRC is enjoined under Article 230(5)(a) to ensure that total compensation bill is fiscally sustainable.

[3.7] The SRC's case was based on law and economic facts. Briefly, the SRC's case as extracted from its response dated 9<sup>th</sup> February 2015 was as follows:

(i) SRC draws its mandate from the people of Kenya and an affront to it is an affront to people of Kenya.

(ii) Article 259(11) renders the advice given by SRC to TSC binding.

(iii) After harmonization of teachers' salaries with those of civil servants in 2009, the salary structure for teaching staff is that same as that of Civil Service except for special school allowances and reading allowances payable to teachers.

(iv) Any increase in basic pay to teaching service will need to be harmonized with the rest of the public service for purposes of equity and fairness.

(v) The demand for increment of basic pay by teachers will expand the teachers wage bill by additional Kshs. 216 billion and will aggravate the sustainability of total public compensation bill.

(vi) The increase of teachers' salaries will trigger an upward salary review of the rest of the Civil Service which will result to additional Kshs. 360.8 billion over and above the current public sector wage bill of Kshs. 568 billion raising the wage bill to 929.8 billion representing 95.3% of all domestic revenue.

(vii) For the government to sustain this demand, it will either be forced to increase taxes or borrow just to pay.

(viii) Further, any change of basic salary will significantly increase the current pension liability which stands at Kshs. 991 billion.

(ix) The consumer price index (CPI) most widely used in measuring inflation has been used to compare the increase in teachers pay from 2005 to 2012.

(x) Currently, remuneration and benefits for public service is taking up about 9.9% of GDP against an international standard of 7% for countries such as Kenya. The wage bill to revenue ratio is about 49% which is way above the desirable level of not more than 35%.

(xi) The present job evaluation exercise will determine whether the teachers are adequately paid for the work that they do and the result will assist in coming up with a public service-wide rank of jobs such that people doing work of equal value are placed in the same rank and remunerated commensurately.

(xii) It is not possible to review remuneration and benefits for teaching service in isolation since they form part of the public service. Any review prior to the comprehensive job evaluation will distort the salary structure obtaining in the public sector besides lacking any objective basis.

(xiii) Determination of remuneration in public sector is a very intricate and technical matter that is

best left to institutions that are specifically created for that purpose.

## **DECISION OF LABOUR COURT**

[4] The court considered the submissions and made a finding at the outset that after a guided dialogue which took almost eight hours with a view to broker truce and getting the children back to school, a process in which the parties fully participated, a consent was entered which compromised the petition replacing it with an economic dispute. The court then framed five issues for determination. The first issue was whether the unions are entitled to conclude a CBA with TSC determining the terms and conditions of employment. On that issue, the court made a finding that TSC is bound under Article 41(5) and section 57(1) of the Labour Relations Act (LRA) to conclude a collective agreement with the unions. The second issue framed related to the role of SRC in the negotiations and conclusion of CBA. On that issue, the court made several findings which form the bulk of the appeal as follows:

- (i) SRC has no role whatsoever in the negotiations and determinations of basic pay for teachers.
- (ii) TSC only needed to budget for the salaries of teachers and seek budgetary approval from the Treasury and once its annual budget is approved by Parliament that was the end of the matter.
- (iii) SRC needed to advise the Treasury as part of the National Government on the remuneration and benefits of teachers being part of the public officers and the Treasury would in turn approve the appropriate budget allocation or the remuneration and benefits of teachers.
- (iv) TSC could not make an offer of salary increment during negotiations with unions and later purport to withdraw the offer before it had been considered by the unions only on the basis that SRC had commanded it to withdraw the offer.
- (v) TSC as part of National Government is bound to consult SRC in terms of Article 230(4) as read with Article 259(11) in the process of negotiating the remuneration and benefits with unions but TSC is not bound by the advice given to it by SRC in the final determination of the remuneration and benefits which ought to be the outcome of collective bargaining process.
- (vi) TSC was not bound to await a job evaluation exercise as per the advice of SRC and only TSC has the constitutional and statutory mandate to conduct a job evaluation exercise of the teachers.

[4.1] The third issue framed was whether the teachers were entitled to a basic salary increment in the CBA as prayed or at all. The court considered the chronology of the unions' disputes with TSC over increase of basic salaries and allowances from 1997, the two reports of the CPMU, the evidence of three witnesses, John Kennedy Munyocho, an economist employed by SRC as Ag. Director in charge of Research Compliance, Policy and Planning, Charles Nyauki Obuki and Dr. Geoffrey Mwau, and the material before the court and made findings that indeed TSC made an offer to the unions of a basic pay increase of between 50%-60% for a period of four years and that the unions had made a counter proposal of increment of between 100% to 150%. The court further stated that in the light of the evidence before it, determined if the teachers deserve a basic salary increase within the parameters by the parties after which it made the findings, *inter alia*, that:

- (i) There is a very big disparity between the average salary increase for the lower cadre of teachers (P1) and that of the highest cadre of the teachers (CP) for the period under review and there was dire need to harmonize the salaries of teachers within the different cadre. This disparity is 57.38% for the period 2009-2013
- (ii) This disparity was stated by TSC as the justification for basic salary increase of 50% - 60%.
- (iii) There was also a big disparity between the terms and conditions of service of the TSC secretarial staff vis-à-vis the teachers in general.

(iv) The average salary increase for teachers between 1997 -2009 was way below that of the civil servants hence the harmonization that took place between 2009 and 2013

(v) The 4% annual automatic salary increase by the government to cushion public officers from inflation was not paid to teachers and the 4% increase spread between 1997 – 2009 would have translated to a 64% accumulative salary increase to the teachers for the period it had been implemented.

(vi) CPMU has in the 2<sup>nd</sup> report indicated that the lower grade of teachers have earned a basic salary average below the average consumer price index (CPI) for a period 2009 to 2013.

The fourth issue related to allowances and the fifth issue to effective date of the award.

[4.2] The court on 30<sup>th</sup> June 2015 awarded the teachers a basic salary increase of between 50% - 60% stating that it met the wage review criteria it had already set out. The court further ordered that the Collective Bargaining Agreement containing the 50% - 60% basic wage increase is effective from 1<sup>st</sup> July 2014 and the same to expire on 30<sup>th</sup> June 2017. In addition, the court ordered that the specified allowances already awarded to teachers by TSC with effect from 1<sup>st</sup> July 2015 are confirmed as awarded by the court and should be reflected in the collective bargaining agreement for the period 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2017.

Regarding the other allowances specified in the memorandum of the unions and any other allowances that parties may wish to be reflected in the CBA as negotiable items were to be reflected in the CBA agreement in their current status for the period from 1<sup>st</sup> July 2013 to June 2017.

Lastly, the court ordered that the CBA duly signed by the parties should be registered with the court within 30 days of the date of the judgment. However, judgment was to take effect immediately.

## **[5.0] THE APPLICATION**

The filing of the three appeals was preceded by an application filed by TSC being Court of Appeal Civil Application No. NAI 190 of 2015 in which TSC sought an order under Rule 5(2) (b) of the Court of Appeal Rules for stay of execution of the judgment and decree of the Industrial Court and all consequential orders pending the determination of an intended appeal. The application was heard by the court (differently constituted) and in a tacit ruling dated 23<sup>rd</sup> July 2015 the court granted a conditional stay thus:

***“A conditional stay of execution of the judgment delivered on 30<sup>th</sup> June 2015 is granted on the following conditions.***

***(i) The applicant and the interested party herein shall implement the increment ordered by the judge in respect only of the basic salary with immediate effect from 1<sup>st</sup> August 2015.***

***(ii) Thereafter the applicant shall continue to pay the increment ordered above until the hearing and determination of the appeal.***

***(iii) We hereby stay the implementation for the judgment in respect of arrears of salary and allowances ordered by the judge until the hearing and determination of the appeal.”***

The court made a further order that in the default of the implementation of the order on payment of increased salary; the motion shall stand dismissed with costs. In addition, the court gave directions relating to the filing of the appeal and the written submissions by the respective parties and fixed hearing of the appeal for 22<sup>nd</sup> September 2015.

[6.0] Dissatisfied with the orders of the court, TSC filed Civil Application No. 16 of 2015 in the Supreme Court seeking a stay of execution of the orders granting conditional stay of execution pending the filing of a petition of appeal to that Court. On 24<sup>th</sup> August 2015 the Supreme Court upheld a preliminary objection to the jurisdiction of that Court to reconsider an appeal on the exercise of discretion by the Court of Appeal under Rule 5 (2) (b) and consequently dismissed the application.

On 9<sup>th</sup> September 2015 the unions filed an application in TSC's appeal No. 196 of 2015 for an order that the record of appeal be struck out with costs or in the alternative the appellant be denied audience and/or further proceedings be stayed until such time that TSC shall have fully complied with the judgment and consequential orders of the Industrial Court.

The application was brought under the inherent powers of the court, sections 3, 3A and 3B of the **Appellate Jurisdiction Act (Act)** and rule 84 of the Court of Appeal Rules and all other enabling provisions of the law.

Section 3(1) of the Act gives this Court power to hear appeals from the High Court and section 3(2) provides that for purposes of, and incidental to the hearing and determination of any appeal, the Court shall have, in addition to any other power, authority and jurisdiction conferred by the Act, the power and authority and jurisdiction vested in the High Court.

Section 3A stipulates the overriding objective of the Act and the rules as to be to facilitate the just, expeditious, proportionate and affordable resolution of appeals governed by the Act. Section 3B of the Act prescribes the duty of the Court to handle all matters before it for purposes of attaining the specified aims. Rule 84 gives Court power to strike out an appeal or notice of appeal on application on the ground that no appeal lies or that some essential step in the proceedings has been taken or has not been taken within the prescribed time.

The application is based on the ground that, there being no order of stay of execution, TSC is in blatant and wilful contempt of both the orders of the Court given on 23<sup>rd</sup> July 2015, and the judgment of the Industrial Court by reason of failure to pay basic salary increment awarded.

TSC and SRC filed a preliminary objection to the application. At the hearing of the appeals, Mr. Muite for KNUF sought directions regarding the manner of dealing with the application and the preliminary objections. The Court ordered that the three appeals be consolidated and further, that the application and the preliminary objection be heard within Civil Appeal No. 196 of 2015 and, lastly, that at the determination of the appeals the Court to first determine the issues raised in the application with the result that if the application succeeds, then, the Court shall not consider the merits of Civil Appeal No. 196 of 2015.

[7.0] It follows that the Court has to determine the application at the threshold. Three of the unions counsel **Mr. Kilukumi, Mr. Muite, Mr. Mbaluto** and **M/s Guserwa** made extensive submissions on the application, the gist of which being that the National Treasury has demonstrated an attitude of "won't pay, can't pay", that the government has not demonstrated genuine inability to pay; that TSC has failed to ensure that it has adequate funds or to prepare a budget for enforcement of the award, that the award can be paid from a supplementary budget or from a contingency fund; that TSC has not even complied with the order requiring the registration of CBA within 30 days and that rule of law is threatened by the wilful disobedience of judgment of the trial court.

**Prof. Githu Muigai, The Hon. the Attorney General, Mr. Ngatia** and **Mr. Nowrejee** made replying submissions, in essence that the application is incompetent and is intended to delay the determination of the appeal; that a party cannot be denied access to justice, that there has been no determination that TSC is in contempt, that contempt of court must be wilful, that alleged contempt does not impede any procedural proceedings that Court may take, that the orders of the Court of Appeal became spent after the dismissal of the application for stay of execution and that the unions have initiated new proceedings in the trial court to compel payment of the enhanced salary.

The Attorney General asked the Court to discourage the unfortunate and unconstitutional practice gaining route where advocates encourage parties to cite public officers for committal for contempt of court to enforce money decrees.

The right of appeal from the decisions of the Labour Court to this court is conferred by section 17(1) of the Industrial Court Act which provides:

***“Appeals from the court shall lie to the Court of Appeal against any judgment, award, decision, decree issued by the court in accordance with Article 164(3) of the Constitution.”***

Incidentally, section 17(2) which restricted such appeals to only matters of law has been deleted by Act No. 18 of 2014 meaning that the Court of Appeal can now entertain an appeal from the labour court on both matters of fact and law. Article 164(3) aforesaid, confers jurisdiction on the Court of Appeal to hear appeals from the High Court and any other court or tribunal prescribed by an Act of parliament. Section 3(1) of the Appellate Jurisdiction Act reinforces the jurisdiction of the Court of Appeal to hear appeals.

It is not the case of the unions that the appeal has not been filed in accordance with rules governing appeals to this Court. It follows therefore, that there is no provision in the Constitution or any statutory law which debars a party who has filed a competent appeal to this Court from being heard on the merits.

[8.0] The jurisdiction given to courts by section 5(1) of the Judicature Act to punish for contempt of court, leaves open the punishment that the court can meet. The punishment for contempt by denying a party a right to be heard until he has purged the contempt is a rule of common law and, as section 3(1) of the Judicature Act provides, its application is subject to the Constitution and the written laws.

As the case of ***Hadkison v Hadkison* [1952] 2 All ER 567** shows, there is no rigid rule that a party in contempt cannot be given audience by a court. The rule is hedged with exceptions and is subject to the discretion of the court. Such exceptions include cases where a party is challenging the jurisdiction of the court to make the impugned order.

It is conceded that TSC failed to comply with the conditional stay order dated 25<sup>th</sup> July 2015 and that the order has become spent. Thus, there are no existing orders of this Court which TSC has disobeyed. It is also conceded that the unions had filed prior committal for contempt proceedings in the trial court which are pending determination for the enforcement of the judgment of the labour court. This application is thus a collateral proceeding. It is also evident that after the judgment of the labour court, TSC wrote to the National Treasury to consider the action required to implement the decision and that the National Treasury maintained that it was not able to provide additional funding to implement the salary award. The decision of the Supreme Court of India in ***Ram Kishan vs. Sir Tarun Bajah & Others – Contempt Petition No. 336 of 2013*** has been cited for the proposition that in order to punish a contemnor it has to be established that disobedience of the order is wilful.

[9.0] In this case, the question whether TSC is in contempt of court is pending for determination in the labour court and it would be inappropriate to pre-empt those proceedings. Furthermore, TSC is questioning in the appeal the jurisdiction of the labour court to make the award. The application is expressly brought against TSC and it has been conceded that it cannot apply to SRC. The quest to apply it to the Attorney General who is not named as a party to the application is highly unprocedural. Furthermore, allowing the application would be futile as SRC and the Attorney General’s appeal which have commonalities with TSC’s appeal, and, which have been consolidated with the TSC appeal, would independently proceed to hearing.

Lastly, and more importantly, the effect of the application, if allowed, would be that a party who has filed a competent appeal in this Court and who has not disobeyed any of order of the Court would be denied a chance to prosecute the appeal merely because he has not obtained a stay of execution order. That would be not only contrary to the constitutional principles and statutory provisions, but also would be against public interest as it would intrude into the right of very many people to have access to this Court.

As to the complaint of the abuse of contempt of the court jurisdiction to enforce money decrees against public officers, I would throw the ball back to court of the Attorney General. The office of Attorney General has the duty and power to initiate legislative process to govern the exercise of contempt of court jurisdiction as has been done in many countries.

For those reasons, I would dismiss the application and proceed to determine the appeals.

### **[10] THE APPEALS**

The respective appellants have in their respective memorandum of appeal raised numerous grounds of appeal. The labour court did not make any order as to costs of the proceedings either inadvertently or otherwise. The 2<sup>nd</sup> appellant KUPPET has filed a cross-appeal to the effect that the labour court having found in favour of the unions, it ought to have awarded the costs to the unions and asks that the judgment be varied to that extent. At the hearing of the appeals, Mr. Muite compressed the grounds of appeal into four clusters thus:

1. Did the parties consent and agree to have the dispute between TSC and the two unions adjudicated by court as an economic dispute?
2. Did court have jurisdiction?
3. Was the award made by the court justified?
4. What is the role of SRC vis-à-vis TSC in setting salaries and remuneration of the teachers?

The fourth issue necessarily fades into the issue of jurisdiction. Further, if the answer to the second issue is in the negative – that is, if a finding is made that court had no jurisdiction the third issue falls aside.

On the first issue, extensive submissions were made by the respective parties. Mr. Ngatia for TSC submitted that from the proceedings of 14<sup>th</sup> January 2015, the representatives of the parties and their advocates had divergent views and that the ingredients of a lawful consent were absent.

On the other hand, Mr. Muite referred to the proceedings in an attempt to show the context in which the consent was recorded and submitted that there was indeed consent to have the economic dispute adjudicated by the court. **Mr. Mbaluto** – also a counsel for KNUT referred to section 84 of the Evidence Act on the sanctity of court records which provides:

***“Whenever any document is produced before any court purporting to be a record or memorandum of any evidence in a judicial proceedings or before any officer authorized by law to take such evidence, and purporting to be signed by a judge or magistrate or any such officer as aforesaid, the court shall presume –***

***(a) that the document is genuine;***

***(b) that any statement as to the circumstances in which it was taken, purporting to be made by a person signing it, are true; and***

***(c) That such evidence was duly taken.”***

Mr. Muite also submitted that SRC acknowledged that there was consent in its written submissions dated 10<sup>th</sup> April, 2015 filed in the labour court. It is true that SRC in paragraph A, 1 and 2 stated that the unions filed their memorandum pursuant to the consent order entered into by the parties on 14<sup>th</sup> January 2015 and in paragraph 2 referred to the effect of that consent.

**[11]** The learned judge was in charge of the proceedings for about eight hours. It is clear from the

proceedings that the representatives of the parties and the respective counsel expressed the desire to have the underlying dispute resolved in one way or another. The learned judge acknowledged that the consent order may not have been elegantly recorded but observed that the parties fully participated in the process that culminated in the consent order and undertook fully to abide by the terms of the consent. These were judicial proceedings and the learned judge is best placed to express the intention of parties in those proceedings. This was a consent order recorded after the end of long consultations. In recording the consent, the judge had well in his mind what the parties had said and desired. At appellate level, it cannot be assumed that a judge ignored or overlooked some particular point merely because he did not specifically mention it either in the proceedings or in the judgment.

[12] On analysis, and considering the context in which the order was recorded, I make a finding that the learned judge did not err in describing the order as a consent order and that the parties indeed entered into a consent order allowing the court to adjudicate on the economic dispute. I would agree with the learned judge that the consent compromised petition No. 3 of 2015.

## **JURISDICTION**

[13] This is the central issue in the appeals. The issue has taken two forms. The first one is the procedural jurisdiction and the other the substantive jurisdiction – that is the subject-matter jurisdiction.

On the first aspect of the jurisdiction, it has been submitted, as I can decipher from the submissions, *inter alia*, that the proceedings before the judge was a petition by TSC and judge had no jurisdiction to determine the economic dispute which did not arise from the pleadings; that judge had no jurisdiction to create a dispute and frame issues which were not before him; that judge had no jurisdiction to preside over the proceedings as a conciliator; that judge had no jurisdiction to determine the economic dispute before the parties exhausted other statutory means of dispute resolution such as conciliation and mediation, that judge had no jurisdiction to determine disputes arising from collective agreement negotiations and also no powers to take over collective bargaining and impose terms. All those criticisms are made on the premise that the judge had power to adjudicate on economic dispute but criticize the judge for committing those errors within the jurisdiction by improperly expanding his jurisdiction.

[14] The second aspect of jurisdiction relates to the statutory and constitutional jurisdiction of the labour court to adjudicate on the issue of teachers' basic salary and allowances increment and the legality of the resultant award of increment.

The issue was encapsulated in the submissions of TSC filed in the labour court dated 11<sup>th</sup> March 2015 thus:

***“The court has no jurisdiction to proceed with the matter as it directed on 14<sup>th</sup> January 2015 for following reasons:***

***a) That this court lacks the requisite legal mandate, institutional expertise and technical resources to exclusively determine remuneration for public officers including teachers as the constitutional mandate to determine, set, review and advise on remuneration of public officers falls solely on the Salaries and Remuneration Commission (the interested party herein) under Article 230(4) of the Constitution of Kenya.”***

I have already referred to TSC's submissions in the labour court earlier.

The written submissions of the Attorney General dated 14<sup>th</sup> September 2015 filed in these appeals under the heading **Fiscal Implications or Sustainability of the Judgment** refer to usurpation of the role of Parliament and also usurpation of role of SRC under the heading of **Usurpation by Court of the Role of SRC**. The Attorney General under the heading of improper exercise of jurisdiction submits that:

***“4...the superior court erred in law to award a salary increment devoid of jurisdiction considering the express provisions of the Constitution governing wage determination and awards***

*within the public sector.*

**5. The Constitution provides for both substantive and procedural legal framework for determination and award of salary for public officers (teachers included) which must be exhausted before dispute can be ripe for determination by the courts.**

**6. Accordingly, this limb of submissions proceeds on three premises; first, that by dint of the harmonized reading of the Constitution, the salary determination for teachers is a preserve of**

**TSC established pursuant to Article 237 of the Constitution which mandate is exercisable only upon the advise by the SRC pursuant to Article 230 (4) (b) as read together with Article 259(11) of the Constitution ...”**

On its part, SRC stated in the written submissions dated 9<sup>th</sup> September 2015 filed in these appeals that the labour court had violated the Constitution by usurping the roles of TSC and SRC and that the judgment of the labour court is illegal and unconstitutional.

**Prof. Githu Muigai** has also referred to the issue of jurisdiction in his oral submissions. He submitted that:

***“The judge had no constitutional mandate to interfere with a constitutionally mandated budget framework.”***

[15] It is logical to deal first with the wider second form of jurisdiction because a finding on it may render it unnecessary to deal with the narrow issue of jurisdiction.

### **STATUTORY JURISDICTION**

[16] It is submitted by counsel for the unions that jurisdiction of the labour court is derived from Article 162(2) and section 12 of the Industrial Court Act

Article 162(2) provides:

***“Parliament shall establish courts with status of a High Court to hear and determine disputes relating to –***

***(a) Employment and labour relations;”***

Section 12 of the Industrial Court Act provides in part:

***“12(1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(1) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including –***

***(a) ...***

***(b) dispute between an employer and a trade union;***

***(c) .....”***

The other relevant legislation is the Labour Relations Act (LRA). According to the definition in section 2, a trade dispute means

***“a dispute or reference, or an apprehended dispute or difference between employers and employees, between employers and trade unions, or between an employer’s organization and***

***employees or trade union, concerning any employment matter and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or recognition of a trade union.”***

Section 57(1) requires in mandatory terms, among other things, that an employer that has recognised a trade union should conclude a collective agreement with the recognised union setting out the terms and conditions of service for all unionisable employees covered by the recognition agreement. As provided in section 59 of LRA such collective agreement binds all parties to the agreement; should be incorporated in the contract of employment of every individual employee covered by it and is enforceable and should be implemented upon registration by Industrial Court. By section 60 thereof, the collective agreement should be submitted to the Industrial Court. The court has a discretion to register but section 60(6) prohibits the court from registering the collective agreement if it conflicts with the LRA, or any other law or if it does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister responsible for labour matters.

Collective agreement is defined in LRA as a written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organization of employers.

The LRA provides in sections 62-73 for dispute resolution mechanism. The mechanism requires that the dispute be reported to the Minister first, who then appoints the conciliator and if the dispute is not resolved, reference to the Industrial Court should be resorted to.

[17] Section 61 of LRA provides how the terms and conditions of service in public sector where there is no collective bargaining should be settled. It provides:

***“(1) The Minister may, after consultations with the Board make regulations establishing machinery for determining terms and conditions of employment for any category of employees in the public sector.***

***(2) The terms and conditions of employment determined under subsection (1) shall have the same effect as a collective agreement registered under this part and may be enforced as if it were a collective agreement.***

***(3) The Minister may –***

***(a) determine different terms and conditions for different category of employees; or***

***(b) not exercise the powers under this section in respect of a category of employees who are represented by a trade union entitled to be recognised in terms of this part.”***

Article 41 which deals with labour relations has also been cited. It provides in Article 41(2) (a) that every worker has a right to fair remuneration and Article 41(5) provides that every trade union, employers' organisation and employer has the right to engage in collective bargaining.

[18] Mr. Obura a counsel for TSC also referred to Convention 98 of 1949 of International Labour Organisation which was ratified by Kenya on the **“Principles of the Rights to organize and to bargain collectively”**. Mr. Obura submitted that the convention envisages voluntary negotiations and that no provision of the Convention envisages a mandatory award of salaries by employers to workers in the course of negotiations, that an award of salary increase must be preceded by voluntary negotiations and if not resolved the dispute goes to conciliation. He further submitted that the right guaranteed by Article 41(5) is subject to limitations including the role of SRC and limitation of expenditure in Article 201, 202, 209, 220 and 221.

The labour court made a finding that TSC was bound to enter into collective bargaining to conclude a collective agreement with the unions and observed that the court has since its inception adjudicated on

economic disputes between employers and unions and has made basic salary and other mandatory awards.

[19] In the present case, there was no collective agreement in existence setting the basic salary and allowances of the teachers. The very essence of a collective agreement is that the terms and conditions therein contained are voluntarily agreed upon between the employer and the union. As section 61 of LRA stipulates, the terms and conditions of service in public sector if not contained in the collective agreement are fixed through the machinery established by the Minister in charge of labour and not by the courts. That section, if it still exists in its present form, has to be construed, as section 7(1) of the Sixth Schedule to the Constitution stipulates with necessary alterations, adaptations to bring it into conformity with the Constitution. The Constitution has not given that role to TSC and SRC. If the labour court fixes basic salary and allowances to be incorporated in a collective agreement as the labour court did in this case, the collective agreement ceases to be a collective agreement as envisaged by the law.

[20] From the foregoing, I find that there is no express statutory provision of the law which gives jurisdiction to labour court in absence of a collective agreement to set the basic salary and allowances of public officers. To the contrary, section 61 of the LRA expressly takes away the jurisdiction from the court in the absence of a collective agreement. I further find that conciliation or mediation is a compulsory condition precedent before the labour court can assume jurisdiction.

### **CONSTITUTIONAL JURISDICTION**

[21] Article 230(1) established SRC as an independent commission with power and functions set out in Article 230(4) which are:

***“(a) to set and regularly review the remuneration and benefits of all state officers; and***

***(b) To advise the national and county governments on the remuneration and benefits of all public officers.”***

Article 230(5) states that in performing its functions the commission shall take the following principles into account:

***“(a) the need to ensure that the total public compensation bill is fiscally sustainable;***

***(b) The need to ensure that the public services are able to attract and retain the skills required to execute their functions;***

***(c) The need to recognise productivity and performance; and***

***(d) Transparency and fairness.”***

Article 230(2) stipulates the members of SRC who include a person nominated by TSC, an umbrella body representing trade unions, an umbrella body representing employers, a joint forum of professional bodies, Cabinet Secretary, in charge of Finance, the Attorney General and a person nominated by Cabinet Secretary responsible for Public Service who has experience in the management of human resources in public services.

In 2012, SRC made regulations on the **“submission of salaries and remuneration proposals and pay determination for state officers and advising on remuneration for other public officers”**.

Regulation 18 provides:

***“(1) the Commission shall not negotiate with a trade union.***

***(2) the management of public service organization with unionisable staff shall seek the advice of the commission before the commencement of any collective bargaining process with the***

*respective union on the sustainability of the proposal of the union.*

***(3) where the collective bargaining process referred to in sub-regulation (2) above is successful, the management shall, before the signing of the agreement, confirm the fiscal sustainability of the negotiated package with the Commission.”***

TSC had requested for advice before the start of negotiations with the unions and SRC by a letter dated 10<sup>th</sup> April, 2013 replied in part:

***“The request for advice on collective bargaining agreement proposal before the start of the negotiations with the unions was presented to the salaries and Remuneration Commission. The commission deliberated on the request and advised that in view of the current economic situation and for purposes of managing the wage bill;***

***(a) The following remuneration and benefits remain as they are currently and should not be the subject of negotiation.***

***(b) The basic salary .....***”

In SRC’s response dated 9<sup>th</sup> February 2013 to unions’ claim filed in the labour court explains its mandate in paragraph 25 partly thus:

***“Historically remuneration and benefits were set by public sector employers without due regard to what was obtaining in the market and fiscal sustainability. The unions would make demands and negotiate with the employers, failure to agree led to industrial action. The new Constitution created a paradigm shift in the manner in which such negotiations may be undertaken. The SRC is established to guide the public sector employers on the parameters within which to negotiate...”***

## **TSC**

[22] TSC is established as an independent commission by Article 237(1). Its functions are set out in Article 237(2) which includes the recruitment and employment of registered teachers.

Section 37(5) of the Teachers Service Commission Act provides:

***“The registered teachers recruited by the Commission under***

***Article 237 (2) (b) of the Constitution shall serve under such terms and conditions as the committee established under section 13(5) of this Act in consultation with the Salaries and Remuneration Commission may determine”.***

Section 13(3) aforesaid requires TSC to constitute a consultative committee on terms and conditions of service of registered teachers employed by the Commission. Section 13(6) of the TSC Act stipulates the members of the committee who include a representative of the Principal Secretary in the Ministry responsible for finance, a representative of the Principal Secretary in the Ministry responsible for public service and five persons nominated by trade unions representing the interests of registered teachers.

By section 36 of TSC Act, the funds of the Commission consist of *inter alia*, monies allocated by Parliament for purposes of the Commission.

[23] The Court has been addressed on the Constitutional and statutory framework in respect of the management and control of public finance by the National Government with particular reference to budgetary process and the appropriation of public funds.

By Article 221, the Cabinet Secretary responsible for Finance is required to submit to the National

Assembly estimates of revenue and expenditure of National Government for the next financial year. The National Assembly is required to consider the estimates. Before the National Assembly considers the estimates, a committee of National Assembly is required to discuss and review the estimates while allowing public participation and thereafter make recommendations to the National Assembly. When the estimates have been approved by the National Assembly, an Appropriation Bill is introduced in the National Assembly to authorise the withdrawal from the Consolidated Fund and for appropriation of money for purposes mentioned in the Bill.

By Article 228, the Controller of Budget – an independent office under the Constitution, oversees the implementation of the budgets by authorizing withdrawals from public funds and the Controller is prohibited from approving any withdrawal unless satisfied that the withdrawal is authorised by law.

The Public Finance Management Act in section 15 establishes the National Treasury to manage Public Finances. By section 15 of the Act, the National Treasury is required to enforce fiscal responsibility principles. The principles include a requirement that over the medium term, a minimum of thirty percent of the national budget shall be allocated to development expenditure; that the national government's wage bill shall not exceed a percentage of the revenue as prescribed by the regulations; that government borrowing shall only be used to finance development expenditure and that national debt shall be maintained at a sustainable level.

**Dr. Kamau Thuge**, filed a report on award of salaries and allowances to public officers dated 20<sup>th</sup> February 2015 in the labour court giving the impact of the increase of salaries and allowances claimed by the teachers on the national wage bill, and stated that its implementation will push the national wage bill to Kshs. 808.1 billion which will affect the macro-economic stability of the economy. According to him, to finance the additional wage bill, the national government had three options namely; borrowing, rationalization of the budget and tax measures which three options were not feasible.

As already shown, **Dr. Geoffrey Mwau** gave evidence in the labour court. His evidence on the magnitude of the wage bill and its impact on the economy is similar to Dr. Thuge's report. He, like Dr. Thuge, stated that 52% ratio of wage bill to national revenue is not sustainable and that the implementation of the salary increase would have devastating consequences; lead to serious macro-economic instability, other sectors of the economy would shut down, the country would have to heavily borrow, would lead to high labour costs, economy would be unstable and may collapse, exchange rate would go up and the capital market would be affected.

[24] I now turn to the role of SRC in the determination of salaries and allowances of public officers. The main reason why the learned judge entertained the unions' claim was based on his finding that SRC's advise was not binding on TSC and hence TSC as an independent commission could merely budget for the salary and allowances increase, seek budgetary approval from the National Treasury and upon approval by the National Parliament, that would be the end of the matter.

**Mr. Nowrojee** for SRC submitted, among other things, that the advice of SRC is binding and not optional; that if the advise is optional, SRC will not be able to perform its constitutional mandate; that the process of advise is a constitutional fiscal process whose requirements and steps are specified in the constitution, that the judge's finding has no grounding in Article 259, that if the advise is optional there will be no uniformity or harmony and that an action performed without advise is a nullity.

On his part, **Mr. Kilukumi** submitted that from the text of Article 230 (4) (b), the advice is not binding; that the clause is one of general application; that the Constitution gave SRC mere advisory role.

The Attorney General submitted that the judge committed a fundamental error to ignore the constitutional mandate of SRC; that there is no difference between a state officer and a public officer regarding the role of SRC and that, in the constitution making process, the people of Kenya agreed on the principle that no public officer would be able to award himself pay without reference to an autonomous body.

[25] SRC heavily relies on the case of **Kenya Union of Domestic Hotels, education and Allied**

**Workers Union (KUDHEHIA workers) v Salaries and Remuneration Commission & Attorney General** High Court Petition No. 294 of 2013, where the High Court Constitutional Division (*Lenaola, J.*) held in essence, that, employees of parastatals are public officers and that their union CBA's are subject to the advice of SRC.

The learned judge held at paragraph 35:

***“Looking at the provisions of Article 230 of the Constitution as well as the provisions of section 11 of the SRC Act, it is clear that SRC has the mandate of settling and regularly review the remuneration and benefits of state officers and advising the national and county governments on the remuneration of other public officers. I therefore find that SRC acted within its constitutional mandate in describing the employees of state organizations represented by the petitioners as public servants and they are subject to the mandate of SRC in relation to settling and reviewing of their salaries.”***

Mr. Kilukumi criticized the decision on the grounds that the case dealt with employees of State Corporations; that judge erred in stating that employees are bound by the decision of SRC to fix salaries and that judge was wrong to say that SRC sets salaries of public officers.

The petitioner's grievances in that case are indicated in paragraph 6 of the decision. It shows that the petitioner's complaint was with regard to the advice of SRC that it would not negotiate with the unions and that public organizations with unionisable employees should seek the advice from the SRC before commencing CBA negotiations. It is clear from the quoted passage of the judgment that what the learned judge was saying is that unionisable public servants are subject to the advice of SRC in relation to negotiation of CBAs, settling and reviewing their salaries. Indeed, Mr. Kilukumi conceded that what the learned judge said was that SRC as a third party cannot participate in negotiating CBA. However, the learned judge did not expressly say that the advice was binding, which is one of the issues raised in this dispute.

[26] The unions relied on the decision of Supreme Court of India in **AN D'SILVAU union of India on 6 December, 1961 - 1962 AIR 1130** where the Court held that although the Indian Constitution requires the President to consult in disciplinary matters, the President was not bound by the advice. That decision is of little persuasive value because it was dealing with consultations in a narrow issue of disciplinary proceedings. In the instant case, we are dealing with complex issues of right to fair remuneration and the role of multiple constitutional bodies in the management of national wage bill.

[27] **Article 259(11)** which relates to the construing of the Constitution provides:

***“If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or in consultation with another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent or after that consultation except to the extent that this Constitution provides otherwise.”***

TSC is established by Article 237 and its functions are prescribed by the Constitution. TSC is therefore exercising its functions under the power conferred by the Constitution. It is common ground that TSC as an employer of teachers who are public officers is subject to the advice of SRC under Article 230(4)(b) on the remuneration and benefits of teachers. Indeed, section 37(3) of TSC Act states that the registered teachers shall serve under the terms and conditions as the committee established under section 13(5) **“in consultation”** with Salaries and Remuneration Commission may determine. However, in my view, the phrase **“in consultation”** is a drafting error as it does not conform to the provisions of Article 230(4) (b) which uses the word **“advise”**.

By **Article 259(1)(a)**, the Constitution has to be interpreted in a manner which promotes its purposes, values and principles. The inherent weaknesses in the wage settling mechanisms prior to the establishment of SRC have been described by SRC. Dr. Thuge in his report refers to such weaknesses and

states in paragraph 29 and 30:

**“29. As a result, wage awards were granted to sub-sectors of the public service without regard to their implications on the other sectors of the public service, macro-economic stability and external competitiveness, effectiveness and service delivery and affordability of such award.**

**30. To address these challenges and ensure fair and transparent harmonization of public service salaries and value for money the people of the Republic of Kenya consciously established the Salaries and Remuneration Commission...”**

The very composition of SRC indicates that its advice has to be given great weight. The phrase **“only on that advice...”** used in Article 259(11) shows that the advice is a mandatory condition precedent for a valid exercise of power or function. If the word **“advise”** in Article 230 (4) (b) is construed to be not binding, the country would be returned to the pre-Constitution 2010 era which would defeat the purposes, values and principles of the Constitution and of the institutionalization of SRC under the Constitution. It is conceivable and indeed inevitable that many employers in public sector would defy SRC’s advice leading to unimaginable financial crisis in the management of national wage bill.

[28] Having regard to the mischief that the institutionalisation of SRC under the Constitution was intended to cure the principles of public finance and fiscal responsibility, the budgetary process and the complexity of salaries and benefits determination for public officers, I hold that the advice of SRC under Article 230(4)(b) on remuneration and benefits of all public officers is binding on national and county governments and any power or function exercised without that advice is invalid.

[29] That finding paves the way for the consideration of the constitutional jurisdiction of the labour court to determine the dispute.

It is clear from the foregoing that an effective and valid resolution of the teachers claim involves at least five constitutional institutions – TSC as employer for the decision and preparation of the budget; SRC for advise on fiscal sustainability of the claim; National Treasury for preparation of National Budget, National Parliament for approval of the budget and Appropriation and Controller of Budget for implementation of the budget by authorizing withdrawals from public funds. The decisions of those constitutional bodies are subject to, *inter alia*, principles of public finance articulated in Article 201 and principles of financial control of public funds in Article 225 and Article 10 National values and principles of governance.

[30] I have referred to the Report of Dr. Thuge, the report of SRC and the evidence of Dr. Mwaui with no intention to show that the unions’ claims for basic salary increment is not fiscally sustainable but essentially to show the complex nature of the dispute and the impact it will have on the micro-economic stability of the economy.

The dispute is not a simple private dispute between unions and employer as envisaged in the Labour Relations Act. It is, in essence, a public law dispute involving the interpretation and the application of the Constitution on a matter of general public interest.

The Constitution has conferred the necessary power and discretion to the relevant institutions to perform their constitutional functions. The TSC through its consultative committee has deliberated on the dispute and has decided to abide by the advice of SRC. SRC has made its decision through various letters already referred to, including the letter of 10<sup>th</sup> April 2013, letters of 26<sup>th</sup> September 2014 and 9<sup>th</sup> December 2014, in essence, that the claim of the unions for 50% - 60% basic salary increment is fiscally unsustainable due to budgetary constraints and that the salaries should be retained in the current harmonized levels to be reviewed upon result of the forthcoming job evaluation exercise. The National Treasury has also made its decision vide a letter dated 24<sup>th</sup> December 2014 declining to provide a budget for basic salary increase. In the absence of a budget, the National Parliament and Controller of Budget have not made any decision.

[31] Disputes relating to revenue allocation and public wage setting are complex, intricate and of technical nature and are best handled by the institutions with institutional competence. The Constitution conferred that jurisdiction to the five institutions to which I have referred.

In **Narok County Council v Trans Mara County Council [2000] 1 EA 161** this Court held that the repealed Constitution did not clothe the High Court with jurisdiction to deal with matters that statute had directed should be done by a Minister as part of statutory duty and that the jurisdiction of the High Court could only be invoked where the Minister refuses to give a direction or in purporting to do so, arrived at a decision that was grossly unfair or perverse. The court further held that where a Minister refused or neglected to act, the proper course was for either party to apply to the High Court for an order of mandamus compelling the Minister to perform his statutory duty.

In the instant case, the Constitution has conferred the duty to determine remuneration and benefits of public officers to specialized constitutional institutions which are democratically accountable, particularly the SRC. Those institutions have made a decision in accordance with their constitutional power which decision was not favourable to the unions. Although the doctrine of separation of powers cannot be invoked to undermine the operation of a specific provision of the Constitution, it nevertheless requires that constitutional actors should respect the role and mandate of other constitutional actors by refraining from usurping their functions.

[32] The only lawful remedy to challenge the decision already made by constitutional bodies is a constitutional remedy in the nature of a constitutional petition in the court invested with jurisdiction seeking appropriate orders or declarations or alternatively, a remedy under the **Fair Administrative Action – Act No. 4 of 2015** where applicable. The remedy does not lie in the institution of private law or statutory proceedings for the same relief that the constitutional institutions failed to give.

#### **JURISDICTION FROM CONSENT ORDER**

[33] It is trite law that a consent order, such as the one relied on in this case cannot confer jurisdiction on a tribunal or a court which it does not have. **Lord Reid** with whom **Lord Jenkins** and **Lord Hobson** agreed, summarized the principle in **Essex Incorporated Congregational Church Union v. Essex County Council [1963] AC 808 at page 820-821** thus:

***“It is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction or can estop the consenting party from subsequently maintaining that such court or tribunal had acted without jurisdiction.”***

If a constitutional remedy is sought in an appropriate court to challenge the decision, then different principles apply to the lawfulness of the decision including the conformity of the decision with constitutional principles, principles of reasonableness, proportionality of the impugned decision and the doctrine of deference – that is, the level of deference to be given to the decision maker in relation to the decision.

I find therefore that it is only the relevant constitutional institutions particularly SRC which have the exclusive jurisdiction to deal with increment of basic salary and allowances for public officers. The labour court in awarding teachers a basic salary increase of 50% - 60% and allowances, a task for which it had no institutional competence to handle, made a fundamental jurisdictional error by usurping the role of SRC and other actors, and the award having been made without jurisdiction, is a nullity and liable to be set aside on that ground alone.

[34] In summary, I find that the labour court had no jurisdiction to award the teachers a basic salary increment and allowances as it could not derive such jurisdiction from the consent order or from the Labour Relations Act or from the Constitution.

Having so found, it is not necessary to consider the procedural issue of jurisdiction or the merits of the

appeal. However, from the analysis of the provisions of the Labour Relations Act and the Industrial Court as shown above, I would agree with the unanimous finding of the members of this Court that as a general principle, a judge of the Industrial Court has no jurisdiction to conduct conciliation or mediation proceedings under section 15 of the Industrial Court as read with Article 159 (2) of the Constitution.

Regarding the costs of the appeal, I find that no party is to blame, for it is the erroneous assumption of jurisdiction by the court which led the parties to participate in the proceedings. This is a case where no orders as to costs should be made. I would therefore allow the appeal with no orders as to the costs.

### **SUMMARY OF THE JUDGMENT**

[35] I have had the advantage of reading the judgments of the other members of the Court. There are unanimous findings as follows.

- (1) With regard to the application to deny TSC a right of audience for contempt of court, TSC, SRC and the Attorney General have a right to be heard in these appeals.
- (2) That the advise by SRC under Article 230(4)(b) of the Constitution is binding and that SRC has a role to play in collective bargaining agreement on matters relating to remuneration and benefits of public officers, including teachers.
- (3) There is unanimity that the order of 14<sup>th</sup> January 2014 did not confer jurisdiction to the trial court.
- (4) As a general principle, a judge of the Employment and Labour Relations court has no jurisdiction to conduct conciliation under section 15 of the Industrial Court Act as read with Article 159(2) (c) of the Constitution.
- (5) The majority of the members of the Court have made the following findings:
  - (i) That SRC also has a role to play in job evaluation of public officers including teachers.
  - (ii) That the judge erred in backdating the award.
  - (iii) That the trial judge erred in not taking into consideration the expert evidence of Dr. Godfrey Mwau (RW3).
  - (iv) That the Petition No. 3 of 2015 was not compromised.

For those reasons, the unanimous judgment of the Court is that the three appeals have merit and are hereby allowed. The judgment of the trial court dated 30<sup>th</sup> June, 2015 and the decree thereof, and all consequential orders be and are hereby set aside in their entirety.

Each party to bear its own costs.

**Dated and delivered at Nairobi this 6<sup>th</sup> day of November, 2015.**

***E. M. GITHINJI***

.....

***JUDGE OF APPEAL***

*I certify that this is a true copy of the original*

## **DEPUTY REGISTRAR**

### **JUDGMENT OF KOOME, JA**

[1] On 30<sup>th</sup> June 2015, Nderi Nduma PJ., of Employment and Labour Relations Court delivered a judgment in petition No. 3 of 2015 in which the teachers were inter alia awarded salary increment of between 50-60 % for four years with effect from July 2013. Aggrieved by that judgment, Teachers Service Commission (**TSC**) appealed in CA No 196 of 2015; the Salaries and Remuneration Commission (**SRC**) appealed in CA No. 195 of 2015, and the Attorney General (**AG**) is the appellant in CA No. 203 of 2015. The Kenya National Union of Teachers (**KNUT**) and the Kenya Union of Post Primary Education Teachers (**KUPPET**) the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively (**Unions**) also cross appealed on costs. All the appeals were consolidated for purposes of hearing and determination as they emanate from the same judgment and decree in the aforesaid judgment.

[2] The industrial dispute between **TSC** and the **Unions** has had a long history but, for purposes of the instant appeal, it can be traced to two notices issued by the Unions on 27<sup>th</sup> and 31<sup>st</sup> December 2014, respectively calling for a nationwide strike by unionisable teachers in public schools with effect from the 5<sup>th</sup> January 2015. TSC in its capacity as the employer of teachers filed a suit by way of a constitutional petition before the Employment and Labour Relations Court (**the Court**) on the 7<sup>th</sup> January 2015. The said petition was accompanied by an application by way of a Notice of Motion under certificate of urgency that sought injunctive relieves against the officials and members of the Unions from continuing with the strike until the determination of the application or the petition.

[3] The court was also asked to declare the strike by the members of the **Unions** unprotected and therefore illegal, null and void; this was because the respondents did not declare an industrial dispute with **TSC** prior to commencing the strike as provided under **sections 62 (1) and 73 (1)** of the Labour Relations Act; further it was alleged that the **Unions** refused, failed and/neglected to attend negotiations with a view to execute a collective Bargaining Agreement (CBA) as provided under **Article 41 (5)** of the Constitution. The application was heard ex parte, certified as urgent, the judge declined to issue interim orders but directed both the petition and motion be served upon the respondents.

[4] On 14<sup>th</sup> January 2015, parties appeared before the judge and he made an order that the proceedings be conducted under the provisions of **section 15** of the Industrial Court Act. I think it is necessary to set out the provisions of the aforesaid section as its interpretation and application was one of the key issues that was most contested in these appeals. It provides as follows:-

#### **“15. Alternative dispute resolution**

**4) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159 (2) (c) of the constitution.**

**5) ....**

**6) ....**

**7) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.**

**8) In the exercise of its powers under this Act, the Court may be bound by the national wage**

**guidelines on minimum wages and standards of employment, and other terms and conditions of employment that may be issued, from time to time, by the Cabinet Secretary for the time being responsible for finance.**

**9) Nothing in this section shall preclude the Court from making reference to the guidelines as may be published from time to time by the Salaries and Remuneration Commission to the extent to which they may be relevant to the dispute?**

[5] The record of the trial court shows, it is also common ground that, an order was made converting the court room in to chambers for purposes of conducting conciliation proceedings under **section 15** of the Industrial Court Act. The meeting went on for a whole day under the chairmanship or guidance of the trial judge on the 14<sup>th</sup> January 2015. Several persons made speeches. (they were referred to as speeches as the speakers were not sworn to give evidence). What is discernable from those speeches is that each speaker spoke in support of their respective positions regarding the dispute at hand which by that time was identified as the basic salary payable to teachers and terms and conditions of a collective bargaining agreement (CBA). Mr. Muite SC, for KNUT, Mr. Sitima counsel for TSC, Mr. Jaoko counsel holding brief for Ms. Guserwa for KUPPET, Ms. Munyi for the Attorney General, Mr. Sitienei for SRC, the Cabinet Secretary for Labour, Mr. Sossion, Secretary General of KNUT, Mr. Misoi, Secretary General of KUPPET, Commissioner for Labour, Mr. Sammy Nyaberi, Chief Executive Officer of TSC, Mr. Gabriel Lengoiboni, and the Chairperson, TSC, Maria Nzomo were present and they all made speeches.

[6] After recording the aforesaid speeches, the Judge recorded an order which is later referred to in the impugned judgment by the learned judge as a consent order. There was also an application filed by TSC immediately after the said order was recorded on 22<sup>nd</sup> January 2015, seeking to set it aside. After hearing the parties on the application to set aside the order, the judge directed the issues be raised during the hearing of the economic dispute. I will revisit the issue of whether it was a consent order or an order by the court. It is necessary to reproduce this order as considerable time and effort was taken by respective counsel submitting on it.

**“ORDER:-**

- (i) That the parties have agreed to have the economic dispute adjudicated by the court.**
- (ii) The KNUT and KUPPET will file their memorandum and serve by 19<sup>th</sup> January 2015.**
- (ii) The employer (TSC) to file their memorandum and serve on or before 26<sup>th</sup> January 2015.**
- (iv) The Central Planning and Monitoring Unit (CPMU) and SRC to file their reports within 10 days from 26<sup>th</sup> January 2015.**
- (v) Meanwhile the unions‘ i. e. KNUT and KUPPET call off the teachers strike commenced on 5<sup>th</sup> January 2015 forthwith.**
- (vi) For avoidance of doubt, all teachers resume teaching by Monday 19<sup>th</sup> January 2015.**
- (vii) TSC to undertake not to victimize any teacher/ union officials/ unions who may have participated in the strike, including payment of salaries.?**

## **PLEADINGS**

[7] Parties filed their respective pleadings, reports and written submissions and they were duly heard. Oral evidence was adduced by some experts. The two **Unions** filed a detailed joint memorandum of claim that gives a fairly detailed chronology of their longstanding struggle with the **TSC** against poor pay for teachers for several decades. They gave an account of various efforts they have made through negotiations with **TSC**. They held meetings; called for strikes, entered into agreements for return to work,

but because of failure on the part of **TSC** to honour the agreed terms and generally because of discrimination of teachers who were treated differently from other public officers, teachers' salaries have remained poor. **TSC** was accused of failing to address the plight of teachers who are overworked and poorly remunerated; failure by **TSC** to co-operate for purposes of finalizing a CBA for which would regulate the teachers future relationship with **TSC** as the employer as provided in the constitution was a key grievance that the trial judge addressed in the judgment.

[8] The **Unions** were principally seeking for increase of basic salary and other benefits to cushion teachers against the prevailing inflation and give them fair remuneration that is commensurate to their work. The memorandum of claim contains other demands like house allowance, responsibility, annual leave, hardship and others. The claim by the **Unions** would provide the information required by both parties to finalize the terms and conditions of a CBA. During the hearing of this appeal, we were told the allowances payable to teachers were harmonized with the rest of the government employees in public service and payment was implemented to the tune of Ksh 9.3 Billion. Perhaps the payment of allowances to teachers explains why there were no serious arguments on the allowances during the hearing of this appeal.

[9] **TSC** filed a response on protest claiming the procedure adopted by the trial court, that was forcing them to become parties to an economic dispute, when it had filed its own suit by way of a petition was irregular; a procedure that was not founded in law.

**TSC** narrated background information on the long standing dispute between it and the **Unions** that dates back to several decades but the dispute snowballed in 1997 into a full pledged industrial action. There was an agreement on salary increase in 1997; however there were a few challenges regarding the implementation of some terms of the agreements but by and by further agreements were arrived at, at different times; and so far the salaries and allowances of teachers have been harmonized with those of public servants.

[10] **TSC**, maintained that the strike that they sought to stop was premature because there were continuing negotiations with the **Unions** pursuant to the provisions of **section 13 (5)** of the TSC Act. **TSC** is obligated to seek advice from **SRC** under the provisions of **Article 230 (4) (b)** of the Constitution and **section 37 (3)** of the TSC Act before setting the salaries of teachers. It is **SRC** which has the constitutional mandate to ensure the entire national wage bill is fiscally sustainable and upon seeking that advice as per the law, **SRC** advised **TSC** not to review the basic salaries of teachers until a job evaluation was undertaken. **TSC** also sought guidance from the National Treasury regarding the proposed increase of the teacher's basic salary and they were told it could not be paid due the economic situation obtaining in the country. **TSC** alleged that as at the time the strike was called, the negotiations had neither completely failed and the **Unions** failed to adhere to the laid down dispute resolution mechanism set out under Part VIII of the Labour Relations Act; also they alleged the strike paralyzed education services thereby prejudicing the fundamental rights of children which is contrary to the provisions of **Article 53 (1) (b)** of the Constitution.

[11] **SRC** filled their report; they also took issue with the pleadings as the judge directed the parties to file "economic dispute" which they claimed was not properly before the court because what was before court was a petition to determine the legality of the strike. They nonetheless went on to respond to the dispute; they reiterated their mandate as set out under Article 230 (4) (ii) and (5) which is to advise the national and county governments on the remuneration of all other public officers; and to be guided by the principles of; - fiscal sustainability of public wage bill; ensuring competitive terms; recognize productivity, performance, transparency and fairness. Section 11 of the SRC Act sets this mandate in greater detail which includes among others, conducting comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public officers.

[12] According to **SRC**, the salary structure for teachers is the same as that of the public service except the allowances for special schools and the reading allowances payable to teachers. SRC further stated that they were undertaking job evaluation in the public sector which exercise will inform the salaries that are commensurate to each job as well as determining whether the teachers are adequately paid for their work.

In conclusion SRC posited that determination of remuneration in public sector is a very intricate matter that should be left to those who have the mandate and any increase of basic salary will impact negatively on the current wage bill. There is justification for the creation of SRC in the Constitution to ensure no state organ or individual retains the authority to determine its own wages or benefits.

[13] The Central Planning and Monitoring Unit (CPMU) filed two reports which were considered by the judge. There was a report by the National Treasury which has the responsibility of formulating financial and economic policies, developing and maintaining sound fiscal and monetary policies for the government. In addition to the pleadings and reports, three witnesses gave evidence on the part of the appellants and they were cross-examined at length; these were, **John Kennedy Monyoncho** (RW1) working with SRC as the acting director in charge of research compliance policy and planning; **Charles Nyariki Obuki** (RW2) a senior economist in the Ministry of Labour and Social services and **Dr. Geoffrey Mwau** (RW3) economic secretary in charge of budget, fiscal economic affairs at the National Treasury. The respondents did not adduce oral evidence. The parties filed written submissions and made oral highlights before the judge.

[14] After hearing the submissions and the evidence that was before court, the judge made the following key findings that are embodied in the judgment and order of 30<sup>th</sup> June 2015, as follows:-

**“RW3, The Economic Secretary told the Court that Government has consistently budgeted for a 4% basic salary increase for all public officers including teachers to cater for the loss of money value, also referred to as inflation increase.**

**It is common cause that the last negotiated salary increase to the teachers was in the year 1997. This salary award was however implemented in a period of ten (10) years. Even though the Court has already found the year of reference for analysis of CP1 is 2009, being the last date teachers received an arbitrary award of salary from Government, it is clear from the totality of evidence before Court that the average salaries increase for the teachers between 1997-2009 was way below that of the Civil Servants hence the harmonization that took place between 2009 to 2013.**

**This observation is important in view of the evidence by RW3, The Economic Secretary that Government budgeted for an automatic 4% salary increase cushion against inflation. This 4% increase was not automatically paid to the teachers for the period 1997 to 2013. The Court notes that a 4% automatic inflation cushion spread between 1997-2009 would have translated to a 64% cumulative salary increase to the teachers for the period had it been implemented.**

**In addition, CPMU has in the 2<sup>nd</sup> report demonstrated that the lower grades of teachers have earned a basic salary average below the average CPI index for the period 2009 to 2013 by a margin of 8.56% for P1 grade, 6.35% for ATSIV and 8.42% for ATS III.**

**Furthermore, the disparity in the average basic salary increase between a P1 teacher and a teacher in CP level is 57.38% for the period 2009 to 2013.**

**This is the situation TSC rightly wanted to address in the proposal tabled in the negotiations on 9<sup>th</sup> September, 2014. Accordingly, the Court has upon careful consideration of the evidence before it found as follows:**

**(a) A basic salary to the teachers of between 50-60% for four (4) years meets the wage review criteria set out herein before in this Judgment and the Court awards the teachers accordingly. This award in reality translates to an annual award of between 12.5%-15%.**

**(b) In line with the circular issued by SRC dated 4<sup>th</sup> July 2012, the Collective Bargaining Agreement containing the 50-60% basic wage increase is effective from 1<sup>st</sup> July, 2013 and the**

same will expire on 30<sup>th</sup> June 2017.

(c) The allowances increases already awarded to the teachers by TSC with effect from 1<sup>st</sup> July, 2015 which includes:

(i) House allowance

(ii) Leave allowance

(iii) Hardship allowance

(iv) Advance for motor vehicle purchase: and

(v) Mortgage facility; are hereby confirmed as awarded by the Court and the items to be reflected in the Collective Bargaining Agreement for the period 1<sup>st</sup> July, 2013 to 30<sup>th</sup> June 2017.

(d) All other allowances and benefits in the Memoranda of the parties including;

(a) Responsibility allowance

(b) Hazard allowance

(c) Disturbance allowance

(d) Accommodation and night out allowance

(e) Mileage claims

(f) Study leave

(g) Sabbatical leave and any other allowances and benefits that the parties may wish to be reflected in the collative Bargaining Agreement as negotiable items are to be reflected in the Collective Agreement for the period 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2017 in their current status.

(e) The term of CBA to be reflected in the ultimate clause of the CBA document to be from 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2017.

(f) The CBA, duly signed by the parties to be registered with Court in terms of section 60 (1) of the Labour Relations Act, 2007 within thirty (30) days from the date of this judgment.

(g) For the avoidance of doubt, this judgment takes effect immediately notwithstanding any delay in preparation of the CBA document and its registration with the Court.‘

Here is to hope, this judgment will bring to an end the era of arbitrary remuneration awards to the teachers. The Court desires, that the era of acrimony and regular national wide strikes by the teachers will be replaced by an era of guided collective bargains in a four (4) year cycle. If this scenario come to pass, the pain felt today, by government implementing this award would be repaid many fold by the peace and harmony to be experienced in Education Sector. The annual anxiety by the teachers, children and their parent’s sill equally come to an end. Good Labour Relations, translating into national peace and harmony is a trophy worth investing in today.?

consolidated appeals. The **Unions** also filed an application by way of a Notice of Motion seeking to strike out, or alternatively, stay the proceedings in respect of the two appeals by **TSC** and the **AG** on the grounds that they are in contempt of court for disobeying the orders appealed against. The **Unions** also cross-appealed on the issue of costs of the proceedings before the Employment and Labour Relations Court which they contended should have been awarded to them as the successful parties in any event.

### **APPELLANTS' SUBMISSIONS**

[16] In addressing the various grounds of appeal, Messer's Ngatia teaming up with Obura, Kiragu Kimani, Issa Masoud and Ms. Ruto for TSC collapsed the grounds of appeal into four thematic areas to wit:-

- a) Whether there was a consent to abandon the petition by TSC and convert the proceedings into an economic dispute
- b) Whether the judge had jurisdiction to conduct both conciliation and adjudication proceedings under **section 15** of the Employment and Labour Relations Act.
- c) Whether there was justification for the judge to make the award of 50 and 60 percent in favour of the respondents.
- d) Whether appellants should be accorded audience in these appeals.

[17] In summary, Mr. Ngatia, learned counsel for **TSC** submitted that there was no consent order as known in law that was recorded before the judge. If the Court should find there was no consent, then the entire proceedings that preceded the consent would turn out to be a nullity. Going through the various speeches that were made by various counsel and parties who appeared before the Judge on 14<sup>th</sup> January, 2015 when he conducted conciliation proceedings, there was no convergence of ideas that is discernable which could have led the judge to record a consent order. Each party stood to their position and the fact that the parties did not sign the order and the judge did not title the order **'a consent order'**; it was misdirection on the part of the judge to proceed to disregard the petition by TSC and adopt a new proceeding called, **"an Economic Dispute"**. Although the judge appeared to rely on a well established principle as set in the case of **Flora Wasike v DestimoWamboko (1988) 1 KAR** that a consent order binds the parties the same way as a contract, and it cannot be set aside except if there is prove of fraud or collusion, there was nothing on record to show the parties or their advocates entered into a consent; there was no signature by the parties or the advocates, as it is the practice when counsel dictate a consent order to a court; a judge ordinarily adopts the consent as the order of the court and requests the parties to endorse their signatures. This was further compounded by the fact that merely 9 days after the consent order was entered into, TSC filed an application on 24<sup>th</sup> January 2015 seeking to set aside the very consent order.

[18] Regarding the pleadings that were before court, we were urged to find the judge had no jurisdiction to frame a case called **"an economic dispute"**. Even though the judge directed the Unions to file their memorandum of dispute, the judge exceeded his jurisdiction by determining issues that did not emanate from the proceedings that were before court; and for conducting reconciliation and adjudication proceedings. The cases of;-**Kenya Commercial Bank Ltd vs. Osebe** [1976-1985]CA 706; **Nairobi City Council vs. Thabiti Enterprises Ltd** [1995-1998]2 EA 23 and **Captain Harry Gandy vs. Castor Air Charters Ltd** [1956] 23 EACA 139 were cited to underscore the point that cases must be decided according to the pleadings on record. Further arguments were based on the provisions of **section 15** of the Industrial Court Act which provides for Alternative Dispute Resolution (ADR).

[19] According to TSC, the judge could not preside as a conciliator, which is an envisaged ADR mechanism meant to be conducted outside or separate from the court proceedings. The judge could not change from being a conciliator to adjudication over court proceedings that resulted into a judgment. The Title of Section 15 of the Industrial Court Act denotes a separate proceeding alternative to judicial proceedings which is undertaken away from court. The judge ought to have referred the matter for

conciliation outside the court and if the parties failed to reach a settlement, that is when the matter could be referred back to court for hearing; thus it was a misdirection for the judge to allow conciliation and adjudication of the dispute as law does not give that jurisdiction the whole proceedings should be regarded as null and void. Moreover, parties could not confer jurisdiction to the judge by consent, it emanates from statutes.

The other misdirection argued by Mr. Ngatia, was the fact that there was a petition by TSC that was never heard; for that reason, the judge reduced the petition to an „**Economic Dispute**‘ which was quite erroneous in the sense that the decree being appealed from now refers to a petition but all the orders made by the judge had nothing to do with the petition; both the decree and the petition are at variance, because the judge directed a new suit be filed within an existing pleading. Although the judge said the petition was compromised; there was nothing on the record especially the proceedings showing an order compromising the petition. Mr. Ngatia stated that the correct thing to do in the circumstances would be for the Court of Appeal to allow the petition as prayed as there was no opposition by the Unions and set aside the orders of 30<sup>th</sup> June 2015.

[20] Mr. Obura took the arguments of TSC further. He submitted that there was no justification for the award of 50 to 60% salary increment that was awarded to teachers. Although the judge relied on the provisions of **Article 41 (5)** of the Constitution that gives Trade Unions the power to enter into Collective Bargaining Agreements (CBA) that right is not absolute, it is exercisable with the involvement of the employer and in this case, TSC and SRC are constitutional bodies with the mandate to determine salaries for public officers and teachers are public officers. The power to organize and bargain is also enshrined under the United Nations International Labour Organization (**ILO**) which was ratified by Kenya in 1964 and is applicable under the provisions of **Article 2** of the Constitution. According to **ILO** Convention, any award of salary increase must be preceded by voluntary negotiations; if there is a dispute, it is settled according to the prevailing labour laws. If the matter is taken before a conciliator, the job description of a conciliator is provided for under **section 60** of the Industrial Court Act. After conciliator has failed to bring the parties to a settlement of the dispute, a disagreement is recorded and the matter is referred to court for adjudication; a conciliator is not supposed to impose a settlement. It was wrong for the judge to adopt a proposal by TSC's Committee which had been rejected by the Unions. The Unions having declined the proposal and countered it with another proposal, it could not be called a proposal any more. Moreover, when the TSC sought the advice of SRC as mandated by law, they were advised the proposal was not tenable.

[21] By awarding 50-60% salary increment, the judge ignored a fundamental principle set out in the Industrial Court Act that provides for wage guidelines that are set out by the Cabinet Secretary from time to time; also an award of wage increment in the public sector has to be done according to statute; the principles set out under **Article 201** of the Constitution that require openness, accountability and public participation on matters involving public finances were not followed when the judge made the award. The judge ignored crucial evidence on fiscal sustainability and macro- economic stability of the country that would be affected by the public wage bill. That evidence was adduced by constitutional mandate holders on such matters such as the SRC and the Treasury.

[22] On the last issue whether the TSC should be given audience, Mr. Ngatia submitted that TSC is a Constitutional Commission under **Article 249** of the Constitution. TSC does receive funding from Parliament; it has no resources of its own. When the judgment was issued, TSC was aggrieved, and it appealed before the Court of Appeal. The appeal was accompanied by an application for stay of execution. TSC was granted a conditional order of stay of execution and because TSC had no funds to meet the conditions provided in the order, the order of stay lapsed. TSC also forwarded the court order to the Cabinet Secretary Treasury for implementation. The Cabinet Secretary wrote back stating the Government did not have money to implement the salary increment and therefore could not satisfy the decree and hence the appeal by the Attorney General. We were told resources are allocated by Parliament following approved budgets by Treasury after which an appropriation law is passed that authorizes the expenditure. There is no way TSC can be held in contempt of court because it does not have money of its own apart from what is allocated according to the budget. Further TSC has not been adjudged guilty of deliberately disobeying a court order and impeding the cause of justice.

[23] On the part of the Attorney General, Prof. Githu Muigai collapsed the 16 grounds of appeal to six. The judgment was faulted for ignoring fiscal sustainability and allocation of state resources as set out in the Constitution; he agreed with TSC that the judge had no jurisdiction to act as a conciliator and proceed to write a judgment; He took issue with the way the judge converted the dispute to an economic dispute and for ignoring the suit that was filed by TSC; In the memorandum of Dispute there was no claim for 50; 60 % salary, thus the judge granted orders that were not prayed for. According to Prof. Muigai, it was a misdirection by the judge to hold that the advice given by SRC on salary increment was not mandatory whereas it is SRC that has the sole mandate to advice on salaries for public officers; based on the principles set out in Article 259 (11) of the Constitution, the judge clearly erred in his conclusion that TSC could ignore the advice of SRC. Further it was argued that by making an order for immediate increment of teacher's salary, the judge ignored the very elaborate budgeting procedures as provided for in the Public Finance Management Act. There is no public officer who should award themselves a pay without recourse to SRC an independent Constitutional body with the sole mandate of setting the salaries of state officers and advising the National and County governments regarding the salaries of public officers.

[24] The AG cited the case of; **Okiya Omutatah & 3 Others v Attorney General & Others [2014] e KLR**. In that case, Mr. Omutatah challenged the decision of Parliament that nullified a gazette notice by SRC setting out the salaries for Members of Parliament. A bench of three judges of the High Court, Lenaola, Mumbi Ngugi & Korir JJJ., held that Parliament exceeded its mandate by purporting to annul a gazette notice issued by SRC on 1<sup>st</sup> March 2013, in view of the provisions of **Articles 230 and 260** of the Constitution. The AG submitted that in view of the constitutional mandate assigned to SRC by the Constitution and in particular the provisions of **article 259 (11)** makes the advice given by SRC regarding the salaries of public officers mandatory; the judge also ignored crucial evidence by Dr. Mwau the Chief Economist in the Treasury, an expert whose evidence was not challenged. Dr. Mwau testified that the award of 50:60 percent of basic salary was going to ground the economy to a halt. The fiscal situation would be devastating to the economy. The judge had an obligation to evaluate the crucial evidence from the treasury and the other witnesses. Determining matters of national wage bill are constitutional functions that cannot be determined without the involvement of the National Treasury, SRC and TSC; the national values that bind all state organs such as equity and fairness must be taken into account as there must be justification for the salary increase which must be applicable to other public officers; there is also an elaborate budgeting procedure which was ignored by the judge and if the judgment were to stand, it would essentially amend the Constitution to include the courts of law in budget making, and render SRC irrelevant. The judge did not consider the provisions of **section 15(5)** of the Industrial Court Act which requires a court to take into consideration the national wage guidelines on minimum wages and standards of employment and other terms and conditions of employment that are issued by the cabinet secretary for the time being.

[25] Commenting on the application seeking to deny TSC audience in these appeal, Prof Muigai submitted that the idea that a public officer can be found guilty of contempt of a court order for failure to honour a money decree payable by a government ministry or body was wrong. He chided the practice of dragging public officers through contempt proceedings whenever a government ministry or organ failed to honour a money decree. It was his view that the award ordered to be paid to teachers is disputed and hence the appeal before the Court of Appeal; there is no order of mandamus directed to a particular officer, in which case it is the National Treasury that would be compelled to pay; a party cannot be denied audience or access to court unless there is a final order of court declaring the party in contempt of court; even then the court has to find the participation of the party found in contempt would impede the administration of justice before denying that party audience. TSC did not have a budget line to honour such an award which would involve an elaborate process of budgeting and approval by Parliament as well as effecting the requisite amendments to the Finance Act so as to authorize the said expenditure.

[26] Mr. Nowrojee SC teaming up with Mr. Nyamodi for SRC took the arguments in support of the appeals by the TSC and AG, a notch higher. He basically adopted the submissions by Mr. Ngatia and Prof. Muigai regarding several grounds of appeal which were similar. His arguments were centered on the mandate of SRC as provided for under Articles 10, 230 and 259 of the Constitution, section 11 of the SRC Act and sections 30 and 37 of the TSC Act. The days when public sector employers could set the

remuneration of their employees was erased by the provisions of the Constitution of Kenya 2010. Setting the salaries of state and public officers is now a constitutional fiscal process which must follow the law. SRC has a fundamental role to play so as to create harmony of wages across the country while taking into account the principles set out under **Article 230 (5)** of the Constitution.

[27] Mr. Nowrojee cited the case of; **Kenya Union of Domestic, Hotels, Education and Allied Workers KUDHEHIA WORKERS v SRC and AG [2014] e KLR**. In that case KUDHEHIA was challenging some regulations enacted by SRC regarding the Remuneration and Benefits of State and Public Officers vide gazette notice no 2 of 2013; the role of SRC was challenged in that case. Lenaola J., interpreted Article 230 of the Constitution and Section 11 of SRC Act, and held that SRC acted within its constitutional mandate in describing the employees of state organizations represented by KUDHEHIA as public servants who are subject to the mandate of SRC. What constitutes a constitutional advice was also determined by the Supreme Court in the case of; - **In the Matter of Advisory Opinion of the Court, Constitutional Application No. 2 of 2011**. In that case the Supreme Court held;-

**“On this account, it is inappropriate that the Supreme’s Court’s Advisory Opinion should be sought as mere advice. Where a government or State organ makes a request for an Opinion, it is to be supposed that such organ would abide by that Opinion; the Opinion is sought to clarify a doubt, and to enable it to act in accordance with the law...”**

[28] According counsel for SRC the learned judge fell into error when he found that no other party other than the TSC and the Union could conclude a CBA; this conclusion was erroneous in view of the provisions of the Constitution and the TSC Act that require consultation between the TSC and SRC before determining issues of wages of public officers; TSC can only proceed with the determination of the salary on the advice of SRC; the task involved in job evaluation such as skills audit, qualifications, the nature of services rendered as well as comparative analysis of the obtaining markets and fiscal sustainability of the wage bill are relevant considerations which the judge failed to consider. TSC is an independent Constitutional Commission as far as its operational mandate is concerned, but when it comes to setting salaries and remuneration of its employees, the teachers, it has to consult and seek the advice of SRC and the advice is bidding on TSC.

## **RESPONDENTS SUBMISSIONS**

[29] On the part of the respondents, this appeal was opposed; the Notice of Motion seeking orders to strike the appeal or in the alternative, TSC be denied audience or there be stay of further proceedings until such time that TSC will have fully complied with the judgment and orders of the Employment and Labour Relations Court was argued first. Learned SC counsel, Mr. Muite teaming up with Mr. Kilukumi, Mr. Mbaluto and Sigei for KNU, addressed us. Mr. Kilukumi narrated the history of the salary dispute which was negotiated by the Unions and TSC for a long time. About 26 meetings were held and yet there was no CBA that was agreed upon and TSC withdrew an offer that had been tabled to the Unions during their 24<sup>th</sup> meeting. The withdrawal of the offer followed by a muted silence by TSC on the way forward regarding the basic salary of teachers and finalization of a CBA is what pushed the Unions to call a strike perfectly within their Constitutional right as protected under Article 41 of the Constitution.

[30] On 30<sup>th</sup> June 2015, TSC was ordered by court to pay teachers a basic salary increment of 50-60 % and complete a CBA. TSC has blatantly and willful disobeyed that order and continues to do so which undermines the authority of court. TSC is aware of the said order because it filed an application seeking orders of stay of execution before the Court of Appeal and by the orders of 23<sup>rd</sup> July 2015; the Court of Appeal granted them a conditional stay where they were ordered to pay the basic salary of 50-60 % with effect from 1<sup>st</sup> August 2015. TSC also unsuccessfully tried to set aside the aforesaid orders before the Supreme Court. It is evident TSC knew their obligation under the law was to implement valid orders of 30<sup>th</sup> June 2015, or the orders of 23<sup>rd</sup> July 2015, by the Court of Appeal; although TSC has a right to challenge the orders of 30<sup>th</sup> June 2015, by way of an appeal, they must first of all comply before they can be heard on the appeal. There is confirmation by the affidavit of TSC Chief Executive Officer that there has been no payment; the Cabinet Secretary was categorical in his letter that Treasury was not going to

pay the salaries ordered. Counsel cited the provisions of Article 249 (3) of the constitution that provides that Parliament shall allocate adequate funds to TSC and other Constitutional Commissions to enable them perform their functions. Thus the obligation of finding money to pay teachers was squarely on TSC, it neglected to budget for the salary according to their proposal which was tabled in April 2014, even before the financial year.

[31] The judge made a finding that it was TSC that made an offer to the Unions which was a finding of fact not amenable to appeal ; having made the offer it was incumbent upon TSC to budget and submit the budget to Parliament for allocation of funds; TSC had the figures for purposes of budgeting under the provisions of Article 221 of the constitution; TSC knew they had a contingent liability based on the offer that was made in April 2014, way before the financial year of the government; as there was no budget or even a supplementary budget prepared by TSC, is a clear demonstration that TSC defied a valid court order; the Government is in defiance of a court order and it has undermined the rule of law. We were urged to ignore the fact that TSC has not been found guilty of contempt; defiance of court orders are serious matters; there is no other way the Unions can enforce the order as they cannot attach government property other than through contempt of court proceedings.

[32] In further arguments, Mr. Muite, urged us to punish TSC especially for the utterances by senior government officers who have been quoted in the media, declaring unashamedly that the government will not and cannot pay teachers as ordered by the court. According to counsel, the Unions should not be asked to pursue execution proceedings which is only done in regard to difficult and recalcitrant litigants but not against the government that is supposed to be the custodian of the rule of law and to set a good example for others; there is no evidence of the government's inability to pay the salaries ordered after all the government collects 1.3 trillion in taxes. Also under Article 268 of the Constitution, a Cabinet Secretary can make payments from the contingency fund. Our attention was also drawn to massive looting of state coffers through corruption, and payment of huge sums of money from Treasury to settle fake Anglo leasing debts which money could be used to pay the teachers; it is not the business of the court to worry about the payment of the decretal sum but for TSC to ensure the order against it is complied with to the letter.

[33] Mr. Mbaluto was also emphatic that no party can be allowed to choose not to obey a valid court order; he cited the case of **Justus Kariuki Mate and Another v Martin Nyaga Wambora & Another** (2014) e KLR where a Bench of this Court sitting in Nyeri dismissed an appeal by the Speaker of Embu County Assembly. The Speaker and his Deputy had appealed against a decision of the High Court that found them in contempt of court for disobeying an order that restrained the County Assembly from discussing a motion of impeachment of the County Governor. Counsel urged that even the KNUT Secretary General faced the wrath of the court for disobeying a court order and was held in contempt of court which he purged; it is now time for TSC to face the same wrath of the court for disobeying a court order to pay the teachers' salaries and to present a CBA within 30 days as ordered by the court.

[34] Ms. Guserwa for Kuppet agreed with the aforesaid submissions and urged us to find TSC neglected to prepare a budget notwithstanding that they had engaged the Unions in 26 meeting to discuss the salary increase and even made an offer. TSC has willfully neglected their duty and they should bear the blunt of disobeying the court orders.

[35] Mr. Muite while responding to the appeal distilled the several grounds of appeal into the following;-

1. Whether the parties consented that the dispute between TSC as the employer of teachers and the teachers Unions agreed to have the salary dispute adjudicated by the Employment and Labour Relations Court as an economic dispute
2. Did the judge have jurisdiction
3. Was the award made by the court justified
4. What is the mandate of SRC vis a vis TSC in setting the remuneration and benefits for

teachers.

[36] According to counsel for **KNUT**, the dispute over teacher's remuneration is a perennial one dating back to many years. Over the years we were told **TSC** had perfected the art of rushing to court whenever the teachers exercised their rights to strike in order to press for recognition of their constitutional rights to a fair, equitable remuneration and good working conditions. Instead of addressing the grievances by teachers, TSC always found excuses; it was the Consultative Committee of TSC that offered the Unions a salary increase of 50; 60 % way back in September 2014; and one wonders if the offer was fiscally sustainable then, what made the same offer unsustainable today. The Consultative Committee of TSC is the one mandated by law to negotiate salaries with the Unions and in that regard, the Committee worked out a proposal; when the proposal was withdrawn signaling a total collapse of the negotiations, the Unions were justified to call a strike.

[37] When the matter went to court the judge was entitled to look at the case before him and find a solution to the dispute. After the judge unsuccessfully facilitated a dialogue that addressed three main issues that is calling off the strike, the basic salary and finalization of a CBA, he had no choice but to try every methodology of resolving the impasse that was causing the children of Kenya untold suffering. Under section 15 of Industrial Court Act, the court is not precluded from adopting ADR, conciliation and mediation to resolve a dispute; all the parties submitted themselves to the process of conciliation and when the parties failed to agree, the court gave directions on how to move the matter forward by directing the parties to file pleadings that could lead to the resolution of the salary dispute which the judge referred to as an „**economic dispute**‘. There was nothing peculiar in describing the dispute thus, which is essentially a term used under the International Labour Organization (**ILO**) to refer to disputes about rights of employees.

[38] According to the Unions, it was well documented that negotiations failed to conclude a CBA thus a strike was called which is an avenue for the Unions to galvanize recognition of their rights; it was not necessary to refer the matter before a conciliator under Section 15 of the Employment and Labour Relations Act as the respondents had gone through the same process which failed to yield any success and they were issued with a certificate of disagreement by a conciliator. The record of proceedings is replete with speeches by counsel for the appellants and officials from TSC and the Cabinet Secretary for labour with all of them urging the court to find a lasting solution to the problem and end the strike. In the circumstances, the appellants are merely approbating and reprobating and thus they should be estopped by their own conduct from questioning the consent entered into on how the court proceeded to hear the matter; **see Halsbury's Laws of England (4<sup>th</sup> Ed. Vol. 16 para 967**, on what constitutes a consent order.

[39] On the role of SRC and TSC, it was the respondents' case that both are Independent Commissions established under Articles 230 and 237 of the Constitution. SRC has no mandate to set or review the salaries of teachers because teachers are not state officers. Under Article 230 (4) the role given to SRC is to advise the national and county governments with respect to remuneration of public officers. The role of TSC on the other hand is to recruit and employ teachers and advise the national governments on matters relating to the teaching profession. Counsel submitted that the judge correctly interpreted the role of TSC and SRC while bearing in mind the provisions of Article 249 (2) that provides each Commission is independent and none is subject to direction or control by any person or authority. Although TSC was bound to consult and seek advice of SRC in the process of negotiating with the Unions in terms of the provisions of Section 37 (3) of the TSC Act, the judge found that TSC was not bound by the advice given to it by SRC in the final determination of the salaries payable to teachers; a contrary finding would only destroy TSC's independence and also defeat the teacher's right to collective bargaining with their employer.

[40] On whether the award of 50-60 % was justified; counsel for the respondents submitted the figures came from the offer made by TSC in a document titled „**working document**‘; this document was informed by comparative studies carried out in other jurisdictions and the principles of fiscal sustainability, the need to ensure teaching service attracts and retains the best skill to execute its function and transparency and fairness were all taken into account. The offer was tabled by TSC during the 24<sup>th</sup> meeting of the Consultative Committee pursuant to section 13 (5) of the TSC Act. The judge carefully

considered and analyzed the evidence by the three witnesses called by the appellants and they indeed confirmed teachers did not receive an automatic basic salary increment of 4% from 1997 to 2013 which was an historical injustice that subjected teachers to differential treatment as they were not cushioned against inflation; finally it was submitted that it is the trial judge who heard and saw the witnesses testify and therefore this court should not interfere with the findings of fact.

[41] Ms. Guserwa learned counsel for **KUPPET**; the 2<sup>nd</sup> respondent adopted the submissions made on behalf of **KNUT**. By way of further submissions she narrated the history of her client's struggle, first for recognition by **TSC** as a Trade Union which happened only six years ago. **KUPPET** joined **KNUT** in negotiating for better remuneration for teachers. By the time **SRC** was created by the Constitution in 2010, it found Unions on the scene negotiating for better remuneration; SRC issued a circular to all government organs requesting them to give proposals for terms and conditions of service for their employees which was to cover a 4 year cycle with effect from July 2013; as at 31<sup>st</sup> July 2013, the respondents had given their proposals but TSC sat with the proposals and did nothing with them. In April 2014, SRC issued another circular directing that before registering a CBA every employer must seek advice from them.

[42] The **Unions** were involved in numerous meetings with **TSC**, during the 24<sup>th</sup> meeting its Consultative Committee tabled a proposal to increase the teachers' salaries by 50-60%; **SRC** in response to the aforesaid proposal stated that the offer could only be implemented if the Treasury confirmed there was funding. Thus TSC should have submitted to Parliament, a budget according to their proposals. The Unions were forced to call a strike in order to compel **TSC** accede to their demands for better remuneration which is within their constitutional mandate; when the matter was taken to Employment and Labour Relations court, the judge had jurisdiction to determine disputes between Unions and employers; the court is established to deal with labour disputes between employers and employees which are essentially economic disputes. To solve those disputes, the court can result to ADR, conciliation or mediation; further the judge had jurisdiction also to adjudicate over the matter when the parties failed to reach a settlement. Finally counsel urged us to find there was a consent by all the parties on how the court proceeded with the determination of the dispute; this was demonstrated by the record as none of the parties who are now contesting the consent order stated on oath that they were coerced into a consent.

[43] The cross appeal by the respondents on costs before the trial court was argued by Mr. Sigei. He submitted that the Unions were successful litigants thus they should have been awarded the costs in any event. There was also a Motion filed by TSC albeit late that sought to amend the petition to include a prayer for costs. According to Mr. Kiragu learned counsel for TSC, there was a typographical error in the petition which he sought to rectify through the amendment. That application was opposed by counsel for the Unions as an afterthought as it substantively alters the prayers. I will explore the issues raised therein further as well as the responses by counsel for the appellants as I evaluate the entire matter.

## **DETERMINATION**

[44] The above is a brief summary of the highlights of the respective submissions and the records. I have been able to distill the following issues for determination and I will analyze each one of them seriatim;-

1. Should the appeal by TSC be struck off or in the alternative they be denied audience for failure to pay the salaries awarded.
2. Did the judge have jurisdiction to conduct conciliation proceedings and to preside over the adjudication of the matter
3. What is the nature of the proceedings that were before the court, was there a consent order?
4. What is the role of SRC vis a vis TSC and its attendant mandate
5. Is the award of 50-60% justified

6. Who should pay the cost both in the Employment and Labour Relations Court and of this appeal?

### **WHETHER TO STRIKE OUT THE APPEAL AND DENY TSC AUDIENCE**

[45] The application to strike out the appeal or in the alternative to deny the appellants audience is brought under sections, 3A and 3 B of the Appellate Jurisdiction Act and **Rule 84** of the Court of Appeal Rules respectively. These provisions invoke the inherent jurisdiction of this court to ensure just, expeditious, affordable and proportionate dispensation of justice; while **Rule 84** of the Court of Appeal Rules provides for striking out an appeal because an essential step in the proceedings has not been taken, or an essential step has not been taken within a prescribed time. In my view, the arguments by the respondents did not support the application as drawn. This was not an application for committal of officials of TSC for contempt. We were also not told the essential steps that were not taken by the appellants when the appeal was filed or what steps were taken out of time to qualify the appeal for striking out.

[46] An appeal or a pleading cannot easily be struck off because a right to a hearing is a fundamental one under our Constitution. This Court observed in the case of; **-Richard Ncharpi Leiyagu -vs- Independent Electoral and Boundaries Commission and 2 Others, C.A. No. 18 of 2013, Nyeri.**

**“The right to a hearing has always been a well-protected one in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality.”**

This finding therefore disposes of the first prayer seeking to strike out the appeal. There is no basis upon which the appeal can be struck out.

[47] On the next issue, whether the appellants should be denied audience on the grounds that they have willfully disobeyed the orders of 30<sup>th</sup> June 2013. My understanding of this prayer is that TSC should be denied audience as a form of punishment for being in contempt of court. I am stating this cautiously as I am cognizant of the oft-cited rule in pleadings that parties are bound by their pleadings. If the respondents were seeking committal of TSC for contempt of court they should have said so in the instant application, they should have filed an application to commit the officials of TSC for contempt. I will nonetheless follow their arguments to a logical conclusion as they also invoked the overarching objective in the administration of justice which is to facilitate the just, expeditious, proportionate and affordable resolution of appeals. In doing so the court is enjoined to always focus on the bigger picture that is substantive justice.

[48] The submissions and authorities cited in support of the motion to strike the appeal and deny TSC audience were geared towards a finding or a conclusion that TSC was in contempt of the court orders of 30<sup>th</sup> June 2015. As stated hereabove, the application is not seeking TSC be found in contempt but going with the submissions, we were urged to deny TSC audience due to their willful disobedience of a court order to pay the salaries to teachers as ordered. In my view this application falls within the realm of contempt proceedings. In **Christine Wangari Gachege - vs- Elizabeth Wanjiru Evans & 11 Others, Civil Application No. 233 of 2007**, this Court differently constituted set out the statutory basis for determining a case of contempt of court. That is Section 5 of the Judicature Act and Section 63 (c) of the Civil Procedure Act. The former provides;

**“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”**

Section 63 (c) of the Civil Procedure Act, which falls under the heading of supplemental proceedings, in order to prevent the ends of justice from being defeated, the court may if it so prescribed;-

(a) ...

(b) ...

**Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.”**

[49] This is the law that governs contempt of court proceedings which is modified as the practice is in England and indeed in the case of **Christine Wangari Gachege** case (supra), this Court followed the developments of the law in England and stated as follows;-

**“Following the implementation of the famous Lord Woolf's Access to Justice Report, 1996, the Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rule, 1999. Recently on 1<sup>st</sup> October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and part 81 thereof effectively replaced Order 52 of the Rules of the Supreme Court of England in its entirety. Part 81 (Applications and proceedings in relation to contempt of Court) provides different procedures for four different forms of violations.**

**Rules 81.4 relates to committal for 'breach of a judgment, order or undertaking to do or abstain from doing an act.'**

**Rules 81.11 relates to committal for 'interference with the due administration of justice'. (Applicable only in criminal proceedings)**

**Rules 81.16- relates to committal for contempt 'in the face of the court.' and**

**Rules 81.17- relates to committal for 'making false statement of truth or disclosure statement.'**

[50] **Rule 81.10** sets out the procedure for filing a contempt application is as follows:-

**“(3) The application notice must—**

**(a) set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and**

**(b) be supported by one or more affidavits containing all the evidence relied upon.**

**(4) Subject to paragraph (5), the application notice and the evidence in support must be served personally on the respondent.**

**(5) The court may—**

**(a) dispense with service under paragraph (4) if it considers it just to do so; or**

**(b) make an order in respect of service by an alternative method or at an alternative place.**

[51] Formidable arguments were put forth by the Unions that TSC was aware of the orders of 30<sup>th</sup> June 2015; they were represented when the judgment was read; they filed an appeal in the Court of Appeal and an application seeking stay of execution. That application was allowed on condition that TSC was ordered to pay teachers' salaries with effect from 1<sup>st</sup> August 2015; TSC went on to defy the order by this court and unsuccessfully appealed to the Supreme Court; to date TSC has not paid teachers' salaries; the Cabinet

Secretary Treasury has said there is no money to pay teachers; senior government officials have also said in the media that they cannot and will not pay the teachers' salaries as ordered by court.

[52] Mr. Mbaluto supported the above arguments with the following authorities;

- i) **Hadkinson & Hadkinson**[1952] 2 ALL.E.R. 567
- ii) **Justus Kariuki Mate & Ano. vs. Martin Nyaga Wambora & Ano.** [204] eKLR
- iii) **Mawani vs. Mawani** [1977] KLR 159
- iv) **Ramesh Popatlal Shah & 2 others vs. National Industrial Credit Bank Limited** [2005] eKLR.
- v) **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Ano.** [2005] eKLR.
- vi) **Teachers Service Commission vs. Kenya National Union of Teachers & others**[2013]eKLR.

[53] Out of the above cases, I will discuss the case; **Hadkinson** which seems to have had considerable influence over our jurisprudence on the law of contempt and **Justus Mate** which is a recent decision of this Court. The appeal in **Hadkinson** matter concerned a boy aged 13, whose father and mother were divorced. When the decree of divorce was pronounced, the mother was given custody of the boy, but it was directed that the boy was not to be taken out of the jurisdiction of the court without its sanction. In breach of that order, the mother took the boy to Australia without the sanction of the court, and she wanted him to stay with her there. The father wanted the boy returned to England. Wallington, J. ordered the mother to bring the boy back to England. The mother appealed to the Court of Appeal; but when the appeal was called on, counsel for the father objected to the appeal by the mother being heard at all. It was said that the mother was in contempt because she had taken the child out of the jurisdiction of the court without its sanction, and that it was a settled rule that a party in contempt could not be heard until he or she purged the contempt. The Court held:

**“It was the plain and unqualified obligation of every person against, or in respect of, whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt; where an order related to a child the court would be adamant on its due observance, for such an order was made in the interests of the welfare of the child, and the court would not tolerate any interference with or disregard of its decisions on those matters, and least of all would permit disobedience of an order that a child should not be removed outside its jurisdiction; in the present case the mother was not entitled to prosecute or be heard in support of her appeal until she had taken the first and essential step towards purging her contempt of returning the child within the jurisdiction.”**

[54] The respondents' response to the allegations that TSC or the AG were in contempt was total denial. In particular, TSC described the application in the sworn affidavit of Nancy Macharia of 19<sup>th</sup> September, 2015 as **‘a red herring’**. This is because the Unions had filed an application seeking execution of the decree against TSC and several Government officials who were not parties to the suit and the said application was still pending determination. There was no order of contempt that has been made to that effect. Moreover, immediately the Court of Appeal granted a conditional stay directing TSC to pay the teachers' salaries with effect from August 2015, TSC sought funding from Treasury but no funds were availed therefore TSC cannot be in contempt of court.

[55] Lastly, TSC argued that a right to appeal to the Court of Appeal is a constitutional right enshrined in the Constitution that cannot be denied a party. The AG contended that there is no evidence of any

execution proceedings that has given rise to the alleged contempt. The Unions as decree holders are required to take certain procedural steps against a judgment debtor and they should not be afforded an opportunity to circumvent the process of execution that is provided by statute.

[56] Should the appellant's be denied audience in this matter?

The appeal is properly before the Court as I posited earlier in this judgment. For unknown reasons, the Unions did not file an application for contempt as prescribed by law. The decree is directed against TSC and it is the subject of the instant appeal. TSC was given a conditional order staying execution of the order which must have lapsed on or about September 2015, when they did not pay the salaries. That in essence means there is no order staying execution that is in place and the Unions are at liberty to pursue execution. It was also submitted that there are execution proceedings before the trial court. Whether to hear a party or not is an exercise of the court's discretion. The case of *Hadkinson's* sets out the various exceptions that would be considered before a party who is in contempt of a court order can be denied audience. One of those exceptions is the challenge of jurisdiction of the court that made the orders being appealed against. Also a defence by the alleged contemnor that his actions did not constitute a breach of the order. I am satisfied that even if the Unions had exhausted the execution proceedings, this appeal has elements that would bring it within the exception rule.

[57] My own reading of the decree that was issued, and I have reproduced it elsewhere in this judgment, it is about payment of money or a money decree. Apart from the finalization of CBA, the decree is about payment of money. Even the CBA was to be completed upon an agreement on basic salaries being settled. I agree with submissions by AG that there is an elaborate procedure prescribed under the Government Proceedings Act Cap 40 of the Laws of Kenya especially Part IV which deals with execution and satisfaction of orders against Government. TSC is a Constitutional Commission within the Government. The **Unions** should follow execution procedures as set out by the law; this is a money decree and the nature of the instant case is different from the case of **Hadkinson** where the behavior and participation of the wife who had defied a court order and taken a child in Australia out of the jurisdiction of the court was viewed an impediment to the administration of justice. In this case, we were told TSC forwarded the decree to Treasury and they were advised there was no money; there is also an elaborate process involved in allocation of recourses through budgeting, approvals by National Assembly and amendment of the relevant laws.

[58] Nonpayment of decretal sum was not out of willful disobedience of a court order but required an elaborate legal process that involved other state organs not just TSC. My own appreciation of the execution proceedings as provided under the Government Proceedings Act, and the legal process involved in budgeting leads me to the conclusion that the TSC or the AG for that matter cannot be denied audience in pursuit of their appeals. The facts of this case are also different from the case of; - **Justus Kariuki Mate & Another** (supra) in which Justus Mate, the speaker of Embu County Assembly and his deputy were held by the High Court to be in contempt of a court order. On appeal a Bench of this Court sitting in Nyeri had this to say;-

**“When a litigant approaches the High Court seeking remedies for alleged breach of fundamental rights, the Court is mandated to determine the grievances and issue orders as it may deem fit. We agree with the learned trial Judges those orders were supposed to be obeyed with utmost obedience until set aside or successfully appealed against. We hasten to restate as it has been done many times before that disobedience of court orders seriously undermines the rule of law. Every time a person or an institution especially a public officer disobeys a court order, there should be no celebration. A disobedience of a court order should be treated as a funeral, with compassion for the death of the rule of law. The appellants who prepared the order paper and presided over the proceedings of impeachment after having been served with the orders cannot conveniently claim immunity and at the same time claim to respect and obey the law”.**

[59] In the Justus Mate case, he was given audience before the Court of Appeal notwithstanding that he had been found guilty of contempt of a court order. This is different from the instant case where no order

has been made against TSC and the Unions have not exhausted, nay completed the process of execution of their decree. For the aforesaid reasons I would dismiss the motion as premature and for lacking in merit.

## **JURISDICTION**

[60] Jurisdiction in the instant appeal is multifaceted; there are several issues that were raised; whether the judge had jurisdiction to proceed to determine the dispute as a conciliator; whether after conciliation failed, the judge could switch to adjudication; whether there was a consent order converting the petition into an economic dispute; whether the judge usurped the role of SRC in determining and fixing the salaries payable to the teachers by completing the terms of the CBA is also a jurisdictional one but I will deal with it separately.

[61] In dealing with jurisdiction; it will be imperative to review the nature of proceedings that were before the Employment and Labour Relations judge. TSC filed a petition seeking four principle orders;

- (a) Declaration that the strike called by the Unions with effect from 5<sup>th</sup> January 2015, was illegal, null and void *ab initio*;
- b) Declaration that the industrial action is unprotected under the labour relations Act.
- (c) A prohibitory injunction restraining the Unions its officials and members from participating or continuing with the strike
- (d) An order directing the Unions to resume negotiations with a view to finalize the CBA.

It is common ground that the judge ordered the proceedings be conducted according to **section 15** of the Industrial Court Act.

[62] Part III of the Industrial Court Act, especially **Section 12** provides the Jurisdiction of Employment and Labour Relation Court as thus:-

**“(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162**

**(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including –**

- a) disputes relating to or arising out of employment between an employer and an employee
- b) disputes between an employer and a trade union
- c) disputes between an employers’ organization and a trade union’s organization
- d) disputes between trade unions
- e) disputes between employer organizations
- f) disputes between an employers’ organization and a trade union
- g) disputes between a trade union and a member thereof
- h) disputes between an employer’s organization or a federation and a member thereof
- i) disputes concerning the registration and election of trade union officials; and

**j) disputes relating to the registration and enforcement of collective agreements.?**

[63] The judge directed the matter to proceed under **section 15** of the Industrial Court Act which provide for alternative dispute resolutions. Counsel for the appellants made heavy weather on whether the judge had jurisdiction to conduct conciliation proceeding and adjudication at the same time. According to Mr. Ngatia, the provisions of **section 15** could not be applied by the judge who appointed himself as a conciliator. Alternative disputes resolution denotes a proceeding that is outside of the court and could not be conducted by the judge. The job description of a person who could be appointed a conciliator is provided for under **section 66 (1)** of the Labour Relations Act:-

**“66. (1) A person appointed to conciliate a dispute under this Part shall be –**

**(a) a public officer**

**(b) any other person drawn from a panel of conciliators appointed by the Minister after consulting the Board.**

**(c) ...”**

The terms of reference of a conciliator of a labour dispute are also provided. In brief, the conciliator is supposed to write an agreement signed by the parties and the conciliator; if the dispute is unresolved after conciliation, the conciliator issues a certificate that the dispute has not been resolved. If a dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court and it is at that level the court adjudication process kicks in. This is the procedure and an ideal practice as provided for by the law.

[64] In the instant case, the judge found himself with a dispute to resolve. I would not quite agree with the procedure the judge adopted when he conducted conciliation proceedings. This is because a conciliator is supposed to issue a certificate in the event that parties failed to reach a settlement. This is because, although the provisions of section 15 of the Industrial Court Act is silent on how a dispute can be referred to conciliation, mediation or ADR, if that section is read together with section 66 of the Labour Relations Act, it specifically provides for who can be a conciliator and also the job description of a conciliator is provided. I also agree with the submissions by the appellants that the plain meaning of ADR, denotes a process that is alternative or outside of the court; or if a judge takes up the role of a conciliator or mediator, then he or she should relinquish the role of an adjudicator. Thus if there is no agreement on conciliation or as the case may be, then the matter is referred to another judge for adjudication. I agree it was un procedural and untidy for a judge to switch from one role to the other.

[65] The aforesaid conclusion notwithstanding, I would still be very reluctant myself to declare the proceedings a nullity. Perhaps a more convincing reason why I will not declare the proceedings a nullity is because I see no prejudice that was suffered by the appellants because the judge played both roles. Parties failed to resolve the dispute; each one of the parties was aware of the dispute which was the root cause of the teachers strike or as Mr. Sitima for the appellant called it the **“elephant in the room?”** in other words the basic salary for teachers. Parties spent a whole day discussing the dispute without reaching a settlement; the judge understandably felt the burden of resolving an urgent dispute that had brought the entire primary and secondary education in public schools to a standstill. The learned judge proceeded to give directions on how parties should file pleadings that would resolve the substantive problem which he referred to as an **“economic dispute?”**. Whether there was consent is an issue I will address hereunder.

[66] The judge presumably invoked his inherent powers otherwise known as the **“oxygen rules?”** to address the substantive issue in dispute and to resolve an urgent industrial conflict and restore peace and order in the education sector. It is evident from the speeches made by several parties who were before court, that the learned judge was faced with a dispute with devastating consequences on the lives of innocent school going children; unless it was resolved urgently the school going children were being affected adversely. The learned judge must have seen himself as a problem solving court (**which it is**) and

therefore proceeded to find a quick solution to the dispute before him.

**Did the parties agree to convert or compromise the petition to be determined as an economic dispute?**

[67] Clearly from the records, I do not see a consent order in the conventional way that is practiced in court. The common practice is; parties ordinarily agree on matters and they file in court a written consent that is signed by all the parties consenting for adoption as a court order. Alternatively if parties arrive at consent, while the matter is before a judge as parties often do, the orders are dictated to the judge, who adopts the consent as the order of the court and requests all the consenting parties to append their signatures. This common practice was not followed in this matter and in my view the aforesaid practice is what should be encouraged as it leaves no room for conjecture. Had the learned judge done the above, he would not have been faced with an application to set aside the said consent orders as it happened in this matter a few days later when on the 23<sup>rd</sup> January 2015, TSC filed a motion seeking to set aside the orders that the judge recorded as a consent order.

[68] Even the learned judge in a pertinent portion of his judgment appreciated that the said consent was not elegantly drafted. This is how the learned judge put it in his own words;-

**“The consent entered into by the parties and recorded as an order of the court on 14<sup>th</sup> January 2015 was conceived in extra ordinary circumstance in a day of high drama that kept the nation in bated breath. The consent, may not have been elegantly crafted but in the Court’s view it import and effect on the pending petition and interlocutory application was manifestly clear as follows;**

**(i) On the consideration of calling of the national wide strike by the two unions, and upon the undertaking by TSC not to victimize the teachers, officials of the Unions and the Unions that had participated in the strike;**

**(a) The petition was compromised and replaced by Economic dispute**

**(b) The Unions KNUT and KUPPET became the claimants in the economic dispute.**

**Neither of the parties was averse to the same court hearing the economic dispute and as the proceedings will show, counsel for the parties thanked the court profusely for the role it had played in brokering a solution and undertook to respect and participate in the prosecution of the economic dispute to its conclusion”**

[69] The learned judge did not determine the prayers sought in the petition, because in his view it was compromised. As I stated here above, the known practice is a party who compromises a suit should be allowed to do so explicitly by filing a formal consent or notice of withdraw. That way the judge would be justified to follow the well-trodden path of set principles that a consent order can only be set aside in the same way as a binding contract if a party can prove fraud or misrepresentation as set out in the oft? cited case of **Flora Wasike** (supra). I have gone through the speeches that led to the above consent, in my view although there appear to have been no concrete convergence of issues, all the parties did admit there was a dispute over the basic salary of teachers which was the root cause of the teachers strikes; none of the parties seemed to object to the judge presiding over the adjudication of the dispute, despite the fact that he presided over the unsuccessful conciliation. I am also cognizant of the jurisdiction of Employment and Labour court is inter alia to determine disputes between Unions and employers. Further the overarching objective in the administration of justice binds courts to focus on substantive justice and overlook procedural technicalities. For those reasons I am satisfied the learned judge had jurisdiction to determine the dispute which he framed as an economic dispute.

[70] I would also not wish to be drawn in the semantics of whether the dispute was an „economic dispute? or a salary dispute as I see no dichotomy in both. The learned judge who was seized of the matter saw the need to determine, underlying causes of the frequent industrial unrest in the teaching profession and in my

view the judge cannot be faulted. He opined that he was faced with extra ordinary circumstances and the whole nation was waiting with bated breath for a solution. He therefore directed the parties to file memorandum of dispute. I agree with Mr. Kimani Kiragu counsel for TSC that the joint memorandum of dispute fell short of the requirements of a valid claim as per the provisions of Rule 4 of the Labour Institutions Rules, which makes provisions on the kind of pleadings to file. There are no specific prayers sought by the Unions for payment of 50-60% salary increase, and more significantly, there is even no verifying affidavit accompanying the claim. There is no doubt the pleadings by the Unions were slovenly drawn and this lends credence to the challenge by the appellants that the decree as issued did not resonate with the pleadings that were before the judge. However going through the memorandum of claim by the Unions, it is quite discernable what

they were seeking for; it was increase of wages and benefits and other terms and conditions of employment, to be included in a CBA to govern them and TSC. I do not think the appellants were ambushed by the memorandum of claim as it nonetheless brought out the Unions claim succinctly. The appellants also filed their respective responses and reports and they even had an opportunity to adduce oral evidence. For those reasons I would not strike out the pleadings by the Unions. See the case of; ***D.T. DOBIE & COMPANY KENYA LTD VS. JOSEPH MBARIA MUCHINA, CA NO. 37 OF 1978***, in which this Court stated that:-

**“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit has shown a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”**

[71] It was also submitted that the issues raised in the petition especially the legality of the strike were not determined because the **Unions** abandoned negotiations and called a strike before the dispute was referred to the Minister who was supposed to appoint a conciliator and it was after the conciliator issues a certificate, that the Union could validly call a strike. The procedure of declaring a dispute to the Minister is one of the best practices that is acknowledged because it gives room for conciliation and for parties to arrive at their own settlement. However my own reading and understanding of **Section 76** of the Labour Relation Act, the Unions have an option to call a strike as it was not disputed that there was an old dispute over the terms and conditions of teachers employment. This is what **section 76** provides;

**“ A person may participate in a strike or lock-out**

**(a) The trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;**

**(b) The trade dispute is unresolved after conciliation-**

**(i) under the Act; or**

**(ii) as specified in a registered collective agreement that provides for the private conciliation of disputes and**

**(c) Seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorized representative of –**

**(i) The trade union, in the case of a strike**

**(ii) ...”**

[72] As stated above the Unions had an option to refer the matter to the Minister for conciliation. Both processes are within the law, and due to the importance of the role played by conciliators or mediators in industrial disputes, it was manifest the judge appreciated that and thus ordered the matter to proceed for

conciliation (which he erroneously conducted) before proceeding with adjudication. Thus even if a party calls a strike under **section 76** of the Labour Relations Act, the court can refer the matter to conciliation and this has been done in several matters. See the case of **Kenya Concrete Structural, Ceramic Tiles Woodply and Interior Designs Employees Union (KCSDW&I) –v- Laxmandhoi Construction Ltd & Another (UR)** Although this was not done in this case, the extra ordinary circumstances that surrounded this matter, I am of the view that the learned judge had jurisdiction to determine the dispute that was before him even though he conducted the conciliation as parties failed to reach a settlement and the court was already seized with the dispute.

### **WHAT IS THE ROLE OF SRC IN DETERMINING TERMS AND CONDITIONS OF EMPLOYMENT FOR TEACHER**

[73] This is the crux of the appeal by SRC; during the hearing of the appeal, Mr. Nowrojee reduced the sixteen grounds of appeal to three thematic issues:-

- a) Whether SRC has a role to play in the collective bargaining process between TSC and the unions and in the job evaluation.
- b) Whether the advice given by the appellant under **Article 230 (4)** of the Constitution is binding.
- c) The legality and the efficacy of the award granted by the Employment and Labour Relations Court.

It is necessary to state that all the three appeals turned on the above issues. The role of SRC in the negotiation of CBA and in determining the terms and conditions of employment of members of the Unions was identified by the learned trial judge as an issue for determination in the impugned judgment.

[74] In determining the aforesaid issues, the judge stated in part of the judgment as follows:-

**“The court therefore reiterates that TSC has the mandate to set and revise the remuneration of teachers upon advice by SRC. The court further restates that TSC is not bound by the advice of SRC in setting and reviewing remuneration of teachers. A plain and holistic interpretation of Article 230(4) as read with Article 259 (11) of the Constitution supports this finding by the Court. TSC needs only prepare a budget and approval by the National Assembly. However, TSC must take into consideration the advice by SRC without necessarily being bound by it. Acting otherwise would be contrary to the constitutional order reiterated by the Supreme Court in its advisory office. The employment and Labour Relations Court has since its establishment in 1964, adjudicated upon economic dispute between employer and unions and made basis salary and other monetary awards.”**

The whole issue of whether the advice by SRC is binding turns on the interpretation of the provisions of **Articles 230 (3), 4 (b) (5) 259 (11), 20 and 10** of the Constitution which should be read in conjunction with the relevant provisions of the SRC and TSC statutes and decided cases.

[75] The case of **Kudhehia Workers** (supra) where Lenaola, J. was dealing with a constitutional determination of whether members of KUDHEHIA a trade union representing domestic and hotel workers in education institutions, hospitals and allied workers, were public officers within the meaning of **Article 230 (4)**

**(b)** of the constitution and **Section 11** of the SRC Act is a persuasive one in these appeals. KUDHEIHA workers Union argued that its members were not subject to SRC Regulations titled **“Remuneration and Benefit of state and Public Officers Regulations 2013.”** Lenaola J., upheld the regulations and stated the following in a pertinent part of the judgment which I find relevant and of persuasive nature in these appeals:-

**“Looking at the provisions of Article 230 of the Constitution as well as the provisions of**

**Section 11 of SRC Act, it is clear that the SRC has the mandate of setting and regularly review the remuneration and benefits of all state officers and advising the national and county government on the remuneration and benefits of all other public officers. I therefore find that the SRC acted within its constitutional mandate in describing the employees of the state organizations represented by the petitioners as public servant and they are subject to the mandate of the SRC in relation to setting and revising of their salaries.”**

[76] The mandate and role of SRC as set out in the Constitution and the law was succinctly set out in another persuasive decision of the High Court;- **Kenya National Commission on Human Rights (KNHCR) vs. Attorney General &Ano.**[2015] e KLR. KNHCR, a Constitutional Commission established under **Article 59** of the Constitution filed a constitutional petition seeking a declaration that the Presidential Retirement Benefit (Amendment) Act No. 9 of 2013 contravened the provisions of among others;- **Article 234 (a)** of the Constitution. The issue was when Parliament enacted the Presidential Benefit Amendment Act it failed to involve **SRC** thereby usurping their mandate. Lenaola, J. set out the mandate of SRC as provided for in the Constitution and SRC Act and concluded as follows:-

**“In the above context, it has not been contested that the SRC was not involved in the process leading to the enactment of the impugned statute. It has also not been controverted that the President is a state officer and therefore his salary and remuneration is subject to the mandate of the SRC. I have already found that section 11 (g) of the SRC Act gives the Commission the sole power to make recommendation on the matters relating to salaries and remuneration of a particular state officer. In addition, Section 11 (f) makes it clear that it is only the SRC that can make recommendation on the review of any pension payable to holders of public offices. It is therefore my finding that the law gives the SRC powers to set and review the remuneration and benefits of (sic) a state officers including a retired president. I think it is necessary to set out the exact mandate of SRC as provided for under Article 230 (4) and section 11 of the SRC Act. See Article 230 (4):**

**230 (4) The powers and functions of the Salaries and Remuneration Commission shall be to-**

- a) Set and regularly review the remuneration and benefits of all State officers; and**
- b) Advise the national and county governments on the remuneration and benefits of all other public officers.**
- 5) In performing its functions, the Commission shall take the following principles into account:**
  - a) the need to ensure that the total public compensation bill is fiscally sustainable**
  - b) the need to ensure that the public services are able to attract and retain the skills required to execute their functions,**
  - c) the need to recognize productivity and performance; and**
  - d) transparency and fairness.?**

[77] The mandate of SRC is spelt out under **Section 11** of the Act which provides as follows:-

- “ 11 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 offices;**
- 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.?**

[78] It was submitted by the Unions that TSC and SRC are both Independent Commissions established under **Article 237** and **230** respectively. The mandate of TSC is set out under **Article 237** as follows:-

**“237 1) There is established the Teachers Service Commission:**

**2) The functions of the Commission are:**

- a) **to register trained teachers**
- b) **to recruit and employ registered teachers**
- c) **to assign teachers employed by the Commission for service in any public school or institution**
- d) **to promote and transfer teachers**
- e) **to exercise disciplinary control over teachers; and**
- f) **to terminate the employment of teachers**

**3) The Commission shall-**

- a) **review the standards of education and training of persons entering the teaching service**
- b) **review the demand for and the supply of teachers; and**
- c) **advise the national government on matters relating to the teaching profession.”**

The independence of each of the commissions is set out under **Article 249 (2)**:

**“The Commission and the holder of the independent officers-**

- a) **are subject only to this Constitution and the law; and**
- b) **are independent and not subject to direction or control by any person or authority.”**

[79] According to counsel for the Unions, it was wrong for TSC to cede its independence when it forwarded the draft salary offer for advice by SRC and merely stated that **“their hands were tied”**. They referred to a Supreme Court decision in the case of: - **In the matter of the Principles of Gender Representation in the National Assembly and The Senate** 2012 eKLR where the Supreme Court held:

**“ We would state that the Supreme Court, as a custodian of the integrity of the Constitution as the Country’s Charter of governance, is inclined to interpret the same holistically taking into account its declared principles and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights are able to discharge their obligations, as a basis for sustaining the design and purpose of this Constitution.”**

We were urged to find TSC was not beholden to SRC in its mandate to negotiate and determine remuneration and benefit of all unionisable teachers in terms of **Article 41 (5)** of the Constitution as read with **section 57** of the Labour Relations Act.

[80] It is not disputed that teachers are public officers under **Article 260** of the Constitution. Therefore, is their remuneration and benefits subject to the jurisdiction of SRC under **Article 230 (4) (b)** of the Constitution and **section 11** of SRC Act. In order to determine whether SRC has a role in the negotiation of CBA for teachers, it is imperative to closely look at the provisions of;-**section 37 (3)** of the TSC Act which provides:-

**“ 37(3) The registered teachers recruited by the Commission under Article 237 (2) (b) of the Constitution shall serve under such terms and conditions as the Committee established under Section 13 (5) of this Act in consultation with the Salaries and Remuneration Commission may determine.”**

[81] The Constitution provides that SRC's role is to advise the national government on the remuneration and benefits of other public officers. In this case there is room for Unions to negotiate with their employer. In my view the terms and conditions of teachers that are negotiated with Unions and TSC can only be completed after consultation with SRC as provided under the aforesaid law. TSC was supposed to seek advice of SRC before tabling the proposals to the Unions. SRC „s advice is fundamental in the conclusion of a CBA which deals with terms and conditions of public officers. This position becomes clearer when the provisions **Article 259 (11)** of the Constitution are read together with **Article 230 (4) (b)**, **section 11 of SRC Act** and **37 (3)** of the TSC Act. Article 259 (11) reads;-

**“259 (11) If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.”**

[82] From the foregoing, I find the advice envisaged of SRC to TSC is binding to TSC. I think it is important to briefly examine whether this finding does undermine or contradict the independence of TSC which is equally an Independent Commission. I pay homage to the well established rule of construction of constitutional provisions in a case that has been cited with approval in many decisions of this Court that is the case of;- **South Dakota v North Carolina 192 US 268 (1940) L ED the US Supreme Court said this at page 465;- it was cited in Centre for Rights Education and Awareness & Another v John Harun Mwau & Others [2012] e KLR**

**“ Elementary rule of constitutional construction is that no one provision of the constitution is to be segregated from all others to be considered alone, but all 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.”**

[83] The Constitution sets out the principles that SRC has to take into account before giving advice on the salaries of public officers. It is also necessary to state that it is only SRC that has the mandate under the Constitution to ensure that the total public compensation bill is fiscally sustainable. The advice is guided by set principles; no other Commission is given that mandate; it is only SRC. I agree with counsel for the appellants that the judge fell in error in his conclusion that the advice by SRC was not binding and also for disregarding the report of SRC who have the sole statutory mandate of ensuring fiscal sustainability of state and public officers wage bill. By advising TSC on the remuneration of teachers, SRC did not interfere with the functional and operational independence of TSC.

[84] It is also important to respond to the issue that was argued most vehemently that TSC, an Independent Commission should have ignored the advice of SRC in setting the remuneration and benefits of its employees as an interference on its independence. I am conscious of the fact that a situation can arise when SRC can give irrational or incompetent advice or even fail to give advice at all. In such

circumstances, TSC or any other body in my view would be entitled to challenge the impugned advice in court by way of judicial review. In my view TSC cannot merely ignore the advice by SRC without giving valid and cogent reasons and thereafter seeking an interpretation by court or an order setting aside an impugned advice. This in my view is what was intended by the framers of the constitution when they created the mandate of SRC which meant that not a single organ of national or county government would have an upper hand in setting their own remuneration and benefits. By giving each Commission specific mandates, the framers of the constitution must have envisaged a situation where there would be mutual cooperation, consultation, complementarily as well as checks and balances of each organ of the government.

[85] The judge fell in error when he held that the advice by SRC to TSC was not binding and by performing the functions of SRC on his own motion without any prompting by TSC. A court cannot usurp the role or functions of a constitutional body unless that body has been found to have failed to carry out its functions. In this case there was no challenge that the advice by SRC was irrational or incompetent. See this Court's decision in the case of Shaban Mohamud Hassan & 3 others [2013] eKLR:-

**“ We add that the courts in discharging their judicial function must always bear in mind the supremacy of the Constitution and to respect the manner it has distributed functions to various state organs and independent bodies. The function of the High court is to see that lawful authority vested in these organs and bodies is not abused by unfair treatment. They cannot step outside the bounds of authority prescribed to them by the Constitution or statute because the supremacy of the Constitution is protected by the authority of an independent Judiciary, which acts as the interpreter of the constitution and all other legislation. But as Lord Brightman warned in the often cited case of Chief Constable of North Wales Police vs. Evans [1982] 1 WLR 1155 at 1173:**

**‘ If the court were to attempt itself the task entrusted to that authority by the law the court would under the guise of preventing the abuse of power be guilty of itself usurping power.’**

#### **Was there justification for the award made?**

[86] It was argued for the Unions that the Employment and labour Relations Court has Jurisdiction to adjudicate over disputes between employer and employees or their Unions. The jurisdiction of the Employment and Labour Court is discussed at length in this judgment and I agree with the argument by the Unions that if parties failed to settle a dispute as they did in this case; it was the business of the court to settle it. In doing so, the court is supposed to be guided by the evidence adduced before court and the law. The appellants called 3 witnesses who gave evidence in court. John **Kennedy Munyocho RW1**. He testified that he had analyzed the demands by the Unions and came to the conclusion that if the demands were awarded to the teachers, over 70% of the government revenue would be used to pay salaries in the public sector. He also stated that the current salaries of teachers were harmonized with those of civil servants and any increase to the teachers' salaries should apply to all civil servants; he confirmed that job evaluation had been undertaken by SRC which exercise was supposed to be undertaken jointly with Public Service Commission. (PSC) and the process would take 8 months from April 2015.

[87] SRC had however undertaken a study on allowances and made recommendation on harmonization with those of civil servants. RW1 also commented on the two reports from Central Planning and Monetary Unit (CPMU). The two reports reflected different positions regarding the costs of living, vis a vis the teachers' current salaries. The 1<sup>st</sup> report suggested that teachers were under compensated especially in basic pay. RW1 confirmed the figures in the 1<sup>st</sup> report analyzed the teachers pay from 1997 up to 2013 and therefore did not reflect the average wage and benefits thus the 1<sup>st</sup> report was wrong. During cross examination, RW1 admitted that even the 2<sup>nd</sup> CPMU report contained some errors.

[88] Further evidence was given by **Charles Nauki Obuki RW2**, a Senior Economist in the Ministry of Labour who served as an economic analyst at CPMU. He confirmed that he had participated in the

preparation of the 1<sup>st</sup> CPMU report which was hurriedly filed in court to comply with the time lines set by court. In the course of reviewing the report with our officers, he noticed some errors which they corrected by filing a 2<sup>nd</sup> CPMU report. RW2 set out the errors which were in the 1<sup>st</sup> report.

[89] The last witness, **Dr. Geoffrey Mwau RW3**, the Economic Secretary in charge of Budget, Fiscal and Economic Affairs of National Treasury, RW3 presented a report that was filed in court by the National treasury on 20<sup>th</sup> February, 2015 which provided an overview of the current economic situation budgetary procedures as well as sustainability of wage bill in relations to the national budget. He testified that it was important to regulate the wage bill to 35% of the revenue as opposed to the current wage bill at 52% of the revenue. According to RW3, if the demand by teachers were allowed it would increase the wage bill to 237% which would have devastating effect on the overall macro-economic instability.

[90] This is a first appeal, that being so I am mandated by law to reconsider and re evaluate the evidence before the trial court and arrive at my own independent conclusion with of course the usual caveat that I did not see the demeanor of witnesses as they testified and therefore give due regard for that. See the case of:-

***Selle vs. Associated Motor Boat Company (1968) E.A. 123 at page 126***, where the Court of Appeal held,

**“ ..... this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect...? See *Jivanji vs. Sanyo Electrical Company Ltd. (2003) KLR 425.***

[91] It is not quite clear to me what the learned judge did with the evidence by these three witness, although in the judgment, he made certain observations as follows:-

**“RW1 was not aware if a rationale was provided and if a budget was attached to the proposal by TSC... RW1 had no information from the National Treasury on the affordability of 50-60% when SRC advised against its implementation”**

Regarding the evidence by RW2, the judge observed:

**“RW2 was at pains to explain why the 2<sup>nd</sup> report they had left out comparison of teachers and secretarial staff wages increment..... RW2 was unable to explain the reason why a clerical officer in TSC secretarial earns more than a P1 teacher who undergoes two (2) year professional training in a Teachers Training College.”**

As regards RW3, the judge observed:-

**“RW3 was cross examined by all counsel. His testimony was fairly consistent in all material aspects.? He confirmed that the allowances that have been approved for the teachers will be paid as scheduled by 1<sup>st</sup> July 2015....”**

[92] From the aforesaid remarks it can be assumed or concluded that the judge disregarded the evidence of RW1 and RW2 on the grounds that the witnesses were hard pressed to offer some explanations on the two reports during cross examination and their answers were not credible. The Unions did not adduce contrary evidence and I am aware of the provisions of **Section 108 of the Evidence Act** which provides that the burden of proof in a suit or proceedings lies on the person who would fail if no evidence at all was given on either side; **Section 112** also provides that in civil proceedings the burden of proving or disproving a fact within the special knowledge of a party is upon that party. I am of the view that the evidence of the two witnesses could only be discredited by contrary evidence by the Unions. That notwithstanding and while reminding myself the judge was dealing with an extra ordinary matter, I am prepared to ignore the evidence of **RW1** and **RW2** because it is the trial judge who heard and saw them testify and he therefore chose to disregard their evidence although it was imperative for the judge to state

clearly whether he dismissed the evidence of the two witnesses or not. The fate of their evidence should not have been left hanging.

[93] The judge acknowledged the testimony of **RW3** was consistent but nothing more turned on it as well. As stated above, the Unions did not offer any evidence and in my view the judge ought to have considered **RW3's** evidence in determining the salaries to award. It is clear from the judgment the learned judge did not apply the evidence by RW3 who was an expert witness.

RW3's evidence covered relevant and critical aspects of constitutional and statutory underpinnings of fiscal sustainability of public wage bill. The judge did not also consider the responses by appellants. Besides, fiscal sustainability of the award, I find there were so many issues that were raised by the appellants and they were not considered by the judge. Among them was job evaluation of teachers so as to; ensure public services attract and retain skills required to execute their functions; recognize productivity and performance; fairness and transparency. The judge recited the principles to be applied by a court in determining economic disputes from a book written by Retired **Justice Saeed Cocker**, such as basic needs of workers, family budget, costs of living, wage comparisons, financial position of the employer and workers productivity among others. All these factors were never taken into account by the judge, he merely recited them but did not subject the case before him to those tests. Apart from ignoring evidence by the appellants and failing to give reasons for so doing, the judge did not consider the National Wage guideline in determining the award. This is as prescribed for under **section 15 (5)** of the Industrial Court Act which provides:-

**“15 (5) In the exercise of its powers under this Act, the court may be bound by the national wage guidelines on minimum wages and standards of employment, and other terms and conditions of employment that may be issued, from time to time, by the Cabinet Secretary for the time being responsible for finance.”**

[94] It is clearly evident from the record that the award of 50-60 % was drawn from a draft proposal that was prepared by the Consultative Committee of TSC and was tabled to the Unions during one of the several meetings held to discuss salaries, benefits and terms and conditions of a CBA. The effective date of 1<sup>st</sup> July 2013 was taken from the circular by SRC of 4<sup>th</sup> July 2012, which stated that all CBAs should adopt a four year cycle with effect from July 2013. It is discernable from the evidence, that there was the basis for said the award and for backdating it to July 2013. It is common ground that this proposal was not accepted by the Unions; the Unions presented TSC with a counter offer of 100-150% basic salary increment which means the offer of 50-60 % ceased to exist as an offer. TSC also withdrew the offer upon advice by SRC and the Treasury. It is also necessary to state that there was no agreement on a CBA, backdating the CBA to July 2013 was also an error on the part of the judge.

[95] According to Mr. Muite, SC., the offer was made by TSC to the Unions and thus it was a proposal; the proposal was drafted bearing in mind the harmonized salaries and allowances; teachers work under difficult circumstances and the judge must have considered the proposal by TSC was all encompassing. With tremendous respect, I am not at all persuaded that the award of 50-60 % has any legal basis. If the judge was relying on the said offer that was rejected by the Unions and withdrawn by TSC, because there was no advice by SRC, clearly that was an error; If the judge was performing the mandate of SRC which is also an error, in that case the Judge had a duty of justifying the award while taking into account the laid down principles. If the learned judge set out to perform the fundamental role played by **SRC**, he needed to justify the award by taking into account all the aspects that guides SRC in arriving at an advice that ought to have been given TSC regarding determination of remuneration and benefits of teachers. For the aforesaid reasons I find the learned judge erred by finding the advice by SRC was not binding; for failing to evaluate the evidence and for taking over the role and mandate of SRC to determine remuneration and benefits of teachers without due consideration to the provisions of the Constitution and statute law.

[96] We were urged by Mr. Kilukumi for KNUT to have due regard to the ruling of this court that declined to allow an application for stay of execution of the award and instead gave a conditional stay. With tremendous respect to counsel, an application for stay of execution is governed by the provisions of Rule 5 (2) (b) of the Court of Appeal Rules. It invokes the courts exercise of discretion which is done

according to set principals which include inter alia; that the intended appeal is arguable and if stay is not granted the appeal would be rendered nugatory. The principles to bring to bear in an appeal are totally different and many are the cases where the court has declined to grant a stay order and allowed the appeal or a stay order was granted and the appeal would be dismissed for lacking in merit.

[97] There were two cross appeals by the Unions on costs before the trial court. Having found the appeals have merit, it follows that the orders of the Employment and Labour Relations Court are set aside in their entirety. The cross appeals in that regard fail. As regards the notice of motion by TSC seeking to amend the memorandum of appeal to include a prayer for costs, I am reluctant to allow it even though I am aware that amendments to pleadings can be brought at any time; this is because I view this matter as a public interest matter that cuts across a cross section of Kenyans who were taken to court in the first place by TSC an organ of the government. The Unions represent teachers and they were pursuing fundamental rights to a fair remuneration. For that reason I would decline to allow an amendment and order each party to bear their own costs in the Court of Appeal and the court below.

[98] I allow these appeals because the Constitution and the law demand that I do so. I am however left with a heavy heart as I address the prayer by TSC in their petition that the Unions be ordered to resume negotiations with a view of finalizing the CBA. Although the trial judge erred in both law and fact in this case and arrived at erroneous conclusions, one thing that is clear from the way he conducted the proceedings, from the beginning to the final award of the court, the judge was in a hurry to finalize the matter and resolve the dispute expeditiously. However, the award turned out to be a „**quick fix**‘ that could not stand the test of the law and the Constitution. I am of the strong view that teachers are entitled to have their dispute determined according to the Constitution and the law. SRC has a fundamental role to play in the determination of remuneration and benefits of teachers; it is disheartening that SRC has taken all these years to carry out a job evaluation for teachers. I understand SRC finalized the job evaluation of state officers two years ago. We were also told that SRC was to carry out job evaluation of teachers and other public officers and the exercise was to commence in April 2015 and continue for 8 months. I think it will be futile for parties to resume negotiations without the report by **SRC** on job evaluation and **advice** on basic salary for teachers.

[99] The orders that commend themselves in the circumstances are:

- 1. SRC is hereby ordered to table before the Employment and Labour Relations Court its report to TSC on job evaluation of teachers within 90 days.**
- 2. SRC to provide written advice to TSC on remuneration and benefits to be awarded to teachers within 90 days.**
- 3. Thereafter, parties to resume negotiations with a view to finalizing the CBA which should be registered within 30 days.**
- 4. The remuneration and benefits agreed upon should accord with the provisions of the Constitution and the relevant statutes.**
- 5. The three appeals are allowed with no order as to costs.**

[100] As there is no consensus on the above orders, save for the order allowing the appeals and the order on costs, the majority decision and orders of the court are as enumerated in the judgment by **Githinji, JA**.

**Dated and delivered at Nairobi this 6<sup>th</sup> day of November, 2015.**

**M.K. KOOME**

.....

**JUDGE OF APPEAL**

## JUDGMENT OF MWILU, J.A

1. The Teachers Service Commission (**TSC**), the appellant herein, filed before the Employment and Labour Relations Court sitting in Nairobi, Petition No. 3 of 2015 on the 8<sup>th</sup> day of January, 2015. The named respondents were the Kenya National Union of Teachers (**KNUT**) and the Kenya Union of Post Primary Education Teachers (**KUPPET**). The Salaries and Remuneration Commission (**SRC**) was sued as an interested party. The Petition sought orders as outlined hereunder:-

*a) a declaration that the strike called by the Respondents on 29<sup>th</sup> and 31<sup>st</sup> December, 2014 respectively and commenced on 5<sup>th</sup> January, 2015 is illegal, null and void ab initio.*

*b) a declaration that the Respondent's industrial action is unprotected under the Labour Relations Act.*

*c) a prohibitory injunction restraining the Respondents, the officials, their members from engaging in, participating and/or continuing with their illegal strike.*

*d) an order directing the Respondents to resume negotiations with a view to finalise (sic) the collective Bargaining Agreement.*

*e) any other order that the court may deem just to grant.”*

Simultaneously with the Petition was filed a notice of motion application seeking orders, *inter alia*, that the application be certified urgent; a prohibitory injunctive order do issue against the officials and members of the respondents restraining them from continuing with the strike.

2. The application was made at the back drop of a nationwide teachers' strike that had paralyzed learning in public primary, secondary and tertiary institutions. The motion was certified urgent and heard *ex parte* in the first instance but orders for prohibitory injunction were declined. Instead, the trial court summoned the parties to appear before him which eventually happened on the 14<sup>th</sup> day of January, 2015. This was preceded by an *inter-partes* appearance by counsel before the judge on the 9<sup>th</sup> day of January, 2015 during which the trial judge recorded noting a willingness by the parties to engage constructively in terms of **section 15** of the **Industrial Court Act**. Respective counsel for the parties and the officials of the parties engaged in some proceedings presided over by the judge, which eventually partly ended with the trial court's judgment dated and delivered on the 30<sup>th</sup> day of June, 2015. The proceedings of the 14<sup>th</sup> day of January, 2015 and the subsequent ones and the resultant judgment are the reason for the appeals herein.

3. From the record, representatives of the parties herein as well as their counsel addressed the judge in chambers at some length. Following what the judge termed as extra ordinary circumstances, a solution was arrived at to unlock the stalemate. An amicable and mutually acceptable position was arrived at, or so the judge thought, resulting into an arrangement to the effect that the petition was compromised and replaced by an economic dispute in consideration of calling off the nationwide teachers strike by the two unions upon undertaking by **TSC** not to victimize the teachers who had participated in the strike. Accordingly, **KNUT** and **KUPPET** became claimants in the economic dispute and **TSC** as the employer became the respondent. **SRC** remained an interested party in the economic dispute. The strike was on this basis effectively called off. As part of what the trial judge termed a consent, the unions were to file their claim, the respondents to file responses and **SRC** and the Central Planning Monitoring Unit (**CMPU**) to file respective reports.

4. About one week later, on 22<sup>nd</sup> January, 2015 counsel for **TSC** sought to revive the Petition and filed an application on 23<sup>rd</sup> January, 2015 seeking to set aside the alleged consent entered into before court on 14<sup>th</sup> January, 2015. The application was heard with both parties making representations. At the end of the

hearing the trial judge issued orders to the effect that the parties abide by the ‘consent’ orders of 14<sup>th</sup> January, 2015 pursuant to conciliation proceedings, undertaken by the court under **Section 15** of the **Industrial Court Act**, and **Article 159** of the **Constitution**. The trial judge further ordered that the issues raised in the application dated 22<sup>nd</sup> January 2015 be addressed by parties and determined by the court during the hearing of the economic dispute filed pursuant to the ‘consent’ orders of 14<sup>th</sup> January 2015. In addition, the respondents **SRC**, and **CPMU** were ordered to file their reports.

5. And then the honourable the **AG** applied to be enjoined as an interested party in the proceedings which application was granted. It was the **AG’s** position that as the legal advisor to the government and defender of public interest it was important for his office to participate in the proceedings as the proceedings were likely to impact on other government institutions that were not party to the proceedings.

6. In compliance with the said orders of 14<sup>th</sup> January 2015, **KNUT** and **KUPPET** prepared and filed a joint memorandum on an economic dispute claim on 19<sup>th</sup> January 2015. **TSC** filed its memorandum of response dated 28<sup>th</sup> January 2015, albeit noting its reservations on the dimensions the court process had taken. **SRC** filed its report dated 9<sup>th</sup> February 2015 while the **AG** filed his response dated 20<sup>th</sup> February 2015 to the adjudication process **CPMU** also filed its report (hereinafter the 1<sup>st</sup> report) while the **AG** introduced another report by **CPMU** (hereinafter the 2<sup>nd</sup> report) through its application to be enjoined in the proceedings.

7. The respondent unions were uncomfortable with the introduction of the 2<sup>nd</sup> **CPMU** report to informally replace the 1<sup>st</sup> report. The court however declined to expunge the 1<sup>st</sup> report, instead allowing parties to submit on both reports highlighting the salient points of both reports introduced two days apart. In addition, the **SRC** availed a witness, **John Kennedy Monyoncho, RW1** the Acting Director Research Compliance Policy and Planning at **SRC** to testify in support of **SRC’s** position.

8. The **AG** on his part availed two witnesses. The first was **Charles Nyariki Obuki, RW2** a senior Economist in the Ministry of Labour and Social Services who had worked at **CPMU** since 1997. He said that **CPMU** was established with the purpose of assisting the Industrial Court, as it then was, under the Ministry of Labour on policy review and research on the economic aspects of the dispute. Due to lack of capacity by the Judiciary following the establishment of the Employment and Labour Relations Court under the judiciary, **CPMU** has continued to offer its assistance to the said court. The second witness availed by the **AG** was **Dr. Geoffrey Mwau, RW3** the Economic Secretary in charge of budget, Fiscal and Economic Affairs at the National Treasury. He is the advisor to the government on economic policy matters especially on budgetary processes.

9. In a word, the witnesses reiterated the contention by **TSC**, **SRC** and the **AG** that the demands for increased pay were unjustifiable, unsustainable and were subject to a strict laid down procedure under the law.

10. Historically there had been previous petitions being Petition Nos. 22 and 23 of 2013 instituted by **TSC** following strikes by the unions. The said Petitions sought to declare the strikes unlawful and unprotected. The effect of the trial court’s ruling was to call off the strike and direct parties back to negotiations whilst ordering **TSC** and the unions to decamp from their hard line positions and proceed to the negotiating table in good faith.

11. Following the proceedings before the Employment and Labour Relations Court, the trial judge delivered his judgment on 30<sup>th</sup> June 2015. From the judgment the following orders were issued against the **TSC**, **SRC** and **AG**;

***“(a) A basic salary of between 50% - 60% for four (4) years translating to 12.5% - 15% be awarded to all teachers in the public service***

***(b) The Collective Bargaining Agreement containing salary increment of between 50-60% be***

*backdated to take effect from 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2017.*

*(c) The allowances increases already awarded to the teachers by the TSC with effect from 1<sup>st</sup> July 2015 including house, leave, hardship, advance for motor vehicle purchase; and mortgage facility be confirmed to be reflected in the Collective Bargaining Agreement for the period between 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2017.*

*(d) All other allowances and benefits including responsibility, hazard, disturbance, accommodation and night out, mileage claims, study leave sabbatical and any other allowances and benefits agreed upon by the parties be reflected in the Collective Bargaining Agreement for the period of 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2017 in their current status.*

*(e) The terms of the Collective Bargaining Agreement to be reflected in the ultimate clause of the CBA document to be 1<sup>st</sup> July 2013 to 30<sup>th</sup> July 2017.*

*(f) The Collective Bargaining Agreement, duly signed by the parties to be registered with the court in terms of section 60(1) of the Labour Relations Act, 2007 within thirty (30) days from the date of the judgment.”*

12. Aggrieved by that judgment, TSC, SRC and the AG filed their respective appeals; TSC filed civil appeal no. 196 of 2015; SRC filed no. 195 of 2015 and the AG filed no. 203 of 2015. In addition, TSC approached this Court under **rule 5(2)(b)** of this Court’s rules seeking stay of execution of the judgment and orders of the trial court and all consequential orders issued in furtherance of the judgment. Upon consideration of the motion, the affidavits, submissions of learned counsel and the law at that interlocutory stage, the bench of three made the following orders:-

*“(a) A conditional stay of execution of the judgment delivered on 30<sup>th</sup> June, 2015 is hereby granted on the following terms:*

*(i) the applicant and the interested parties herein shall implement the increment ordered by the judge in respect only of basic salary with immediate effect from 1<sup>st</sup> August, 2015*

*(ii) therefore the applicant shall continue to pay the increment ordered above until the hearing and final determination of the appeal*

*(iii) we hereby stay implementation of the judgment in respect of arrears of salary and all allowances ordered by the judge until hearing and determination of the appeal.”*

The court proceeded to issue the following further order:-

*“in default of implementation of the order on payment of increased salary the motion shall stand dismissed with costs.”*

13. The TSC preferred an appeal to the Supreme Court to stay the above orders in vain, as the apex court declined jurisdiction to entertain the matter then.

14. All the three appeals were listed for hearing before us on 22<sup>nd</sup> September 2015. Prior to the hearing, KNUT had filed the application dated 8<sup>th</sup> September, 2015 seeking the striking out of Civil Appeal No. 196 of 2015 by TSC or for grant of orders that TSC is in contempt of the court and should be denied audience and for having failed to abide by previous orders of this Court relating to the application by TSC under **rule 5(2)(b)** of the **Court of Appeal Rules** seeking a stay of the decision of the Employment and Labour Relations Court pending the hearing and determination of the appeal by TSC. TSC and SRC filed their respective notices of preliminary objection to the said application by KNUT.

15. At the onset of the hearing of the appeal by TSC, Mr. Muite, senior counsel for KNUT sought the

court's directions regarding the manner of dealing with the application and two preliminary objections raised against the said application. Mr. Muite submitted that it was the view of the applicant that the right of **TSC** to be heard should be determined first. Mr. Kilukumi also for **KNUT** and Ms. Guserwa for **KUPPET** supported Mr. Muite's position.

16. On their part, Mr. Nowrojee senior counsel appearing for **SRC**, Mr. Ngatia for **TSC** and the **AG** suggested that in order to save time, and in view of the fact that the application relates to only the appeal by **TSC** and not the ones by **SRC** and the **AG**, it would be orderly if the three appeals were consolidated and the current application and the preliminary objections as concerns the **TSC** appeal were heard within the consolidated appeals.

17. This Court's directions given on 22<sup>nd</sup> September, 2015 directed that the application and preliminary objections be heard within Civil Appeal No. 196 of 2015 by **TSC**; the appeals be consolidated with Civil Appeal No. 196 of 2015 being the main file and in the determination of the appeals, the court do first determine the issue raised in the application in Civil Appeal No. 196 of 2015 with the result that if the application would succeed, then the consideration of the merits of Civil Appeal No. 196 of 2015 would be an academic exercise.

18. Following our said directions, Mr. Ahmednasir, learned Senior Counsel for **KNUT** applied for adjournment of the three appeals to enable his client consider its further participation in the appeals. Counsel further intimated that should his client consider participating in the hearing of the appeals, a five-judge bench should have to be constituted in view of the fact that the appeals are of great public importance.

19. According to Mr. Ahmednasir, the directions we had given were not procedural but substantive in nature, giving a trajectory as to how the appeals would be determined. M/s. Guserwa for **KUPPET** supported the application for adjournment. On their part Prof. Githu Muigai, the learned **AG**, Mr. Nowrojee for **SRC** and Mr. Ngatia for **TSC** opposed the application for adjournment terming it a delaying tactic. They also opposed the empanelling of a five-judge bench to deal with the appeals as there was no doctrinal conflict of law to require a larger bench.

20. We reluctantly allowed the application for adjournment with liberty to the President of the court to consider the suitability of empanelling a five-judge bench to hear the three appeals.

21. When the hearing of the appeals resumed on 29<sup>th</sup> September, 2015 the President of this Court had empanelled a five-judge bench. However, **KNUT** had on 28<sup>th</sup> September, 2015, the eve of the hearing, filed an application seeking the recusal of the initial bench on grounds, *inter alia*, that the bench had been picked by the President of the court who had continued to direct it on how to proceed with and handle the appeals. Mr. Ahmednasir for **KNUT** argued that application urging us to recuse ourselves in order to safeguard integrity and faith in the Judiciary. The **AG**, Mr. Ngatia for **TSC** and Mr. Nowrojee, senior counsel for **SRC** opposed the application on grounds that the application was speculative and lacked clear demonstration or evidence to warrant our recusal.

22. After a consideration of the matter, we declined the application and directed that the hearing of the appeals commences. Following our ruling, senior counsel Ahmednasir requested to be discharged from further participation in these proceedings on behalf of his client **KNUT** which request was acceded to. Mr. Muite senior counsel and Mr. Kilukumi continued their representation of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

23. Opposing that application for striking out of appeal and denial of audience, and in support of his preliminary objection Mr. Ngatia, learned counsel for **TSC** argued that **TSC**, as any litigant, was entitled to appeal before this court as they did in filing Civil Appeal No. 196 of 2015 having been aggrieved by the judgment of the trial court. As an appellant in these proceedings therefore, **TSC** has a right of audience before the court by virtue of the appeal which was properly before the court, submitted counsel. In addition, it was counsel's argument that **TSC** is one of the commissions under **Article 248** of the **Constitution** which did not own funds of its own and could therefore not effect the payments as ordered by the trial court. In essence, counsel was pleading impossibility of performance and that it would be

wrong in the circumstances to punish **TSC**. Mr. Ngatia found support from the **AG**, Prof. Githu Muigai and Mr. Nowrojee senior counsel for **SRC**. Proceeding from the preliminary objections filed in opposition to the application, both counsel argued that the effect of the application to deny audience was to infringe on the right to a hearing and access to court which is guaranteed under **Articles 25 and 48** of the **Constitution**. Mr. Nowrojee added that the respondent unions had taken steps to institute contempt proceedings before the Employment and Labour Relations Court and bringing the matter before this Court amounted to abuse of process. It was Mr. Ngatia's further argument that **TSC** had a meritorious appeal and the motion was aimed at obstructing the hearing of the appeal, and that the contempt proceedings instituted by **KNUT** in the trial court were against persons not party to the present proceedings. In any event, added counsel, the orders of the motion brought under **rule 5(2)(b) Court of Appeal rules** were self executing as the stay orders were granted upon a condition. Mr. Ngatia argued that no funds had been availed as required by the provisions of the Constitution to be disbursed by **TSC** as evidenced by the response from the National Treasury.

24. On his part, Prof. Githu Muigai the learned AG argued that this Court lacks jurisdiction under the law to deal with contempt proceedings which in any event had to be preceded by a determination of contempt. According to the learned **AG**, the **AG's** appeal was properly on record, there had not been adduced evidence of execution and certain procedural steps were yet to be taken by the decree holder. The **AG** implored us to invoke the oxygen rule to salvage the appeals, arguing that striking out is quite draconian and the absence of immediate settlement of the terms of the order was not proper ground for striking out the appeals. The **AG** reiterated that the appeal raised issues of great public interest that deserved to be heard and determined by this Court after full participation by all the parties as contemplated by the law.

25. Learned counsel Mr. Kilukumi for **KNUT** urging the motion submitted that **TSC** should be denied audience for having willfully deliberately refused to obey the trial court's judgment dated 30<sup>th</sup> June, 2015 despite being aware of its existence. Counsel added that the order of this Court of the 23<sup>rd</sup> July, 2015 was yet to be obeyed by **TSC** long after the conditional stay granted had lapsed. Counsel further added that **TSC** did nothing towards obeying those court orders and saw **TSC's** letter of 25<sup>th</sup> August, 2015 to the National Treasury as not good enough and described the Treasury's letter of 28<sup>th</sup> August, 2015 as a vain futile attempt at amending or varying a court order. Mr. Kilukumi was unable to understand any complexities involved in the budgeting process that would occasion disobedience of lawful court orders and blamed non-payment on the members of the respondent unions on **TSC's** and national government's attitude of "can't pay won't pay." Relying on his submissions and various authorities counsel urged us to allow the application. Mr. Kilukumi found support from Mr. Muite senior counsel who stated that **TSC** had simply not quantified the judgment award to the National Treasury and consequently **TSC** could not be heard to say that they had done all there was for them to do. Learned counsel Ms. Guserwa for **KUPPET** and Mr. Mbaluto for **TSC** also supported Mr. Kilukumi's position.

#### **RIGHT OF AUDIENCE - DETERMINED**

26. I have considered the rival submissions and authorities cited by the respective counsel. The applicants' frustrations in not having benefited from the fruits of the judgment of the trial court as reiterated by this Court's order when granting a conditional stay of execution was palpable. That said, I am mindful of the need to respect, uphold and defend the **Constitution** as the sovereign authority belonging to the people of Kenya to be exercised in accordance with the **Constitution** in terms of **Article 1** of the **Constitution**. **TSC** and the executive arm of government argue that they acted in the manner they did in accordance with the **Constitution** in exercise of delegated sovereign power under **Article 1(3)(b)** of the **Constitution**. And there is also due process which in this case involves appeals. And so in these circumstances is **TSC** to be denied audience and the appeal be struck out?

27. **Rule 84 Court of Appeal Rules** pursuant to which, *inter alia*, the motion is brought provides:

***"84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.***

***Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.***

No attempt was made by **KNUT** and **KUPPET** to show which part of that rule was not complied with so that the appeal may be struck out. I find none. Reliance on that rule does not therefore avail the applicants the relief sought.

28. All parties are agreed that this Court's order of the 23<sup>rd</sup> July, 2015 was one on terms; that stay of execution of the trial court's judgment was conditional on **TSC** making payment as ordered in the judgment of 30<sup>th</sup> June, 2015 from 1<sup>st</sup> August, 2015. It remains uncontested that **TSC** made no such payment and its attempt to obtain a stay of execution from the Supreme Court met with no success. That order of the 23<sup>rd</sup> July needed no further action than that it was either obeyed or the stay granted automatically lapsed. There was no obedience to the order. The same consequently lapsed and the present motion to deny audience to **TSC** cannot be premised on it.

There is then the judgment of the 30<sup>th</sup> June, 2015 which it is admitted has not been honoured. It is that judgment that is the basis of these appeals. Undeniably **TSC** has an unfettered right of appeal which should not be denied on account of allegations of contempt which still pends determination in the trial court. **TSC's** status as a Commission and its ability to pay teachers registered with it is a main ground of appeal herein and in the special Constitutional budgeting, advisory and appropriation processes involved, I would not find that an appropriate case has been made out to deny this appellant the right of audience before this Court, all precedents on contempt of court notwithstanding. This is a unique situation where **TSC** has not been judicially found to be in contempt, and where the Constitution of the land has set out deliberate procedures and processes to be adhered to as regards wages and the reviews thereof. Should **TSC** then be denied audience or its appeal be struck out for not having satisfied the trial court's judgment and also for failing to obey the orders of this Court (three judge bench of 23<sup>rd</sup> July, 2015)? Is **TSC** in blatant and willful contempt of court? The motion by **KNUT** is supported by **KUPPET** whose secretary general has filed an affidavit in support. **TSC's** chief executive officer Nancy Macharia filed a replying affidavit opposing **KNUT's** motion. Nothing is shown to curtail **TSC's** right of appeal in these circumstances where the constitutional processes above need to be exhaustively discussed in the body of the appeal.

And a constitutional and/or statutory right of appeal should not be dashed by a denial of audience or a striking out of the appeal lest the course of justice be obstructed. That was the reason for the finding in **Hadkinson v Hadkinson [1952]2 ALL E.R. 567** in which **Denning L.J.** held

***"I need hardly say that it is very rare for this Court to refuse to hear counsel for an appellant. No matter how badly a litigant has behaved, nevertheless generally speaking, if he has a right of appeal, he has a right to be heard, for the simple reason that if he is not heard, his right of appeal is valueless --- It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy – when the contempt itself impedes the cause of justice and there is no other effective means of ensuring his compliance."***

It is noteworthy that in **Hadkinson**, unlike here, contempt was actually proved.

It is for the above reasons therefore that I would not find that **TSC** should be denied audience. I would therefore order that the motion be and it is hereby dismissed. The costs thereof shall abide the outcome of the appeal.

29. Having so dispensed with the application, I now proceed to consider the appeals as consolidated. I will first proceed to summarize each of the appeals as filed and argued before this court.

30. **TSC** filed a memorandum of appeal raising eighteen (18) grounds of appeal as hereunder.

- (1) THAT the learned Judge erred in law in not appreciating sufficiently or at all that he had no jurisdiction to determine an “Economic Dispute” that was neither in the Appellant’s Petition nor pleaded by any of the parties by way of cross-petition.***
- (2) THAT the learned Judge erred in law and in fact in considering that the counsel had recorded and/or made a consent that an “Economic Dispute” be decided by the Court whereas no such agreement existed.***
- (3) THAT the learned Judge erred in law and in law and in fact in not appreciating that he had no jurisdiction to determine the increment payable to teachers, an issue that was not within his mandate or the courts jurisdiction under Section 12 and 15 of the Industrial Court Act as read together with Section 77 of the Labour Relations Act.***
- (4) THAT the learned Judge erred in law in purporting to frame issues that had not been pleaded and abandoned his role to adjudicate and determine the issues raised in the Appellant’s Petition.***
- (5) THAT the learned Judge erred in law by disregarding the advise of SRC and the evidence tendered that the proposed salary increment for teachers was not sustainable.***
- (6) THAT the learned Judge erred in law and in compelling the Appellant to increase teacher’s salary by 50% - 60% with effect from 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2017 in violation of Articles 230 (4) and 259 (11) of the Constitution.***
- (7) THAT the learned Judge erred in law in disregarding the expert testimony tendered in Court to the effect that any increment that was not budgeted for would violate the provisions of Articles 220, 221 and 249 of the Constitution and create macro economic imbalance.***
- (8) THAT the learned Judge erred in law by misinterpreting the Appellant’s constitutional mandate and role under Article 237 (2) & (3) of the Constitution.***
- (9) THAT the learned Judge erred in law in relying on the erroneous report by the Central Planning and Monitoring Unit and disregarded the expert evidence of the SRC despite having found that the Appellant could only review remuneration of teachers upon advice by SRC.***
- (10) THAT the learned Judge erred in law and in misinterpreting and wrongly invoking Article 41 (5) of the Constitution on the right to engage in collective bargaining.***
- (11) THAT the learned Judge erred in law and in failing to appreciate that Article 41(5) is derived from Convention No. 98 of the International Labour Organization concerning application of the right to organize and bargain collectively and which Convention restricts enjoyment of the right to collective bargaining by public servants.***
- (12) THAT the learned Judge erred in law and in fact by failing to appreciate the enjoyment of the right donated by Article 41(5) is limited by “measures appropriate to national conditions” such measures being inclusive of the SRC as set out at Article 230(4) (b) and (5) of the Constitution.***
- (13) THAT the learned Judge erred in law by awarding salary increases to teachers without observing constitutional safeguards imposed on public expenditure by Articles 201 and 202 of the Constitution.***
- (14) THAT the learned Judge erred in law and in fact in coming to the conclusion that the power to employ given to the Appellant presupposed that it had the power to unilaterally fix or increase salaries.***

**(15) THAT the learned Judge erred in law and in fact by rating recognition agreements above constitutional provisions and more particularly Article 259(11) of the Constitution.**

**(16) THAT the learned Judge erred in law and in fact in coming to the conclusion that job evaluation was not a determinant factor in wage awards.**

**(17) THAT the learned Judge erred in law and in fact in awarding a wage increase to teachers in disregard of the harmonized scales thereby occasioning discrimination against the rest of the public service contrary to Section 5(3) (b) of the Employment Act No. 11 of 2007.**

**(18) THAT the learned Judge erred in law and in fact in not appreciating that the increment of salaries to teachers would violate the principles set out in Article 230(5) of the Constitution and Section 11 of the SRC Act.**

In their submissions as filed and highlighted, the grounds of appeal were collapsed into six grounds under the following thematic areas:-

**(a) what was the nature of the dispute before the Employment and Labour Relations Court**

**(b) whether the Employment and Labour Relations Court had jurisdiction to proceed in the manner it did under sections 12 and 15 of the new Employment Labour Relations Act**

**Whether the trial judge was entitled to convert the petition as initially filed by TSC into an economic dispute**

**(c) the role and mandate of SRC vis-à-vis TSC**

**(d) whether the judge erred in awarding the increment on basic salary by 50-60%**

**(e) whether the trial judge gave due consideration to the evidence tendered**

**(f) whether the trial judge's decision was in accordance with the National Wage Guidelines.**

In summary, TSC contended that the trial court lacked jurisdiction to handle the petition and proceed to conclude the same in the manner that he did and that TSC never made an offer for an increment of 50-60% for the judge to adopt. In addition, TSC contended that it was bound by the advice of SRC and finally that TSC never consented to the order termed as consent order as was indicated by the trial judge following proceedings before the trial court on 14<sup>th</sup> January, 2015.

31. The Honourable Attorney General filed a memorandum of appeal in Civil Appeal No. 203 of 2015 containing twenty-six (26) grounds of appeal as hereunder:-

**(1) THAT the Hon. Judge erred in law in failing to appreciate that what was before the court was not an Economic Dispute and therefore lacked the requisite jurisdiction to hear and adjudicate the matter.**

**(2) THAT the Honourable learned judge erred in law by invoking section 15 of the Employment and Labour Relations Act as a basis for his jurisdiction.**

**(3) THAT the Honourable learned judge erred in law and in fact in holding that the basic wage increment of 50-60% was to be effective from 1<sup>st</sup> July 2013 and the judgment was to take effect immediately without any legal basis and in total disregard of the government budgeting process provided or the under the Constitution of Kenya, 2010 and the Public Finance Management Act.**

**(4) THAT the Honourable learned judge erred in failing to appreciate and or assess the evidence tendered by the Appellant in its totality.**

**(5) THAT the Honourable learned judge erred in failing to appreciate the constitutional role and functions of the National Treasury in the Budget making process under Article 220 and 221 of the Constitution of Kenya, 2010.**

**(6) THAT the Honourable learned judge erred in law in failing to appreciate the constitutional provisions under Article 201 of the Constitution of Kenya, 2010 on the management of public Finance.**

**(7) THAT the Honourable learned judge erred in law by wholly disregarding expert testimony tendered by the expert witness of the National Treasury to the effect that any increment on salary would violate Articles 220, 221 of the Constitution of Kenya, 2010 even after appraising the testimony.**

**(8) THAT the learned judge erred in law and fact by failing to take into account the economic and legal effect of the salary increment it awarded to teachers.**

**(9) THAT the Honourable learned judge erred in law and fact by failing to take into account the fiscal sustainability of the salary increment it awarded to the 1<sup>st</sup> and 2<sup>nd</sup> respondent's members as required by Article 201 and 230(5) of the Constitution and Section 12 of the Salaries and Remuneration Commission Act.**

**(10) THAT the Honourable learned judge erred in law by concurrently relying on the two reports prepared by the Central Planning and Monitoring Unit as a guide for the increment.**

**(11) THAT the Honourable learned judge erred in law by failing to exercise his judicial mind correctly in the face of the two diametrically opposed Central Planning Monitoring Unit reports.**

**(12) THAT the Honourable the learned judge erred in law by not making any**

**decision in respect to the Appellant's Notice of Motion dated 23<sup>rd</sup> March 2015 seeking for an order to the 1<sup>st</sup> Central Planning Monitoring Unit report of 25<sup>th</sup> February 2015 expunged from the record.**

**(13) THAT the Court fell into serious error by proceeding to consider and apply the two reports concurrently.**

**(14) THAT the Court abdicated its role as an impartial arbiter when it took into account extraneous issues/matters that were not part of the Constitutional Petition No. 3 of 15.**

**(15) THAT the Honourable learned judge erred in awarding the 1<sup>st</sup> and 2<sup>nd</sup> respondents' members an increment on basic salary of 50-60% based on what he termed a validly negotiated agreement.**

**(16) THAT the Honourable learned judge fell into a serious error of law and fact in failing to appreciate that the remuneration and benefits for teachers had been harmonized with the rest of the public service sector and that the allowances had already been reviewed upwards for implementation from 1<sup>st</sup> July 2015 and therefore creating disharmony in the salary structure in the public service and exposing other public service workers to discrimination contrary to Article 27(1)(2) read together with section 5(a)(b) of the Employment Act No. 11 of 2007.**

**(17) THAT the Honourable learned judge failed in law and fact by equating recognition agreements under the Labour Relations Act as equal to or above the Constitutional Provisions under the Constitution of Kenya, 2010 with specific reference to Article 259(II) Constitution.**

**(18) THAT the Honourable learned judge erred in law by assuming and usurping the role of**

*Salaries Remuneration Commission through harmonization of the salaries of teachers within the different cadre.*

*(19) THAT the Honourable learned judge erred by taking into account the Teachers Service Commission Secretariat staff terms and conditions as proof of disparity of revenue allocations which was outside the scope of the adjudication and or pleading before the Court.*

*(20) Alternatively, the Honourable learned judge erred by turning the “economic dispute” into an issue of dispute between Teachers Service Commission Secretariat’s terms and conditions and (teachers) in general.*

*(21) THAT the Honourable learned judge erred by failing to distinguish the distinct role of Teachers Service Commission as employer and thereby merging the union members as staff of Teachers Service Commission so as to justify the award.*

*(22) THAT the Honourable learned judge erred failing to apply its mind to the constitutional principles.*

*(23) THAT the Honourable learned judge erred by departing from the doctrine of precedence.*

*(24) THAT the Honourable learned judge erred by failing to deliver any reasoned judgment in line with established principles.*

*(25) THAT the Honourable learned judge erred in failing to take into consideration the growth of the economy as projected in the Treasury Report and the expert evidence tendered thereof.*

*(26) THAT the Honourable learned judge erred by failing to take into account judicial notice of matters of common notoriety affecting the national government namely – Budget Cycle Process.*

In the written submissions and highlights by the Attorney General, those grounds were narrowed down to six (6) as follows;

*(a) whether Superior Court had jurisdiction to hear and determine the petition, specifically invoking section 15 of the Employment & Labour Relations Act; and turning the dispute to an ‘economic dispute’*

*(b) whether it is fiscally sustainable, sound and prudent to effect the payments contemplated by the impugned judgment without abusing and violating the constitutional safeguards of the national government budget and the budget making process.*

*(c) whether it is fiscally sustainable, sound and prudent to effect the payments contemplated by the impugned judgment, without violating the constitutional principles of reverence of the separate organs and institutions of government*

*(d) whether the perception, appreciation, analysis and application of the expert witnesses evidence was properly applied and the probative value thereof in the final judgment of the Superior Court*

*(e) whether the honourable court applied the facts and the law in accordance with the cardinal tenet and principle of stare decisis factors (and/or omitted making of factual findings) in the course of processing the petition, leading to its final decision.*

In summary, apart from supporting the TSC on the issue that the trial court lacked jurisdiction, the AG urged us to consider that the decision of the trial court was not sound and implementable based on its fiscal unsustainability and that the implementation of the decision would be an affront to the budget making process enshrined in the **Constitution**.

32. **SRC** in its appeal no. 195 of 2015 raised sixteen (16) grounds of appeal most of which were similar to the **AG**'s and which were covered by the **AG** in his submissions. The remainder of the grounds were argued together, the substantive ground of appeal by the **SRC** being whether **SRC**'s advice was binding on **TSC** considering **SRC**'s constitutional role and statutory mandate in setting and determining salaries and allowances.

33. Counsel for the parties canvassed their grounds at length and following the conclusion of the submissions by the respective counsel, the following are some of the pertinent issues for this court's determination arising out of the appeals as consolidated:

*(a) jurisdiction of the Employment & Labour Relations Court and the handling of the dispute as an economic dispute.*

*(b) the role of SRC vis-à-vis TSC under the Constitution*

*(c) whether the judge considered the constitutional budgeting process*

*(d) whether the 50-60% award was justified in the circumstances*

34. Concerning jurisdiction, the appellants submitted that the trial judge did not have jurisdiction to proceed in the manner that he did leading to the impugned judgment. Mr. Ngatia on behalf of **TSC** was emphatic in his submission that the trial judge erred in invoking **Section 12** of the **Industrial Court Act** and did not have jurisdiction to determine what the trial judge termed an economic dispute as the same had not been pleaded. Learned counsel faulted the consent recorded by the judge on 14<sup>th</sup> January, 2015 which formed the basis of compromising the Petition and converting it into an economic dispute. To reiterate this point, counsel pointed out that an application was made by **TSC** on 22<sup>nd</sup> January, 2015 to set aside the purported consent order which application was heard and its ruling reserved to the end of the determination. Learned counsel further argued that the determination by the trial judge erroneously arose from the judge's purported framing of issues and that in any event salary determination issues were constitutionally reserved to be determined by **TSC** upon advice by the **SRC** pursuant to **Article 230 (4) (b)** as read together with **Article 259 (11)** of the **Constitution**. Counsel added that **SRC** and the National Treasury had declined **TSC**'s proposed salary increments on account of unsustainability.

35. Moreover, it was **TSC**'s argument that the existing procedures for resolution of the industrial dispute were not followed and their Petition before the trial court was limited to the court's determination of the lawfulness of the industrial action. According to **TSC**, negotiations were ongoing with the unions pursuant to the Employment & Labour Relations Court's earlier rulings in Petition Nos. 22 and 23 of 2013 when the unions suddenly disengaged and proceeded to call for a strike by its members which strike was in any event unlawful and/or illegal contrary to the provisions of **section 76** of the **Labour Relations Act** for want of the statutory seven (7) day notice, the strike notices having been received by the **TSC** on 27<sup>th</sup> and 31<sup>st</sup> December, 2014.

36. On the manner in which the proceedings continued before the trial judge, it was counsel's argument that provisions of **Part VIII** of the **Labour Relations Act** relating to dispute resolution and in particular reporting of a trade dispute to the Minister for conciliation had not been adhered to. In the premises, there had been no conciliation of the trade dispute as to warrant its referral to the Employment and Labour Relations Court for adjudication as anticipated in **Section 73** of the **Labour Relations Act**.

Mr. Ngatia submitted that the trial judge could not sit as a conciliator of the dispute. Counsel relied on **Section 66** of the **Labour Relations Act** which sets out the persons who can be appointed to conciliate in trade disputes by the Minister and said they were, a public officer; any other person drawn from a panel of conciliators appointed by the Minister after consulting the Board or a conciliator from the conciliation and mediation commission. Counsel was equivocal that a judge of the Employment and Labour Relations court was not such a recognized conciliator.

37. On the trial judge's reliance on **Section 15** of the **Employment and Labour Relations Court Act** on

alternative dispute resolution mechanisms as read with **Article 159(2)(c)** of the **Constitution**, it was Mr. Ngatia's submission that the alternative dispute resolution mechanism contemplated is alternative to the court process. If I understood Mr. Ngatia well, his argument was that no form of alternative dispute resolution mechanism can occur within the court process.

38. **TSC's** position was affirmed by the learned **AG**. The **AG** argued that the trial court erred in law to award the salary increment devoid of jurisdiction considering the express provisions of the Constitution governing wage determination and awards within the public sector. It was the **AG's** further submission that the **Constitution** provides for both substantive and procedural legal framework for determination and award of salaries for public officers who include teachers, which must be exhausted before a dispute can be ripe for court's determination.

39. **TSC's** and **SRC's** submissions proceeded on three premises: firstly, that by dint of a holistic harmonized reading of the **Constitution**, the salary determination for teachers is a preserve of **TSC** established pursuant to **Article 237** of the **Constitution** which mandate is only exercisable upon the advise of **SRC** pursuant to **Article 230(4)(b)** as read with **Article 259(11)**. Secondly, in the absence of exhausting the statutory methods of resolving a dispute, then the court will be acting without jurisdiction by allowing itself to be seized of the dispute and thirdly, that the honourable trial judge expanded the scope of the dispute contrary to the pleadings filed by **TSC**.

40. **SRC** through its learned counsel Mr. Nowrojee associated himself with submissions of his learned colleagues Mr. Ngatia and the honourable Attorney General on this issue.

41. In reply, Mr. Muite SC referred us to the background of the dispute tracing the historical development of teachers salary issues. Counsel also referred us to the recognition agreement between **TSC** and the unions and the subsequent establishment of Committees of the Commission under **Section 13(1)** of the **TSC Act** to enable **TSC** carry out its mandate. Mr. Muite referred to **Section 37(3)** **TSC Act** and submitted that remuneration and allowances for teachers and such terms and conditions were a preserve of the Committee established under **section 13(5)** of the Act in consultation with **SRC**.

42. In affirming the jurisdiction of the Employment and Labour Relations Court, counsel referred us to **section 3** of the **Employment and Labour Relations Court Act** which sets out the principal objective of the Act as facilitating just, expeditious, efficient and proportionate resolution of disputes governed by the Act. Under **section 3(3)** of the Act the parties and their representatives shall assist the court to further the principal objective and to that end to participate in the proceedings of the court and to comply with directions and orders of the court, added counsel. Mr. Muite SC submitted that this principal objective was in consonant with **Article 159** of the **Constitution**.

43. On the consent recorded by the trial judge on 14<sup>th</sup> January, 2015 and disputed by **TSC**, Mr. Muite SC took us through the proceedings before the trial judge from the time the petition was filed together with the motion for interim reliefs on 8<sup>th</sup> January, 2015. Counsel pointed out that a high level meeting and deliberations took place before the trial judge, with the parties' officers directly without the participation of counsel at the initial stage. The meeting took place for about eight hours continuously during which time the parties' representatives made presentations before the trial judge.

Eventually the parties' advocates were allowed to make speeches before the judge.

It is apparent from the record that there was participation by the parties through their officers and advocates. A common thread from those proceedings as highlighted by Mr. Muite SC is that parties appreciated the crisis that was occasioned by the then ongoing strike and expressed willingness to resolve the dispute with the judge's intervention to unlock the deadlock. At that point in time it appears, the issue was how to end the strike by the unions.

44. Mr. Muite SC submitted that at that stage of the proceedings, the court was not acting as a conciliator but merely a facilitator and the overriding objective was to solve the dispute. Learned counsel mentioned in passing that his client had responded to the Petition through a replying affidavit filed in Petition No.74

of 2015 by the Kenya Parents Association which had been filed in the Employment and Labour Relations Court presided over by Justice Abuodha and that the existence of the Petition No.74 of 2015 was brought to the trial judge's attention. The responses were therefore subsumed into the claim filed by the unions jointly and defended by the present appellants leading to the impugned judgment.

45. On the issue of fiscal sustainability of the award of salary increment to teachers, Mr. Muite SC submitted that **TSC** had made an offer or proposal for the 50-60% increment on 9<sup>th</sup> September, 2014 and there was no evidence to demonstrate what had changed at the time of the proceedings barely six months later.

46. Concerning the role of **SRC** in determining the awards, counsel argued that under **Article 237** of the **Constitution** establishing **TSC**, there was no mention of **SRC**. Counsel contrasted this with the provisions of **Article 166** of the **Constitution** on appointment of the Chief Justice, Deputy Chief Justice and all other judges where the appointments are to be made in accordance with the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly in the case of the Chief and the Deputy Chief Justice.

47. On the issue of jurisdiction, Ms Guserwa learned counsel for **KUPPET** submitted that the Employment and Labour Relations Court had appropriate jurisdiction under **Article 162(2)(a) & (3), section 15** of the **Employment & Labour Relations Court Act** and **section 73** of the **Labour Relations Act**.

48. The Employment & Labour Relations Court also has jurisdiction to adjudicate disputes arising from referrals. The referrals arise out of failure to resolve the dispute after conciliation. This is in terms of **section 73** of the **Labour Relations Act. Section 15** of the Labour Relations Act which was relied on by the judge to craft a consent between the parties on 14<sup>th</sup> January, 2015, which consent is vehemently disputed by **TSC**, deals with Alternative Dispute Resolution Mr. Ngatia submitted that under **section 15** the jurisdiction of the court is narrow and defined and it is first, to refuse to determine the dispute before it and to compel parties to attempt settlement by virtue of **section 15(2)** and second and more pro-active is under **section 15(4)** where the court stays proceedings before it and refers the same to conciliation, medication or arbitration which is in any event alternative to the court process. Any attempt by the court to take over alternative dispute resolution mechanism under **Article 159(2)(c)** of the Constitution was unlawful and a violation thereof, concluded Mr. Ngatia for **TSC**.

49. Mr. Ngatia further referred us to **section 20(1)(b)** of the **Labour Institution Act Part III** thereof, now repealed by section 31 of the **Employment and Labour Relations Act**. The said repealed provision mandated the court to refer the dispute to a conciliator once it became apparent that the same ought to have been referred to conciliation. Alternatively, with the consent of parties and if expedient to do so, continue with the proceedings with the Court sitting as a conciliator in which case the Court may only make an order that a conciliator would have been entitled to make.

50. The unions were adamant that the dispute was ripe for court determination having remained unresolved for long. Mr. Muite SC brought to our attention the certificate of unresolved Dispute of a Trade Dispute dated 27<sup>th</sup> March, 2013 by J. N. Makaa, a conciliator. Though the dispute did not relate to the petition before the trial court and the same was issued before commencement of proceedings currently before us, Mr. Muite SC urged us to look at the situation in its proper context with the historical background. Counsel indicated that despite court rulings requiring parties to negotiate and enter into a collective bargaining agreement, the same had not borne fruit despite the lapse of time and many meetings. In the circumstances, any further reference of the dispute for conciliation would not yield any results, according to senior counsel.

51. Further, the Unions contend that it is **TSC** that has always been instituting court proceedings against the Unions and it was in bad taste for the **TSC** to now turn around and dispute the court process. The Unions pointed out that it was important for the court to consider that on the strength of the proceedings on 14<sup>th</sup> January, 2015, the strike was called off without any concrete offer from **TSC** and on the basis of good faith and the proceedings before the court. According to the Unions therefore, it was in bad faith

that the strike having been called off on the strength of the court intervention TSC would seek to renege from that position.

### **JURISDICTION – DETERMINED**

52. The main contention, in my view, is the manner in which the trial judge conducted the proceedings to the impugned judgment and whether the judge had the necessary legislative backing. In particular, the issue is whether the judge could conciliate, facilitate and adjudicate all at once and compromise the petition by subsuming it into an economic dispute and eventually make the determination pertaining to the increment of the basic salary component of the teachers salary as he did in his judgment. The jurisdiction of the court under **section 12** of the **Industrial Court Act** is well defined. It includes the hearing and determination of disputes referred to it in accordance with **Article 162(2)** of the Constitution. The disputes include those between employer and trade unions and disputes relating to the registration and enforcement of collective agreements.

53. It is trite law that jurisdiction is everything. Once the same is raised by a party or by the court, the same must be decided forthwith as the court has no power to take any further step. This position was well set out in this court's celebrated case of **Owners of the Motor Vessel "Lilian S." V. Caltex Oil**

**(K) Ltd [1989] KLR 1** wherein Nyarangi, JA stated;

***“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

More recently our Supreme Court held that a court's jurisdiction flows from either the Constitution or legislation or both, as they held in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR**;

***“A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court can only exercise jurisdiction as conferred by the Constitution or other law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... it cannot expand its jurisdiction through judicial craft or innovation.”***

Parties to a dispute can confer no jurisdiction on the court by their consent or otherwise. This position was ably reiterated by the appellants herein. The consequences of improper exercise of jurisdiction is to have the proceedings and the resultant decision declared a nullity. Courts have not been shy to adopt such a position as was held in **Narok County Council v Transmara County Council [2000] 1EA 161** by this court.

54. The primary source of jurisdiction for the Employment and Labour Relations Court is **Article 162(2)** of the **Constitution, 2010**. The **Constitution** under **Article 259** provides for the manner of construing this **Constitution**, which is in a manner that advances the rule of law, promotes the purposes values and principles of the **Constitution** and permits the developments of law while contributing to good governance. I am also guided by **Article 159** which gives the guiding principles in exercising judicial authority. The purpose for which the Employment & Labour Relations Court was established was to hear disputes relating to employment and labour relations. Pursuant to this Constitutional backing, there was enacted the **Employment and Labour Relations Court Act** with the objective to hear and determine disputes relating to employment and labour relations. The principal objective of the Act is to facilitate the just expeditious efficient and proportionate resolution of disputes under the Act. It is common ground that the dispute as filed under the Petition which formed the basis upon which the trial judge was seized of the matter was rightly before the court.

55. The trial judge was mindful that he had to have the necessary legal backing before embarking on his determination of the matters before him. In that pursuit he invoked **Section 15(1)** of the **Employment**

and Labour Relations Court Act; Section 15(1) provides as follows:-

***“Nothing in this Act may be construed as precluding the court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.”*** (Emphasis mine).

The said Article 159(2)(c) provides as follows:-

***“In exercising judicial authority, the courts and tribunals shall be guided by the following principles –***

***[c] Alternative forms of dispute resolution including reconciliation mediation, arbitration and traditional dispute resolution mechanisms shall be promoted ----” emphasis mine***

But was the court itself entitled to resort to any appropriate means of dispute resolution? The word ‘including’ as used in **Article 159(2)(c)** of the **Constitution** is derived from the word ‘includes’ which is defined under **Article 259(4)(b)** to mean “includes but is not limited to”.

56. I appreciate that the judge said he was undertaking conciliation. The respondents said it was facilitation. No matter. Owing to the prevailing circumstances and with the background that the dispute did not occur in a vacuum, the overriding objective was to unlock the dispute in the interim pending the determination of the legal issues. The urgency with which TSC had moved to court called for a quick resolution. Negotiations having broken down between parties, such negotiations having been ongoing for over two years, it was not expedient for the trial judge to once again refer the dispute for conciliation. I would state that the judge adopted an appropriate means of resolving the dispute by encouraging the participation of parties. I accordingly find that the trial judge had general jurisdiction as a matter of law, the dispute falling under **section 12** of the **Employment & Labour Relations Court Act**. He might well have referred the dispute to alternative dispute mechanisms under **Articles 159 (2) (c)** of the **Constitution** and **Rule 3** of the **Mutunga Rules**, but it appears, and not wrongly in my view, that the judge considered that time was of the essence and a resolution had to be found. I would disregard procedural technicalities and not fault the trial judge, in any event what party was prejudiced by the manner in which the trial court proceeded? None in my view.

57. Related to the issue of jurisdiction is the issue of the status of the Petition and the application dated 22<sup>nd</sup> January, 2015 to set aside the consent order of 14<sup>th</sup> January 2015. TSC contends that its dispute was by way of Petition seeking specific orders together with the application dated 22<sup>nd</sup> January 2015 and the same was never resolved by the trial judge. This is buttressed by their argument that the trial court radically changed the case into an economic dispute and proceeded on a false premise that the petition had been compromised following the consent before court on 14<sup>th</sup> January 2015. TSC is aggrieved by the issue framed by court upon which the court made its determination. Counsel referred us to judicial decisions to the effect that judges can only decide cases based on issues pleaded or placed on record by parties. He cited **Nairobi City Council v Thabiti Enterprises Ltd. [1995- 1998] 2 EA 23, Captain Harry Gandy Caspar vs Caspar & Anr Charter Ltd [1956] 23 EACA 139 Kenya Commercial Bank Ltd. vs Osebe [1976-1985] EA 766**. TSC further reiterated its denial of the consent stating that there was no consensus on the file compromising the suit.

58. As I have stated above, this was not a dispute in normal circumstances, there was a lot of public anxiety and impatience and the judge had to act to not only forestall the escalation of the dispute but also retain the integrity of his constitutional duty as a judge of the Employment & Labour Relations Court. Whereas the Petition related to the lawfulness of the strike by the teachers, TSC also sought an order to compel the Unions to resume negotiations with the aim of finalizing the Collective Bargaining. In addition, the Petition under prayer (e) sought any other order that the court may deem fit and just to grant. Even in the absence of such a prayer, the trial court has powers under **Section 12(3) (viii)** of the **Employment & Labour Relations Court** to grant any other appropriate relief as the court may deem fit to grant.

59. Whereas the Petition was couched in terms of seeking orders compelling teachers through their Unions to resume teaching and negotiations on the Collective Bargaining Agreement pursuant to the recognition agreements and previous court orders in Petition Nos. 22 and 23 of 2013, it was apparent that the Petition by **TSC** was similar to past petitions where the Petitioner never sought to address the root cause of the strikes. The negotiations had stalled for over two (2) years and there was no end in sight owing to the failure by **TSC** to table its counter offer for reasons advanced elsewhere. The trial judge considered that at that rate resumption of negotiations was not only destined for failure but also there were no clear timelines. Indeed from the record, the **AG** had requested for a further 90 days to consult his clients and the **SRC** was non committal on the outcome of job evaluations which were expected to take approximately 15 months with the work plan on implementation to be devised thereafter. National Treasury on its part was reading from the script of no money being available.

60. The trial judge appears to have been overzealous to end the perennial cause of teachers strikes and thereby ignored the Petition that started the proceedings and framed issues for determination which were outside the Petition. If his action was justified in the circumstances, the validity or otherwise of the eventual award is a different matter, as is discussed in the lead judgment. The learned judge in his wisdom decided to unlock the salary dispute which was the cause of the strike, as well as dealing with the effects manifested through the industrial action by the Unions and its members. Interestingly following the timelines imposed by the orders of 14<sup>th</sup> January 2015 all the parties including **SRC** and the Treasury through **AG** managed to obtain their reports within the those timelines. Similarly, none of the appellants or its witnesses was willing to table an offer, **TSC** having disputed the 50-60% offer. Any negotiations were unlikely to conclude or yield any meaningful outcomes in the absence of court's intervention, thought the judge, and on my part I would only fault the judge if technicalities, and not substance were to carry the day. As already stated the validity of the trial judge's award especially of his findings on the role of **SRC**, fiscal sustainability of the award of salary increment at 50/60% and the budgeting process, is a different ball game.

61. It therefore follows that even though the trial judge proceeded in the manner he must have thought would best resolve the dispute and end teachers' strike; he clearly ignored the fact that the extent of his jurisdiction was defined by both the Constitution and the relevant statutes and he therefore could not lawfully assume jurisdiction that was not donated to him by either the Constitution or Statutes. Despite his best intentions and my having appreciated his endeavours to resolve matters concerning the strike and getting children going back to schools, nothing I have said above is to be understood to mean that the trial judge had jurisdiction to undertake conciliation as an alternative dispute resolution mechanism. He had none. And my appreciation of his efforts cannot confer jurisdiction on the learned trial judge. Conciliation is a task reserved for the persons defined in **Section 66** of the **Labour Relations Act**. A judge cannot be both judge and conciliator simultaneously.

### **ROLE OF SRC – DETERMINED**

62. I have no doubt whatsoever in my mind that these three appeals turn on the role of **SRC**, each one of the issues regarding salary increment can be resolved on a determination of the role of **SRC** in its role of determining salaries and wage related issues. In any event all the parties were agreed, in whichever way any of them looked at the dispute, and I am similarly persuaded, that the “*elephant in the room*” was the basic salary. It is for that reason that I now proceed to make my determination on **SRC**'s role. On this the trial court found;

***“The court therefore reiterates that TSC has the mandate to set and revise the remuneration of teachers upon advice by SRC. The court further restates that TSC is not bound by the advice of SRC in setting and reviewing remuneration of teachers. A plain and holistic interpretation of Article 230(4) as read with Article 259(11) of the Constitution supports this finding by the court. TSC needs only prepare a budget and approval (sic) by the National Assembly. However TSC must take into consideration the advice by SRC without necessarily being bound by it ----”***  
(emphasis provided)

Elsewhere in his judgment the learned trial judge found and held;

***“It is the court’s considered view that TSC is not bound by the advice of SRC on the matter and only TSC has the constitutional and statutory mandate to conduct a job evaluation exercise of teachers. SRC has an advisory role on both the determination of basic salary and benefits payable to teachers, including the conduct of a job evaluation exercise ---”*** (my underlining)

63. And so was the trial judge right in his such finding? To answer this let us start at the beginning, to wit, the creation and the mandate of **SRC** by the **2010 Constitution**.

**Article 230(1) Constitution**, states;

***“There is established the Salaries and Remuneration Commission.”***

**Article 230(4) Constitution** outlines the functions of **SRC** as regards public officers of whom teachers are as per **article 260** of the **Constitution** when it states;

***“The powers and functions of the Salaries and Remuneration Commission shall be to –***

***a) set and regularly review the remuneration and benefits of state officers; and***

***b) advise the national and county governments on the remuneration and benefits of all other public officers*** (emphasis mine)

64. On its part **section 11** of the **Salaries and Remuneration Commission Act** sets out the **SRC’s** functions as;

***“(a) inquire into and advise on the salaries and remuneration to be paid out of public funds;***

***(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;***

***(g) make recommendations on the review of pensions payable to holders of public offices; and***

***(h) perform such other functions as may be provided for by the Constitution or any other written law.”***

65. Those functions in the enabling statute flow from the **Constitution** at **Article 230(4)** which enumerates the powers and functions of **SRC** as being to;

***(a) set and regularly review the remuneration and benefits of all state officers; and***

***(b) advise the national and county governments on the remuneration and benefits of all other public officers***

In the discharge of its mandate the **Constitution** obliges the **SRC** to mandatorily take into account principles as set out under **Article 230(5)** of;

*(a) the need to ensure that the total public compensation bill is fiscally sustainable;*

*(b) the need to ensure that the public services are able to attract and retain the skills required to execute their functions;*

*(c) the need to recognize productivity and performances; and*

*(d) transparency and fairness.*

66. No valid salary and/or benefit of a state or public officer, as appropriate, shall ensue from a process that ignores the roles of **SRC** as I have reproduced them above. And the trial judge ignored them, save for mentioning them in his judgment, in passing so to say. The trial judge, as shown in paragraph 62 above, was categorical that **SRC's** input in the determination of teachers' salaries, benefits and even in the Collective Bargaining process was peripheral and he was clear in his mind that any advice **SRC** gave could be taken or declined as the same was not binding on the appellant. That was a fundamental misdirection and by which the entire exercise from the 8<sup>th</sup> of January, 2015 through to the 30<sup>th</sup> June, 2015 was invalidated. The giving of advice on remuneration was one of the reasons the **SRC** was created by the **Constitution, 2010**. The role of **SRC** is not cosmetic; it is mandatory. It is not only mandatory, it is to be sought and obtained prior to taking any action that requires that advice. And that advice is binding as per the requirements of **Article 259(11)** of the **Constitution** when it provides as hereunder;

*“(11) If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.”* (emphasis

provided).

67. The trial judge found for himself that **SRC's** advice did not bind **TSC** in matters salary and **CBA**. With that finding the trial judge cast out of the window **SRC's** constitutional duty to manage the country's compensation bill to keep it fiscally sustainable, a constitutional requirement of **article 230(5)**. To the extent that he contradicted the **Constitution** and relegated it to a place far below the **TSC Act**, the trial judge erred irredeemably.

68. **TSC**, a Commission just as the **SRC** is, is established under **article 237(1)** of the **Constitution** to carry out the functions; under **article 237(2)**, being;

*(a) to register trained teachers;*

*(b) to recruit and employ registered teachers*

*(c) to assign teachers employed by the Commission for service in any public school or institution;*

*(d) to promote and transfer teachers;*

*(e) to exercise disciplinary control over teachers; and*

*(f) terminate the employment of teachers*

And **TSC** shall, as per **article 237(3)**;

*(a) review the standards of education and training of persons entering the teaching service;*

*(b) review the demand for and the supply of teachers; and*

***(c) advice the national government on matters relating to the teaching profession.”***

69. The TSC Act at **section 37(3)** gives the manner through which registered teachers employed by the TSC may have their terms and conditions of service determined. It provides;

***“37(3) The registered teachers recruited by the Commission under Article 237(2) (b) of the Constitution shall serve under such terms and conditions as the committee established under section 13(5) of this Act in consultation with the Salaries and Remuneration Commission may determine.”***

So that the consultative committee established under **section 13(3)** of the TSC Act must consult with the SRC on matters of salaries and benefits of teachers. That committee has representation from SRC and the National Treasury but it remains the committee of TSC and it does not become, by that representation, part of the SRC and the National Treasury so as to obviate the need for TSC to seek and obtain the prior advice of SRC before setting salaries and benefits for teachers.

The requirement for consultation set out in **Article 259(11)** is repeated under **section 37(5)** of the TSC Act, just to emphasize the need for advice/consultation before setting salaries and benefits.

70. There was fair submission from the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the unnecessary of subjecting TSC to SRC’s advice as that would be to demote TSC’s standing in the **Constitution**. True, **article 249(2)** of the **Constitution** gives independence to each **Commission** when it provides;

***“249 (2) The Commissions and the holders of independent offices –***

***(a) are subject only to this Constitution and the law; and***

***(b) are independent and not subject to the direction or control by any person or authority.”***

to which I say; that the carrying out by SRC of its constitutional mandate of advising on salary, benefits and national compensation bill sustainability is not and cannot be construed to be exercising superiority over a fellow Commission. Rather, it is that each Commission has to carry out its constitutional mandate and if that exercise touches on the mandate of another Commission, then the roles can only be complementary at best and not otherwise.

71. The relationship between commissions should be one of upholding their independence but appreciating that many times they are inter-dependant. The Supreme Court of this land has clarified matters in that regard **in the matter of the Interim Independent Electoral Commission [2011] eKLR**, when it stated;

***“While bearing in mind the various commissions and independent offices are required to function free of subjection to “direction or control by any person or authority”, we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the commissions and independent offices, in carrying out their functions are not to take orders or instructions from organs or persons outside their ambit. These commissions or independent offices must however, operate within the terms of the Constitution and the law; the independence clause does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design configured to the execution of their mandate and performance of their functions as prescribed in the Constitution and the law.”***

And it must be noted that part of the mandate of TSC is to set salaries of teachers but only on the advice of SRC. And so the Supreme Court in the above authority continued;

***“For due operation in the matrix, “independence” does not mean “detachment”, “isolation” or “disengagement” from other players in public governance. Indeed, for practical purposes, an independent commission will often find it necessary to co-ordinate and harmonise its activities***

*with those of other institutions of Government, or other commissions so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of Government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question ... The moral of this recognition is that commissions are not to plead “independence” as an end in itself; for public governance tasks are apt to be severely strained by possible “clashes of independence.”*

72. Provisions of a **CBA** concern terms and conditions of service and involve money issues in addition to performance of duty, evaluation thereof and of necessary competences. Having seen, under **Article 230** of the **Constitution** what the functions of **SRC** are, there can be no doubt that **SRC** has to be involved in its advisory role in negotiations on the conclusion of a **CBA** involving public officers. The manner and style of how that is to be done is not primary, what is of paramount importance, to my mind, is that **SRC’s** advice has to be sought, and once obtained, it is binding.

In conclusion therefore I find and hold that the prior advice of **SRC** had to be sought before **TSC** could make an offer on basic salary to the Unions. That advice from **SRC** binds **TSC**.

73. Having found that these appeals would be determined on how the advice of **SRC** is understood and exercised; and having given above my understanding of the Constitution and relevant statutes on the role of **SRC**; and having found that the learned trial judge completely misapprehended the role of **SRC** in advising on the remuneration of teachers and the binding nature of that advice, I find no need to discuss the other grounds of the appeals in any depth, as in any event those have been discussed by the judgments of my brother and sister judges herein, with which findings I totally agree with nothing more to add. In the result I find merit in the appeals herein and would order the same allowed.

And even as I so order, I would state that the Unions’ legitimate claims must be constitutionally and procedurally processed. The need to retrace all the constitutional and statutory steps to an eventual end of a valid salary increment and a proper negotiated **CBA** is an urgent one.

74. The only other thing I would wish to exercise my judicial mind on is the issue of costs which was the reason for the cross-appeal by the respondents and the motion for amendment by the appellant. The usual course is that costs follow the event. However, the present was not the ordinary suit. This was a case where employees through their Unions were dragged to court as they advanced their constitutional rights to better pay. Right there the case assumed enforcement of constitutional rights status and national public interest see **Mumo Matemu v Trusted Society of Human Rights Alliance sc Civil Application no. 29 of 2014**.

75. Awarding of costs is a judicial exercise at any rate. The nature the proceedings before the trial court and here took, that of right to fair remuneration and the interpretation of the constitutional mandate of **SRC** in advising on remuneration, would oblige me to order, which I hereby do, that each party bears its own costs.

The final orders of the court are those proposed by the presiding judge, Githinji JA.

**Dated and delivered at Nairobi this 6<sup>th</sup> day of November, 2015.**

**P. M. MWILU**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**

## JUDGMENT OF F. AZANGALALA J.A

### Background

[1] On 22<sup>nd</sup> September, 2015 the Court directed that these three appeals, being **Civil Appeals Numbers 195 of 2015, 196 of 2015 and 203 of 2015** be consolidated and heard together for convenient disposal since the main issues in dispute in the three appeals arise from the same judgment and save for their roles, the parties are common. The court further directed that proceedings be taken in Civil Appeal No. 196 of 2015.

The dispute between the parties is hotly contested and has some history to it. It is not clear when the cause of action arose but it is apparent that **Teacher's Service Commission** (hereinafter "TSC") on the one hand and **Kenya National Union of Teachers** (hereinafter "KNUT") and **Kenya Union of Post Primary Education Teacher's Union** (hereinafter "KUPPET") on the other hand, have been in and out of court over the remuneration and benefits of teachers who are members of KNUT and KUPPET at various levels. The immediate cause of the current dispute arose this way.

[2] The officials of KNUT and KUPPET issued strike notices on 27<sup>th</sup> and 31<sup>st</sup> December, 2014 respectively. On 5<sup>th</sup> January, 2015 the notices took effect and members of the unions withdrew their labour as teachers thereby grinding to a halt teaching in public schools.

### TSC's Petition

The strike triggered the filing of a petition by TSC at the court below. TSC sought a declaration that the strike was unprotected, illegal and null and void. It also sought a prohibitory injunction restraining the unions from continuing with the strike and an order that the latter resume negotiations to conclude a collective bargaining agreement (hereinafter "C.B.A.")

### Notice of Motion within the Petition

[3] Appurtenant to the petition, TSC lodged a Notice of Motion under a certificate of urgency, seeking a temporary prohibitory injunction restraining KNUT and KUPPET and their members from continuing with the strike pending the hearing and determination of the Notice of Motion and the Petition. Also prayed for was a declaration that the strike was unprotected and consequently illegal, null and void. TSC relied upon some ten (10) grounds in seeking those reliefs. The principal grounds however, were that the strike had no basis in law and offended the provisions of the **Labour Relations Act 2007(LRA)**; that there existed no legitimate trade dispute between KNUT and KUPPET with TSC and that the former had refused and/or ignored and/or neglected to negotiate with TSC and execute a C.B.A.

### Proceedings of 8<sup>th</sup> and 9<sup>th</sup> January, 2015

[4] TSC went before the trial Judge *ex parte* on 8<sup>th</sup> January, 2015 who certified the Notice of Motion urgent and set the same for mention on 9<sup>th</sup> January, 2015 for directions in the presence of officials of KNUT and KUPPET. On that date all the parties were represented by counsel who briefly addressed the trial Judge. The record shows that TSC was represented by **Mr. Anyuor**, KNUT by **Mr. Mbaluto** and KUPPET by **Ms Guserwa**. **Mr. Mariaria** represented three officials of the unions.

(5) After the brief statements of counsel, the trial judge made the following order:-

***"The court notes the willingness of the parties to engage in constructive engagement in terms of Section 15 of the Industrial Court Act 2010 and the court directs that the officials of the two unions named in the order of the court of 8<sup>th</sup> January, 2015 and the Officers of TSC in court to day appear before me in chambers at 10.30 a.m. on 14<sup>th</sup> January, 2015 for that purpose."***

The trial Judge further permitted KNUT and KUPPET to file, within 7 days of his order, affidavits in reply to TSC's petition and application.

He also granted leave to TSC to file a supplementary affidavit if it thought necessary within 7 days of service of the replying affidavits. He then directed that the matter be further mentioned on 28<sup>th</sup> January, 2015.

### **Proceedings of 14<sup>th</sup> January 2015**

[6] The record shows that on 14<sup>th</sup> January, 2015, the following individuals appeared before the trial Judge.

- (1) 3 officials and 4 representatives of KNUT;**
- (2) 3 officials and 2 representatives of KUPPET;**
- (3) 3 Commissioners of TSC and its CEO together with 3 lawyers;**
- (4) Cabinet Secretary for Labour and the Commissioner for Labour;**
- (5) The Attorney General together with 2 lawyers and**
- (6) Two officials of SRC.**

The trial Judge then made the following order:

***“The officials named herein above to participate in the proceedings under S.15 of the Industrial Court Act in the Court Chambers for the purpose. The Executive Officer to restrict entry into the court to the said parties only.*”**

After making that order, the learned Judge took brief statements from the following: Senior Counsel **Mr. Muite (“SC Muite”)** who represented KNUT; **Mr. Sitima**, a lawyer for TSC; **Mr. Jaoko** who held brief for **Ms Guserwa** for KUPPET; **Ms Munyi** for the **Attorney General** and **Mr. Sitienei** for SRC.

The record shows that thereafter, the following also addressed the court: Cabinet Secretary for Labour; Chairperson TSC; **Mr. Sossion** for KNUT; **Mr. Misori** for KUPPET, **Mr. Sammy Nyabari**, the Commissioner for Labour; **Mr. Gabriel Lengoiboni** the CEO of TSC and The Chairperson of the Salaries and Remuneration Commission, **Ms Nzomo**. The advocates for the parties again addressed the trial Judge, some more than once. At the end of which the trial Judge made the following orders:

- i. That the parties have agreed to have the economic dispute adjudicated by the court**
- ii. The KNUT and KUPPET will file their memorandum and serve by 19<sup>th</sup> January, 2015.**
- iii. The Employer, (TSC) to file their memorandum and serve on or before the 26<sup>th</sup> January, 2015**
- iv. The Central Planning and Monitoring Unit (CPMU) and SRC to file their report within 10 days from 26<sup>th</sup> January, 2015.**
- v. Meanwhile the unions i.e KNUT and KUPPET call off the teachers strike commenced on 5<sup>th</sup> January, 2015 forthwith.**
- vi. For avoidance of doubt, all teachers resume teaching by Monday 19<sup>th</sup> January, 2015.**
- vii. TSC to undertake not to victimize any teacher/union official/unions who may have participated**

**in the strike including payment of salaries.”**

[7] TSC, appearing aggrieved returned to court on 23<sup>rd</sup> January, 2015 with a Notice of Motion dated 22<sup>nd</sup> January, 2015 lodged under a certificate of urgency seeking two principal reliefs namely; an order staying the said orders pending the hearing and determination of the application and another setting aside the same orders. TSC listed the principal grounds for seeking those reliefs as: the same went beyond the substance of the dispute presented in its petition; the process ordered, offended the Constitution; the orders were made without jurisdiction and infringed on the franchise of other constitutional bodies; that the process diminished the principle of separation of powers; that the resultant orders would affect other parties not joined and that unless set aside the resultant orders would occasion a failure of justice.

[8]. The application was placed before **Nzioki wa Maku, J** who certified it urgent and directed that the same be placed, for directions inter partes, before the trial Judge on 26<sup>th</sup> January, 2015. The record shows that the following appeared before the trial Judge on the appointed date for directions. **Mr. Sitima** and **Ms Ruto** for TSC; **Mr. Chacha Odera** and **Mr. Mbaluto** for KNUT; **Ms Guserwa** for KUPPET; **Mr. Nyamodi** and **Ms Njoroge** for SRC and **Ms Munyi** and **Ms Mbilo** for the Hon. Attorney General.

[9] **Mr. Sitima** was unambiguous that TSC was uncomfortable with the manner the matter was proceeding. In his own words: **“Is the court conciliator or adjudicator or whether the roles can be undertaken simultaneously? ..... We need to adhere to the law in resolving this dispute.”** **Mr. Chacha** and **Ms Guserwa** were disappointed with TSC’s action but requested for time to respond to the application. **Ms Munyi** applied for leave to join the Attorney General in the proceedings given the gravity of the matter. Her application was allowed and the Attorney General was joined as 2<sup>nd</sup> interested party.

[10] After the preceding proceedings which were on a date fixed for directions on the TSC’s application to stay and set aside the orders of 14<sup>th</sup> January, 2015, the learned Judge made the following orders:

***“Upon reading the application by the Applicant/Petitioner (TSC) dated 22<sup>nd</sup> January, 2015 and having heard counsel for the Applicant/Petitioner and the counsel for the Respondent, the court makes the following orders:***

***(i) That the parties fully abide by, honour the consent orders entered into on 14<sup>th</sup> January, 2015 pursuant to conciliation proceedings conducted under the auspices of the court in terms of Section 15 of the Industrial Court Act and Article 159 of the Constitution of Kenya 2010.***

***(ii) That all the issues raised in the Application dated 22<sup>nd</sup> January, 2015 be addressed by the parties and determined by the court during the hearing of the economic dispute filed pursuant to the consent orders of 14<sup>th</sup> January, 2015.”***

#### **Documents filed pursuant to the order of 14<sup>th</sup> January 2015**

[11] Pursuant to the order of 14<sup>th</sup> January, 2015, KNUT and KUPPET lodged their joint memorandum on 19<sup>th</sup> January, 2015. The document set out the background leading to the dispute stating, among other things, that in a consultative committee meeting convened under the Teachers’ Service Commission Act on 9<sup>th</sup> September, 2014 TSC tabled a document christened “working document” in which a basic salary increase of between 50% to 60% was proposed against KNUT’s and KUPPET’s proposal of amended salary increase of between 100% and 150%; that despite attempts by KNUT and KUPPET to have meaningful negotiations on the increase of basic salary and the conclusion of a collective agreement, settlement eluded them and both unions resolved for industrial action at the beginning of 2015; that teachers legitimately deserved an increase on basic salary to, among other things, cushion them against inflation, recognize their special skills and special role in society, motivate them; attract quality personnel and align their salaries with those in other employment sectors.

(a) *The joint memorandum was accompanied by a set of tables containing the union members’*

current salaries and their proposed increased salaries.

(b) The memorandum further contained a proposal to review house allowance upwards and the same be paid at the rate of 50% of the proposed basic pay.

(c) It was further proposed that members of KNUT and KUPPET get leave allowance at a rate equivalent to 1 month's salary. A disturbance allowance at the same rate was also proposed. Also proposed for review was hardship allowance which the unions proposed to be between 30% and 40% of basic salary. A hazard allowance at the rate of 10% of basic salary was also introduced in the memorandum. Also proposed were accommodation, night and entertainment allowances.

(d) Medical allowance was to be reviewed at a proportionate rate of 400%. A new allowance christened "township allowance" was proposed for teachers working in urban areas. A mileage claim was proposed to compensate teachers who use their own motor vehicles and motor cycles to travel on official duties, with those serving in Mandera, Garissa, Marsabit, Isiolo, Samburu, Turkana, West Pokot and Baringo counties getting an extra amount per kilometer. A proposal to increase advances for motor vehicle purchases was also suggested in the memorandum.

(e) In addition to those proposals with a monetary element in them, the unions also proposed an increase in teacher grades for Principal 11 and 1 and Chief Principal 11 and 1 at scales Q, R, S and T respectively. It was further proposed that teachers seeking to further their education take study leave with pay. Related to this benefit was sabbatical leave which was proposed for teachers taking leave to carry out research and other forms of educational development limited to a maximum of six months. Such leave, according to the unions, would be taken with full pay.

(f) The memorandum further made other demands including directing TSC to engage in negotiations with the unions on (1) Advances for purchase of motor vehicles; (2) Salary advance on first appointment; (3) Medical loans and advances; (4) Advances to pay school/university fees; (5) Advances for buying houses or putting up new houses; (6) Sick leave; (7) Employment of E.C.D.E. teachers; (8) Employment of Adult Education teachers; (9) Retirement age Pension Scheme; Class size; Teaching aids.

(g) Other issues which the memorandum contained were: Appointing 1<sup>st</sup> July, 2013 as the effective date of any award, the court would make; Determination of the role of TSC vis – a – vis that of SRC and the capacity of the Government to meet the demands of KNUT and KUPPET.

(h) The memorandum concluded by highlighting the special role of teachers in the development of their charges in not so difficult circumstances and their status in society and recommended that the Government should invest in teachers.

[12] In its response, TSC made a challenge to the purported consent order which was summarily rejected by the court as follows:-

**“122. ) In paragraph 9, it is stated that the court „decreed? to subject the matter to the Alternative Dispute Resolution (ADR) mechanism. Nothing could be further from the truth as the record of proceedings will clearly show. A consent by the parties was recorded by this court.”**

[13] TSC narrated how teacher's salaries had been harmonized with those of the civil service and harmonized allowances paid. On the issue of a C.B.A. TSC stated that a delay had been occasioned by delay in development of Rules of the Remuneration Committee and Code of Regulations. According to TSC, the need to comply with Articles 230(4) and 259(11) of the Constitution also contributed to further delay in concluding CBA. Its efforts to do so without agreement on basic salary were rejected by the unions who instead resorted to industrial action. It was its position that the basic salary increase awaits the job evaluation to be conducted by SRC for all employees in the public sector.

[14] In its response, TSC further stated that it had sought technical guidance from the National Treasury on the unions' demands and the latter had declined to approve the salary increase due to the prevailing economic situation in the country. With respect to allowances however, TSC stated that an increase had been approved for all public servants including teachers.

[15] In the end TSC urged restraint on the part of teachers as the proposed job evaluation is undertaken after which negotiations of an increase of basic salary would be held. To buttress its position TSC exhibited a letter dated 24<sup>th</sup> October, 2014 which in the main reiterated TSC's position. The letter, among other things, underpinned the role of SRC which, in harmonizing public service pay, would take into account principles of equity, fairness, productivity and fiscal sustainability of the public service wage bill as mandated by the Constitution. TSC gave National Treasury's position that no additional budgetary allocation had been made to accommodate the increases demanded by the teachers.

[16]) (a) *TSC stated, on the house allowance element, that an increase had been approved for all public servants including teachers which would take effect on 1<sup>st</sup> July, 2015.*

*(b) On responsibility allowance, TSC stated that the same had been increased by 100% with effect from 1<sup>st</sup> July, 2013 and would only be reviewed after the said job evaluation.*

*(c) On leave allowance, TSC responded that the same would be paid with effect from 1<sup>st</sup> July, 2015 at the same rate as that applicable to other public servants.*

*(d) With regard to hardship allowance, TSC stated that the same was being paid at the rate of 30% of minimum basic salary per grade in terms of Legal Notice No. 534 of 1997 to teachers working in gazetted hardship areas and the rates had been reviewed with effect from 1<sup>st</sup> July, 2015.*

*(e) On hazard allowance, TSC stated that the Government does not pay the same as it is governed by the Work Injury Benefits Act (WBA 2007).*

*(f) On disturbance allowance, TSC responded that the teachers have been paid the same in terms of Legal Notice No. 534 of 1997 at the rate of one month salary where a transfer is to a new District which in TSC's view is reasonable given the proximity between Districts as a result of recent creation of new Districts.*

*(g) With regard to accommodation and night out allowances, TSC contended that the same were paid in terms of Legal Notice No. 534 of 1997 and is at par with the allowances paid to other public officers. The rate had however, been increased to take effect from 9<sup>th</sup> December, 2014.*

*(h) With regard to entertainment allowance, TSC contended that the demand by teachers was not justified as the same would not facilitate the teachers to perform their core function.*

*(i) On mileage allowance, TSC contended that the same was paid to teachers travelling to designated hardship areas and in its view the demand made by teachers was unjustified.*

*(j) On advance for motor vehicle purchase, TSC responded that the same had been accorded all public servants including teachers at a minimum interest rate of 3% p.a.*

*(k) With regard to Medical allowance, TSC contended that teachers have been earning the same in terms of Legal Notice No. 534 of 1997 but the Government had approved a Medical Policy Cover which would replace the allowance. In the premises, according to TSC, the teachers' demand for 400% increase on medical allowance was without basis.*

*(l) With regard to township allowance, TSC contended that the same is not provided to any employee in the public service and was not justified.*

(m) *TSC also addressed other demands made by the unions in their joint memorandum as follows:-*

*On creation of additional grades, TSC stated that it is in the process of reviewing schemes of service and grading of teachers and that the teachers should await that exercise before agitating for revised grades.*

(n) *With regard to study allowance, TSC responded that it already has in place a study leave policy applicable to teachers wishing to pursue further studies.*

(o) *On mortgage policy, TSC contended that a mortgage facility is already in place for all public servants including teachers which facility is available at 3% p.a. interest rate.*

(p) *On the demand regarding ECD teachers and adult education teachers, TSC contended that the same were outside its legal mandate and are subject to other legislative framework.*

(q) *With regard to demand for a Code of Regulations for teachers TSC exhibited a draft of the same in response.*

In all those premises TSC contended that all the demands made by the unions in their joint memorandum had been adequately addressed.

[17] The Attorney General responded to the unions' memorandum by way of an affidavit sworn by **Ms Stella Munyi**, a Chief Litigation Counsel of that office on 20<sup>th</sup> February, 2015. Reliance was placed upon a technical report dated 16<sup>th</sup> February, 2015 prepared by the National Treasury, an institution **Ms Munyi** contended, was charged with the responsibility of formulating financial and economic policies, developing and maintaining fiscal and monetary policies for the Government. The report was signed by a **Dr. Kamau Thugge**, a Principal Secretary at the National Treasury.

[18] The report gave an overview of recent economic performance, growth update, prospects and fiscal risks posed by demands for increase of salary by employees in the public service. The report further laid down the Government's objectives for its fiscal policy and budgetary framework: supporting rapid economic growth and ensuring the debt position remains sustainable while ensuring support for the devolved system of Government. To keep focus on those objectives, the report indicated that growth in salaries and allowances of public service employees be contained, hence the establishment of the SRC under **Articles 230** of the Constitution. SRC was mandated to set and regularly review remuneration and benefits of all state officers and advise the National Government and County Governments on remuneration and benefits of all other public officers. The rationale for the establishment of SRC, according to the report, was to ensure reforms in the remuneration and benefits structure of the entire public structure. SRC was therefore, under **Article 230(5)**, mandatorily required to take account of the following principles:-

*(i) The need to ensure that the total public compensation bill is fiscally sustainable*

*(ii) The need to ensure that the public service is able to attract and retain the skills required to execute its functions*

*(iii) The need to recognize productivity and performance; and*

*(iv) Transparency and fairness.*

[19] The current wage bill, according to the report, exceeded the recommended threshold of 35% of the revenue collected domestically which would increase if the unions' demands were implemented and would also have a spiral effect with other demands being made by other public officers given that SRC had, as at the date of the report, harmonized salaries and allowances for teachers and civil servants. The consequence, according to the report, was that the economy could not afford further unplanned upward

adjustments of salaries for public employees.

[20] On the charge by the unions that the Government is engaged in mega projects and should not complain about their demands, the report explained that the same are co-funded by the Government and its development partners and the projects were expected to grow the economy and thereby increase revenue collection to fund current expenditure including the payment of salaries.

[21] On the charge that corruption should not be a basis to deny the unions their legitimate dues, the report stated that the impact of corruption was exaggerated and in any event efforts to deal with the same cannot automatically lead to availability of resources to pay increased salaries. Nevertheless, according to the report, corruption would continue to be fought by the Government.

[22] The report concluded as follows, so far as material:

**(1) That increasing taxation, which would be inevitable, to increase salaries would increase recurrent expenditures, lead to unsustainable public debt, crowd out private investment and job creation and push prices upwards**

**(2) That pay policy in the public sector should be consistent with the following principles:**

**(i) Pay increases should support efficient delivery of improved public services but not divert funds intended for the public service delivery.**

**(ii) Pay settlements should be affordable ie salary growth should march economic growth.**

**(iii) Public service wage outlays are subject to national budgetary considerations and the proposed increases in teacher salaries would increase inflation and adversely affect efforts to reduce poverty.**

**(iv) Pay increases should be fair equitable and just across the entire public service which would not be achieved if teachers demands alone are permitted.**

**(v) Future adjustment of salary should be linked to performance and productivity and a job evaluation was in the offing thereby underpinning the crucial role of SRC.**

**(vi) The National Treasury had cushioned all public officers including teachers against the cost of living and inflation by implementing recently approved allowances.**

The report was accompanied by numerous tables including those indicating the effect of the proposed teacher demands.

[23] Pursuant to the order of 14<sup>th</sup> January, 2015 the Central Planning and Monitoring Unit (hereinafter “CPMU”) filed a report on 23<sup>rd</sup> January, 2015. The Cabinet Secretary for Labour and Social Security Services filed another report pursuant to an order of the court made on the Attorney General’s application dated 24<sup>th</sup> March, 2015. TSC, SRC and the Attorney General discredited the 1<sup>st</sup> report and urged the trial court to accept the 2<sup>nd</sup> report as containing the accurate position of the financial probity of an increase in the salaries of teachers and were based on relevant changes in the consumer price index.

[24] As it came to be, the trial Judge applied data contained in both reports notwithstanding that one of the authors of the reports disowned the 1<sup>st</sup> report and further notwithstanding that it was not signed.

[25] SRC at the court below submitted thereon as follows:

That the pay increase demanded by the teachers was based on an erroneous date in the 1<sup>st</sup> report which report had not taken into account the fact that between the years 2009 and 2012 salaries for teachers had

been harmonized with those of other employees in the public sector. According to SRC, an erroneous consumer price index had therefore been applied. SRC also made the submission that the education sector does not generate any income and productivity should therefore be measured by actual funds expended and not on the amount of work done. In conclusion SRC submitted that the second CPMU report was constitution compliant unlike the 1<sup>st</sup> report and should have been accepted.

[26] TSC's take on the 1<sup>st</sup> CPMU report was not dissimilar to that of SRC. It explained how the two reports had come to be filed and the basis of replacing the 1<sup>st</sup> report with the 2<sup>nd</sup> report. More specifically, TSC contended that the 1<sup>st</sup> report was based on incorrect data which prompted the filing of the 2<sup>nd</sup> CPMU. TSC therefore sought leave to expunge the 1<sup>st</sup> report which application was declined.

### **Proceedings of 11<sup>th</sup> March, 2015**

[27] When all pleadings were in place and preliminary procedures completed, the trial Judge set 11<sup>th</sup> March, 2015 for the highlighting of written submissions. **Mr. Sitima** and **Mr. Nyamodi** revisited the issue of jurisdiction which they sought to have determined as a preliminary issue.

[28] Before the proceedings of 11<sup>th</sup> March, 2015 the Cabinet Secretary, Labour had on 25<sup>th</sup> February, 2015 filed a bundle of documents which the learned Judge expunged from the record because the bundle had been lodged without the leave of the court and by a non-party to the proceedings.

[29] **Mr. Nyamodi**, who represented the SRC, expressed the view that it was important for the Cabinet Secretary, Labour to participate in the proceedings. After listening to submissions from counsel for the parties, the trial Judge refused **Mr. Nyamodi's** application and ordered the hearing to commence.

[30] **Mr. Muite**, learned Senior Counsel for KNUT, then made his submissions. He contended that the proceedings arose out of a consent order and the belated argument on want of jurisdiction could not be raised then. In Senior Counsel's view, the court clearly had jurisdiction. Counsel further expressed the view that SRC cannot replace CBA and that the trial court could determine the dispute including enforcing labour rights under the Constitution. Learned Senior Counsel further submitted that SRC's role was limited to advising the national and county governments on salaries of public officers but not independent Commissions under the Constitution. In his view, only TSC could negotiate terms of employment of teachers which it recruits but had allowed itself to be overrun by the government and SRC, a situation Senior learned counsel asked the court to normalize. He further contended that efforts by the unions to have a CBA concluded had been frustrated by TSC who would only wake up, when faced with a strike by teachers. In his view SRC was using the issue of job evaluation against the teachers' demands yet it has no mandate to carry out such an exercise.

Learned Senior Counsel made reference to a 50-60% salary increase contained in a document which he said had been tabled by TSC during earlier negotiations with the unions. According to Senior Counsel, the increment tabled was made after due research and survey had been carried out.

In the end **SC Muite** urged the court to make an award in favour of teachers which would subsume TSC's petition.

[31] **Ms Guserwa** was next with her submissions. She too was of the view that the court had jurisdiction to determine the dispute between TSC and the unions. Counsel lamented that despite negotiations spanning a long time a CBA had not been concluded despite directions given previously by the court. Learned counsel too referred to the 50-60% increase proposal made by TSC and deprecated the practice of TSC always rushing to court when the unions resorted to Industrial action only shortly afterwards to sleep. Unlike **SC Muite**, learned counsel expressed the view that SRC role is limited to advising TSC on levels of demands made by unions but could not negotiate, a role exclusively in the purview of TSC, according to counsel. In the end learned counsel submitted that union members were entitled to what they had demanded.

## Proceedings of 17<sup>th</sup> April, 2015

[32] The hearing was then adjourned to 17<sup>th</sup> April 2015. In the interim, on 25<sup>th</sup> March, 2015 the Attorney General applied to expunge the 1<sup>st</sup> CPMU report and leave to have the Cabinet Secretary labour joined in the proceedings. In the end the application for the Cabinet Secretary to join the proceedings was withdrawn and the 2<sup>nd</sup> CPMU report was admitted as part of the record in addition to the 1<sup>st</sup> report whereupon all parties were granted leave to respond to the new report by way of written submissions. The hearing date of the dispute remained 17<sup>th</sup> April, 2015. Come that date, besides **Mr. Anyuor** learned counsel for TSC addressing the court, an order was made granting leave to TSC to file a further reply and written submissions out of time.

[33] **Mr. Anyuor** submitted that TSC's petition remained uncontested by then. He further contended that the dispute between TSC and the unions had not been subjected to conciliation under Section 62 of LRA and no certificate of unresolved dispute had been issued. According to **Mr. Anyuor** whilst negotiations were on going the unions issued a strike notice which, according to learned counsel, was premature thereby rendering the strike unlawful.

On Jurisdiction, learned counsel submitted that the court had jurisdiction to hear and determine employment and labour disputes and matters incidental thereto. However, learned counsel contended that on 14<sup>th</sup> January 2014 parties were engaging in conciliation which was still available as TSC had a constitutional mandate to fix salary on advice of SRC and with concurrence of the National Treasury. Learned counsel therefore urged the court to allow the parties to negotiate and the results thereof be adopted by the court. Counsel expressed the view that **Section 15 of ICA** does not give jurisdiction to the court to determine an economic dispute and that parties were to be bound by their pleadings which for TSC, was its petition. Learned counsel contended that TSC's application which had been filed to set aside the order of 14<sup>th</sup> January, 2015, was uncontested and was for allowing.

On basic salary, learned counsel submitted that on 1<sup>st</sup> July, 2012 teacher's salaries were harmonized with those of civil servants and the increase awarded took effect across the board. Learned counsel further submitted that TSC commenced negotiations on review of salaries and allowances for teachers in 2013 but was, mandatorily required to obtain SRC's and National Treasury's approval which approvals had not been given. Counsel submitted that any upward review of salaries and allowances would take into account the government budgeting cycle to ensure fiscal sustainability of the total wage bill.

Learned counsel further submitted that TSC has no funds of its own and relies on the Exchequer which had not given its approval and was therefore *functus officio* without funds.

[34] **Mr. Sitima**, submitted that the CPMU report was crucial in the determination of the dispute. He too discredited data used in the 1<sup>st</sup> CPMU report and urged the court to apply the data in the 2<sup>nd</sup> CPMU report particularly as it was the replacement of the author himself.

[35] **Ms Ruto**, on his part, urged the court to grant the prayers in TSC's petition as there was no declared dispute by the parties. She further urged that an order be made for the parties to return to the negotiating table as negotiations had collapsed when they were on going. Learned counsel further contended that SRC be left to perform its constitutional mandate to conduct a job evaluation to determine salary payable to teachers. **Ms Ruto** supported her colleagues in discrediting the first CPMU report.

[36] After those submissions, the court despite opposition of the unions allowed three witnesses to testify namely **John Kennedy Monyoncho Maina** (RW 1), **Charles Nyariki Obuki** (RW 2) and **Dr. Geoffrey Mwau** (RW3).

[37] RW1 at the time of his testimony on 17<sup>th</sup> April, 2015 was engaged as an Acting Director in charge of Research, Compliance Policy and Planning at the SRC. His duties included providing economic analysis to SRC in relation to issues of economic growth, remuneration and preparation of policies relating to remuneration and benefit. He contended that before SRC giving advice pursuant to its mandate, it

undertakes economic analysis in time with the principles set out under **Article 230(5)** of the **Constitution** among them sustainability and affordability by the tax payer. In that regard SRC liaises with the National Treasury who are custodians of financial date and control the national purse. Given its position under the Constitution SRC, according to RW 1, has a broad view of what happens in different sectors of the public service and how much is being spent by those sectors on salaries and benefits. RW1 contended that the unions' demands if accepted would translate to pushing the public wage bill to 70% of all government revenue. He further contended that teachers current salaries had been harmonized with those of civil servants and any increase for teachers would also have to apply to civil servants. Any increase, according to RW1, would be considered upon job evaluation being undertaken by SRC and the Public Service Commission (PSC) which was the advice SRC gave to TSC on teachers' demands.

RW 1 explained that a job evaluation for all public servants was in furtherance of the principles of transparency and fairness which SRC is required to promote. On the CPMU reports, RW 1 testified that the 2<sup>nd</sup> report was the reliable one because, unlike the 1<sup>st</sup> one, the appropriate date had been used.

### **Proceedings of 6<sup>th</sup> May, 2015**

[38] **Charles Nyariki Obuti** (RW 2) testified on 6<sup>th</sup> May, 2015. At that time, he was working at the CPMU, undertaking economic analysis, policy development and review, monitoring and evaluation, research on budget implementation, analyzing economic disputes, Collective Bargaining Agreements and related tasks. He testified that the 1<sup>st</sup> CPMU report was an advance draft copy filed to comply with time lines set by the court and was filed before it had been approved and signed. RW 2 admitted that he was one of the authors of the report but was not the one who filed it in court. He contended that, as a team at CPMU, they continued reviewing the report thereby noting errors which they corrected in the 2<sup>nd</sup> CPMU report which was then, after consulting the National Treasury, signed. RW 2 explained the changes in the 2<sup>nd</sup> CPMU report and why they had been made and urged the court to rely upon the same.

### **Proceedings of 22<sup>nd</sup> May, 2015**

[39] **Dr. Geoffrey Mwau** (RW 3) took the witness box on 22<sup>nd</sup> May, 2015. At the time of testifying, he was the Economic Secretary in charge of the Budget and Fiscal Economic Affairs at the National Treasury. His role included advising the Government on all economic policy matters especially the budget. In his view, the demands by teachers, if implemented, would have devastating consequences. In his own words:-

***“It would lead to serious macro-economic instability.... Other sectors would shut down. We would have to heavily borrow. Lead to heavy labour costs and uncompetitive economy or tax people by four times. Economy would be unstable and may be collapse. All would be losers. This would be factured (featured) in capital markets. Exchange rate would go up; capital outflow and economy would not sustain it.”***

RW 3, concluded that the teachers' demands would in the circumstances not be met. On why no budgetary provision for the 50%-60% pay increase for teachers was made, (RW 3) stated that there was no provision for the same and in any event, it would not be sustainable.

[40] On conclusion of the evidence of RW 3, counsel for the Attorney General, and the unions made brief oral submissions reiterating their client's respective positions.

### **Highlights of Judgment**

[41] One of the cornerstones of the judgment which ensued after those proceedings was the finding that part of the proceedings had been conducted under Section 15 of the Industrial Court Act (ICA). The learned Judge stated at paragraph 9 of his judgment as follows:

***“9. A guided dialogue ensued with a view to broker a truce and get the children back to schools.***

*It is important to note that the dialogue was at the highest level with the Chairlady and CEO of TSC on the one hand and the Secretary Generals of the unions on the other hand. The input by the Cabinet Secretary for labour and the SRC was invaluable.”*

[42] After the “guided dialogue,” the learned Judge stated as follows in paragraph 11 of his judgment:

*“The court recorded the following consent orders as dictated to by Mr. Paul Muite and Mr. Sitima the counsel for the parties:*

- i. 52. That the parties have agreed to have the economic dispute adjudicated by the court.*
- ii. 53. The KNUT and KUPPET will file their memorandum and serve by 10<sup>th</sup> January, 2015.*
- iii. 54. The Employer (TSC) to file their memorandum and serve on or before the 26<sup>th</sup> January 2015.*
- iv. 55. The Central Planning and Monitoring Unit*
- v. (CPMU) and SRC to file their reports within 10 days from 26<sup>th</sup> January, 2015. Meanwhile the Unions ie KNUT and*
- vi. KUPPET call off the teachers strike commenced on 5<sup>th</sup> January, 2015 forthwith*
- vii. For the avoidance of doubt, all teachers resume teaching by Monday the 19<sup>th</sup> January, 2015.*
- viii. TSC undertakes not to victimize any teacher/Union Officials/Unions who may have participated in the strike including payment of salaries.”*

[43] The trial Judge then determined that TSC’s Petition No. 3 and the application dated 7<sup>th</sup> January, 2015 had been compromised and replaced by a dispute he described as an “economic dispute”.

[44] On TSC’s application to stay execution of the order of 14<sup>th</sup> January, 2015 (“consent order”) and set it aside, the learned Judge held that TSC had not demonstrated any of the grounds for setting aside a consent order as set out in the case **Flora N. Wasike -v- Destimo Wamboko [1982-88]1 KAR – 628**. The application, according to the learned Judge, was an afterthought after TSC had fully benefited from the order which brought to an end the teachers’ strike.

[45] Another cornerstone of the judgment of the court below is the number of issues the court framed for determination which were:

- (i) Whether the unions and TSC are entitled to conclude a Collective Bargaining Agreement (CBA) determining the teachers’ terms and conditions of employment.**
- (ii) The role of SRC in negotiating and concluding a CBA if one has to be concluded.**
- (iii) Whether teachers are entitled to a basic salary increment in the CBA**
- (iv) Whether teachers are entitled to a review of any allowances.**
- (v) If a CBA has to be concluded, when would it take effect.**

[46] Issue (1) was inevitably answered in the affirmative as the same has constitutional underpinning in **Article 41(5)** of the **Constitution** and **Section 57(1)** of the **Labour Relations Act No. 14 of 2007**. On whether SRC has any role to play in concluding a Collective Bargaining Agreement, the learned Judge came to the conclusion that it had none. The learned Judge went further and conclusively determined that although SRC is mandated by the Constitution to advise TSC on the salaries and benefits for teachers,

TSC is not bound by that advice.

[47] On whether teachers are entitled to a basic salary increment in the CBA, the learned Judge not only determined that they were so entitled, but went ahead to fix the same at between 50% and 60% which, in the view of the trial Judge, translated to an annual increment of between 12.3% - 15%. The trial Judge went further and appointed the 1<sup>st</sup> July, 2013 as the effective date and 30<sup>th</sup> June, 2017 as the expiry date. The trial Judge then confirmed the TSC's award to the teachers with respect to house allowance, leave allowance, hardship allowance, advance for motor vehicle purchase and the mortgage facility, which allowances, the trial Judge directed that they be reflected in the CBA.

[48] With respect to other demands made by the teachers the trial Judge directed that the same be incorporated in the CBA after negotiations which CBA the trial judge ordered to be registered with the court in terms of **Section 60(1) of the Labour Relations Act 2007** within thirty (30) days from the date of his judgment.

## **APPEAL AND CROSS APPEAL AND SUBMISSIONS OF COUNSEL**

### **Case for Appellants**

[49] The TSC, SRC and the AG were aggrieved by that judgment and lodged the appeals which have now been consolidated before us. TSC cited eighteen (18) grounds of appeal. At the hearing of the appeal however, Senior Counsel **Mr. Ngatia**, who appeared with **Mr. Kiragu Kimani** and **Mr. Obura** for TSC argued the first 5 grounds which raised the following issues:

[50] (1) The nature of the dispute which was before the trial court; (2) The jurisdiction of the Employment and Labour Relations Court; (3)

The determination of the dispute as an economic dispute; (4) Whether the trial court could award increment of teachers' basic salary by 50% - 60% and (5) Analysis of the evidence which was adduced before the trial court with reference to demands made by the unions vis-à-vis the National Wage Guidelines.

[51] On the first broad ground, learned counsel submitted that TSC lodged a petition to the trial court seeking a declaration that the strike the unions had commenced was unprotected, illegal, null and void; a prohibitory injunction restraining KNUT, KUPPET, their officials and members from engaging, participating in and/or continuing with the strike and an order directing KNUT and KUPPET to resume negotiations to conclude a C.B.A. In the interim TSC sought a prohibitory injunction to restrain the officials and members of KNUT and KUPPET from continuing with the strike pending the hearing and determination of the application and petition. That application was certified urgent on 8<sup>th</sup> January, 2015 and at the interparties mention on the direction of the learned Judge, on 9<sup>th</sup> January, 2015 the trial Judge noted the parties willingness to engage in constructive engagement. He consequently adjourned the application to 14<sup>th</sup> January, 2015 with directions that officials of KNUT and KUPPET attend. In addition the trial Judge ordered the filing of replying affidavits by KNUT and KUPPET.

[52] According to learned counsel, and the record supports him, on 14<sup>th</sup> January 2015 the trial Judge permitted counsel for the parties, officials of the unions, officials of TSC, its Commissioners and CEO, the Attorney General and two advocates and two officials of SRC to make statements and participate in the proceedings of that day. The learned Judge stated that he did so under the provisions of **Section 15** of the **ICA**.

[53] At the end of those proceedings, the trial Judge recorded an order he stated was by the consent of the parties. Learned counsel expressed the view that the parties did not consent to the order the learned Judge recorded. It was also counsel's view that as the proceedings were in conciliation the trial Judge could not preside over the same. It was further contended by learned counsel that after the conciliation proceedings, the trial Judge made orders which resulted in the parties filing their memorandum with the desire to

compromise the petition. According to learned counsel, it was not open to the trial Judge to compromise the petition. In his view, substitution of the petition with the economic dispute disadvantaged TSC and gave benefit to the unions. Besides, according to counsel, the trial Judge could not assume jurisdiction on the basis of an order which was not by consent.

[54] **Mr. Ngatia** further submitted that TSC challenged the order of 14<sup>th</sup> January 2015 without delay by its application dated 22<sup>nd</sup> January, 2015 and lodged on 23<sup>rd</sup> January, 2015. TSC sought that execution of the order be stayed and that the order be set aside. The trial Judge did not hear that application. Instead he ordered that the application be determined within the economic dispute. According to learned counsel, the procedure adopted by the trial court was unknown in law and had no foundation in the pleadings with the consequence that the resultant judgment was also a nullity and should be set aside. Reliance was placed upon the cases of **Nairobi City Council -v- Thabit Enterprises Ltd. [1995 – 1998] 2 EA 23** and **Captain Harry Gandy -v- Caspar Air Charters Limited [1956] 23 EACA 139** which determined that cases are decided on the basis of pleadings placed before the court and the Judge is not entitled to decide on an unpleaded issue unless the pleadings have been amended appropriately otherwise strange results would follow (See also **Kenya Commercial Bank Ltd. -v- Osebe [1976 – 1985] EA 706**).

[55] The 2<sup>nd</sup> broad ground is related to the 1<sup>st</sup> cluster of grounds as it challenges the jurisdiction of the trial court. **Mr. Ngatia** submitted that the lower court's jurisdiction is set out under **Article 162(2)** of the **Constitution, Section 12(1)** of the **ICA** and **Section 73** of the **LRA**.

In learned counsel's view, the court could not conduct Alternative Dispute Resolution proceedings under **Section 15** of the **ICA** and any attempt to take over alternative dispute resolution process was unlawful and offends the **provisions of Article 159(2) (c)** of the Constitution and **Section 15** of the **ICA**. In learned counsel's view, Alternative Dispute Resolution proceedings are subordinate to the Employment and Labour Relations Court proceedings and cannot lawfully be carried out by the court itself. Reliance was placed on the case of **Barradough -v- Brown [1887] AC 615** where the House of lords held that where a statute gives a right of redress in an inferior tribunal a party cannot proceed to enforce the same right in the High Court before exhausting the process in the inferior tribunal. The same principle was stated in **Fatemi Investments Limited -v- Bayusuf [1990] KLR 390** upon which **Mr. Ngatia** relied.

In those premises, learned counsel submitted that the trial Judge could not preside over the economic dispute before referring the dispute to conciliation or any other alternative dispute resolution process. Counsel buttressed his contention by referring to the repeal of Part III of the RLA by **Section 31** of the **Industrial Court Act, 2007** which contained **Section 20(1)(a)** which permitted the court to sit as a conciliator.

Learned counsel therefore concluded that the court below acted without jurisdiction at the stage it proceeded with the economic dispute and the resultant judgment is a nullity.

[56] The 3<sup>rd</sup> broad ground relates to the trial Judge's determination to hear an economic dispute. **Mr. Ngatia** submitted that an economic dispute was not before the trial court and a non-existent dispute could not compromise TSC's petition. Learned counsel reiterated that the record of the trial Judge himself shows that there was no consensus on how the impasse obtaining then would be resolved before the trial judge imposed a consent order upon them. TSC challenged the same and sought to set it aside as already stated. In learned counsel's view, the trial Judge should have heard TSC's application to set aside the purported consent order.

[57] On the 4<sup>th</sup> broad ground as to whether the trial Judge was entitled to grant to the teachers increment of basic salary of between 50% - 60%, **Mr. Ngatia** submitted that the trial Judge had no jurisdiction to do so. **Article 162(2)** and **Section 12** of the I.C.A were invoked as the basis for that argument. In learned counsel's view, TSC did not make an offer in the said terms as the trial Judge found. **Mr. Ngatia** contended that **Article 41(5)** of the **Constitution** was misinterpreted by the trial Judge.

It was further learned counsel's submission that any salary increment by the TSC had to be made in

accordance with the laid down constitutional and statutory process which involved approval by SRC; provision of the proposal in TSC annual estimates under **Section 37** of the **TSC Act** in addition to obtaining National Treasury approval and finally inclusion of the estimates in an Appropriation Bill for approval by the National Assembly. In learned counsel's view, the document which contained the 50% - 60% increase could not substitute the mandatory constitutional and statutory process. In the premises according to learned counsel, the trial Judge had no legal foundation for making the award and the same should be set aside.

The last broad ground argued by **Mr. Ngatia** related to the evidence which was adduced before the trial Judge. Learned counsel submitted that evidence was adduced by TSC which demonstrated that an increment of between 50% and 60% was not fiscally sustainable but which evidence the trial Judge ignored. The evidence was presented by way of the National Treasury Report, on Award of Salaries and Allowances to public officers and oral testimony of **Dr. Geoffrey Mwau**, the Economic Secretary in charge of Budget and Fiscal Economic Affairs of the National Treasury. Learned counsel further contended that under **Section 15(5)** of the **ICA**, the court is bound by the national wage guidelines which require all parties to be made aware that Treasury would honour wage awards so long as there was budgetary provision. Further, according to learned counsel, the court should take into account harmonization, equity and fiscal sustainability. All these, according to learned counsel, were ignored by the trial Judge. In the premises, so counsel argued, the award of a salary increment of 50% - 60% was made without jurisdiction and against the evidence.

[58] On the union's application to strike out the appeal, **Mr. Ngatia** contended that the basis for the application was erroneous. In his view, TSC is not in contempt of court with regard to the order of this court made under **Rule 5 (2) (b)** of this **Court's Rules**. Learned counsel argued that the order had ceased to exist as a condition for the order was not met by TSC. With regard to the judgment of the court below, learned counsel submitted that inability to pay or negligence to make budgetary provision cannot be a basis for striking out an appeal.

[59] **Mr. Obura** argued grounds 5 to 18 in the TSC's Memorandum of Appeal under one ground namely, whether it was open to the trial Judge to make the award he made notwithstanding express provisions of the Constitution and International Conventions. Learned counsel acknowledged that under **Section 57(1)** of **LRA**, TSC and the Unions were bound to enter into a CBA. That requirement has constitutional underpinning in **Article 41(5)**. In counsel's view, however, the conclusion of a CBA has limitations provided in the same Constitution such as provisions relating to the role of SRC and limitation on public expenditure found in **Articles, 201, 202, 206, 220 and 221**. It was also counsel's view that the right to conclude a CBA is subject to specific provisions in International Conventions including recommendation, 92 of the **International Labour Convention (ILC)** on application of principles on voluntary conciliation arbitration and the rights of workers. **Mr. Obura** posited that neither the Constitution nor International Conventions envisaged mandatory awards of salary increments to employees by employers as other considerations such as national conditions must be taken into account.

[60] Learned counsel, further, submitted that salary awards must be preceded by voluntary negotiations by the parties and if there is disagreement conciliation takes place. If a conciliator or conciliators are not appointed, a negotiating party has liberty to refer the matter to the I C. Learned counsel held the view that under the **Labour Relations Act (LRA) Section 66**, a judge is not one of the persons who may be appointed a conciliator. It was also his view that on conciliation failing, adjudication may commence in court under **Section 73 of LRA**. So, according to counsel, adjudication by the court only commences when a conciliator/s has/have failed to resolve the dispute. In those premises, according to **Mr. Obura**, the court improperly invoked **Section 15 (1)** of the **Act** and **Article 41** of the **Constitution** as he assumed that negotiations had been held and a CBA reached which was not the case.

[61] On the 50% to 60% salary increment, **Mr. Obura** contended that it was wrong for the court to assume that an offer in those terms had been made by TSC. According to counsel, the proposal had been made in a meeting of a committee set up under **Section 13 (5)** of the **TSC Act** which was not a negotiating committee as the trial Judge had incorrectly held.

[62] It was also counsel's view that the court, in awarding the 50% to 60% pay increment, ignored wage guidelines although it acknowledged the same. Learned counsel emphasized that before making salary increments, the National Treasury had to make provision for the same, otherwise, it would not honour the same. That underlies the requirement for harmonization so that one group does not have an award significantly, higher than another. Also to be considered is the fact of ability to absorb the award. All these, according to learned counsel, were submitted before the trial court and evidence adduced but the trial court ignored the same. Learned counsel concluded that Kenya is not the only country required to apply these principles. Countries such as India and South Africa according to counsel have similar statutory and constitutional limitations imposed on their Governments with regard to increase of salary and benefits to public servants.

[63] **Mr. Obura** like his colleague, SC **Ngatia**, urged that the appeal be allowed.

[64] SRC in its memorandum of appeal cited 16 grounds of appeal. **Mr. Nowrojee**, learned Senior Counsel for SRC, however, condensed the same into two broad issues. The 1<sup>st</sup> issue argued by learned Senior Counsel was whether SRC's advice is binding on TSC. The learned Judge framed it as issue number 2 in his judgment. The learned Judge determined that the advice of SRC to TSC is not binding and that SRC has no role to play in concluding a C.B.A.

[65] Learned Senior Counsel submitted that under **Article 230(5)** of the **Constitution**, TSC, in fixing salaries for teachers, has to take into account, among other things, the need to ensure that the total public compensation bill is fiscally sustainable. In learned Senior Counsel's view, that principle is in consonance with the provisions of **Section 11** of SRA. Learned Senior Counsel contended that by dint of the provisions of **Article 259 (11)**, SRC's advice to TSC is mandatory.

Reliance was placed on the persuasive authority of **Kenya Union of Domestic, Hotels, Education and Allied Workers, (KUDHEIHIA Workers) –v- Salaries and Remuneration Commission (2014) eKLR**. There, Lenaola, J., held that SRC has the mandate of regulating and reviewing salaries of State Organizations.

[66] Given the above provisions of the law and **Section 37 (3)** of the TSC Act, learned Senior Counsel submitted that the trial Judge erred in determining that TSC could opt out of the advice or consultation of SRC as SRC's objectives cannot be achieved if its advice is optional.

If that was the case, according to learned counsel, there would be no harmony and fiscal sustainability would not be achieved. **Section 11** of **SRC Act** would also not be implementable.

[67] Learned Senior Counsel, submitted that SRC is a new creature introduced by the **Constitution 2010** to consolidate decision making with regard to remuneration of public officers including teachers. In the exercise of its functions, SRC is involved in collective bargaining to ensure the rights of different cadres of public servants are balanced against public interest to ensure that public compensation bill is fiscally sustainable. In the premises, according to Senior Counsel, the finding by the trial Judge that SRC had no role to play in concluding a C.B.A violated constitutional provisions.

[68] Learned Senior Counsel expressed the view that for SRC to satisfactorily perform its mandate, job evaluation was paramount. He further contended that job evaluations are a necessary tool which SRC must possess so as to enable it effectively discharge its mandate, otherwise, salary disparities and wage differences in the public service would not be eliminated. In the premises, according to Senior Counsel, the trial Judge erred in holding that SRC has no role to play in conducting job evaluation for teachers.

[69] On whether the advice of SRC to TSC with regard to increasing teachers' salaries is binding, learned Senior Counsel submitted that it is. Senior Counsel invoked the provisions of **Articles 230 (1)** and **259 (11)** of the **Constitution** for that submission. In the premises, the trial Judge had no ability to determine salary increment for teachers as he did as his determination violated the Constitution. Further, learned Senior Counsel submitted that the trial Judge should have relied upon SRC's advice which was available before him rather than rely upon the CPMU reports in determining the teachers' salary increment.

[70] Learned Senior Counsel also made submissions on the legality and efficacy of the award granted by the trial court in the TSC's Petition.

Reference was made to **Article 10** of the **Constitution** which sets out national values and principles of governance which must be upheld whenever any state organ, state officer, public officer or anyone else applies, or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. **Mr. Nowrojee** argued that the trial court, which was established under **162 (2)** of the **Constitution**, can only interfere with a decision of a Constitutional body such as SRC and TSC if the body has violated the Constitution in the exercise of its mandate.

[71] The decision of this Court in **Shaban Mohamud Hassan and 2 Others –v- Shaban Mohamud Hassan & 3 Others [2013], eKLR**, was invoked to buttress the argument on the supremacy of the Constitution and the functions of the High Court which is to see that lawful authority vested in state organs and independent organs is not abused by unfair exercise and ensure that bodies do not operate outside the bounds of authority prescribed by the Constitution or Statute. In violation of the above principles, the trial court, according to counsel, usurped the roles of TSC and SRC in increasing salaries for teachers.

[72] Reliance was placed upon the case of **Kenya Youth Parliament & Another -v- The AG and Anor. [2012 eKLR]**, where it was held that the court should be slow to interfere with a constitutionally mandated function of another state organ which has proceeded with due regard to procedure. According to Senior Counsel, TSC & SRC properly exercised their mandates and the court should have been slow to interfere.

[73] It was further the view of Senior Counsel that as the salaries of teachers' and allowances had been harmonized with those of the rest of public service, any increase in their salaries would have to be harmonized with the rest of the public service to achieve equity and fairness pursuant to **Article 230 (5) (d)** of the **Constitution** as read with **Section 11 (c)** of the **SRC Act**.

[74] Learned Senior agreed with his colleagues for TSC and the AG that the court failed to consider expert evidence which demonstrated fiscal unsustainability of both increase in the remuneration of teachers as claimed and the inevitable harmonization of public officer' salaries which would be demanded by others in the public sector. He was of the further view that the trial court also failed to consider the process of budgetary allocation and economic effects of the increase.

[75] Learned Senior Counsel further identified various provisions of the Constitution which had been violated by the decision of the court below and further, that the decision was against public policy principles of public finance and good governance. On objection to the appeal, learned Senior Counsel submitted that as SRC was appealing against the decision of the court below which court lacked jurisdiction, the union's objection in counsel's view, was without merit.

[76] **Professor Githu Muigai, The Attorney General**, led a strong team of lawyers from his office including **Ms Wanjiku Mbiyu, Mr. Muiruri Ngugi** and **Mr. Samuel Bitta** in prosecuting his appeal. Twenty six (26) grounds of appeal are cited in the Memorandum of Appeal dated 19<sup>th</sup> August, 2015 and lodged on 20<sup>th</sup> of the same month. The grounds, however, raise six (6) broad issues namely, the jurisdiction of the trial court; the role of SRC in making salary increments for teachers; fiscal implications of the role of Parliament and SRC; violation of Constitutional provisions; failure to apply the doctrine of *stare decisis* and consideration of extraneous matters.

[77] The **AG** associated himself with the submissions of **Mr. Ngatia** and **Mr. Obura** and reiterated that the trial Judge erred in converting TSC's petition into an economic dispute which is unknown in law and was contrary to provisions of the Constitution. In doing so, according to the learned AG, the trial court ignored questions of fiscal sustainability and prudent public financial management. The learned AG held the view that the increment of salaries awarded to the teachers by the trial court was made without jurisdiction considering the express provisions of the Constitution governing salary and wage determination in the public sector.

[78] The learned AG acknowledged that teachers' salaries were a preserve of TSC, pursuant to **Article 237** but qualified that the mandate is only exercisable on the advice of SRC pursuant to the provisions of **Article 230 (4) (b)** as read with **Article 259(11)** of the Constitution. It was contended that in the absence of exhaustion of the mandatory methods of resolving disputes, the trial Judge would act without jurisdiction.

[79.] It was also the AG's contention that the learned trial Judge expanded the scope of the dispute TSC had presented before him and assumed jurisdiction on the basis of a purported consent order of the parties. Invoking the decision of the Supreme Court in **Samuel Kamau Macharia and the Official Receiver, Madhupaper International Limited –v- Kenya Commercial Bank Limited and 2 Others, [Petition No. 2 of 2012], (UR)**, the Attorney General posited that parties have no power to confer jurisdiction on a court.

[80] On the adjudication process which the trial court invoked, the learned AG submitted that without jurisdiction, the process was a nullity. This assumption of jurisdiction was, according to the Attorney General, challenged by TSC in its Notice of Motion of 22<sup>nd</sup> January, 2015 and even upto the date judgment was delivered. A further factor which denied the trial court jurisdiction was the failure to appreciate that SRC had not given its advice that the award be made. The Attorney General submitted that SRC as an independent Constitutional body, protects the sovereignty of the people of Kenya to secure observance by state organs of democratic values and principles and promote Constitutionalism. **Articles 230 (4) (b)** and **259 (11)** were invoked for that proposition.

[81] Without receipt of advice from SRC, it was improper, so the AG posited, for the trial court to take over the consideration of the dispute which action offended the principles enshrined in the Constitution and the rule of law. In the AG's view, statutory procedures set out under the **I CA No. 18/14** had to be exhausted before any reference to court. The case of **Narok County Council –v- Transmara County Council & Another [Civil Appeal No. 25 of 2000] (UR)**, was invoked for that proposition. The AG further contended that the unions did not raise a counterclaim to TSC's petition to form a basis for the court to determine an economic dispute.

[82] On implications of the judgment, the learned AG submitted that about Kshs. 72.5 Billion would have to be provided to satisfy the judgment which event would be devastating to the economy; other sectors of the economy would shut down; heavy borrowing would be inevitable; the economy would be unsustainable, uncompetitive and could even collapse; capital markets would be adversely affected and so would be exchange rates resulting in capital flight.

[83] In these premises, the increment awarded would not be sustainable. The trial court, according to the AG, was insensitive to the nature and effect of the case before him. The case of **Judges and Magistrates' Vetting Board & 2 others –v- Centre for Human Rights & Democracy & 11 Others [2014] eKLR**, was invoked for that proposition.

[84] The learned AG, on interpretation given by the trial Judge to constitutional provisions, submitted that the same was erroneous as the trial Judge failed to take into account the effect and nature of the matter before him and how it would affect other Kenyans and Kenya as a whole. In doing so, according to the AG, the trial Judge failed to appreciate the magnitude of social, political and financial disruption of implementing his judgment.

[85] The AG invoked several provisions of the **Constitution** including **Article 10 (2) (d)** on National Values which bind all state organs and public servants, indeed, all persons charged with the responsibility of applying, interpreting the Constitution or any law and even those who are mandated to enact laws.

[86] Also, invoked was **Article 201** on **Public Finances**. The AG contended that salary increments must take into account the Government policy to ensure that burdens and benefits of natural resources are shared equitably between present and future generations which considerations may only be made after job evaluation to determine affordability based on job worth. These matters, according to the learned AG, were brought to the attention of the trial Judge by the testimony of RW 3 but were ignored.

[87] The AG, further, submitted that Parliamentary involvement in budgetary approval and allocation was also ignored by the trial Judge with the result that the judgment could not be implemented additionally as constitutional safeguards were ignored. Alleged to have been ignored were **Articles 201, 202, 206, 220, 221, 223, 225 (1) (2) and 228 (4) (5)**. In ignoring those provisions, the learned Judge, according to the learned AG, usurped the role of Parliament which has to debate an appropriation bill and grant authorization to withdraw funds from the public purse. In this regard, the learned AG submitted that the budgetary process is controlled by the **Public Financial Management Act, 2012** and the **Constitution** which processes were not considered by the learned Judge in granting the teachers' salary increment.

[88] The learned AG also contended that in awarding the salary increment to teachers, the learned Judge usurped the role of SRC sanctified in **Articles 230 and 259 (11)** of the **Constitution**. In doing so, the trial Judge, according to the learned AG, offended the principle of separation of powers. Salary determination, according to the AG, is a technical issue which requires a specialized institution to handle, hence, the introduction of SRC in the Constitution 2010. It was therefore not proper for the trial Judge to take away powers entrusted with one commission and clothe himself with those powers.

[89] On the ground that the learned Judge considered extraneous matters. The AG submitted that consideration of SRC staff salaries was not relevant to the issue before him and yet that consideration influenced his final judgment.

[90] On the Application to deny the appellants right of audience on alleged breach of court orders, the AG contended that no wilful and deliberate disobedience of court orders had been demonstrated. In any event, according to the AG, payment of the salary increment would be contrary to the law as no budgetary allocation had been made for the same. In the end, the learned AG urged that the appeal be allowed with costs.

### **Case for the Unions**

[91] **Senior Counsel, Muite** and learned counsel, **Kilukumi**, represented KNUT but it was **Mr. Kilukumi** who had the first bite at the cherry. He first addressed us on the application to strike out the appeal. He contended that despite the right to appeal, TSC should have first complied with the orders of the court below. In his view, TSC could have set in motion the process of making payment by approaching Parliament for revenue allocation. He also expressed the view that the court has no business ascertaining whether judgment debtors have funds before passing judgment against them. TSC had itself proposed the 50% to 60% pay increment and should have provided for the contingency in its budget. Learned counsel submitted the TSC proposal had been made at an earlier consultative committee meeting at which the Treasury was represented.

[92] **Mr. Kilukumi** argued, in the alternative, that TSC should have taken action under **Article 223** of the **Constitution** and obtained funds through the Supplementary Appropriation Process. Also available to TSC, according to counsel, were provisions of **Article 208** which creates the Contingencies Fund from which the Treasury can access urgent funds. Learned counsel blamed the attitude of the Government as the reason for failure to pay the salary increment. **Mr. Kilukumi** argued that denial of audience to TSC should not depend on a finding of guilt against it since it had been demonstrated that it had disobeyed an order of the court of which it had full knowledge. According to him it was irrelevant that the party against whom judgment was passed believes it is irregular. Indeed, in counsel's view, TSC's disobedience is deliberate.

[93] **Mr. Muite** reiterated the submissions made by **Mr. Kilukumi** and added, for emphasis, that during this financial year, Parliament approved a 1.3 Million budget which in his view, is evidence of a rich Government but had merely refused to pay the salary increment. Another indication that the Government is in funds is its recent decision to pay large sums of money in the Anglo Leasing cases. In those premises, learned counsel urged that the Notice of Motion be allowed.

[94] **Mr. Mbaluto**, learned counsel, who appeared with **Senior Counsel, Mr. Muite** and learned counsel, **Mr. Kilukumi**, for KNUT submitted that disobedience of orders of the court is a grave matter and the

perpetrator should not be heard unless the contempt is purged. Learned counsel, further, contended that the issue of conclusion of a CBA was really not in contention and the failure of TSC to do so amounted to wilful disobedience.

[95] **Ms Guserwa**, learned counsel for KUPPET, submitted that the parties, indeed, recorded a Consent Order on 14<sup>th</sup> January, 2015, and as the resultant judgment remains unsatisfied, contempt had been demonstrated. She further referred to the increment of between 50% and 60% ordered by the trial court and posited that the same figures had earlier been furnished by TSC and provision for the same should have been made and TSC should not now allege inability to pay.

[96] **Senior Counsel Muite**, was the first to defend the judgment of the court below in his response to submissions made against it. He contended that under **Section 15** of the **I C A**, the court below has power to reconcile warring parties and is free to adopt the alternative dispute resolution process. Indeed, according to **Mr. Muite**, the objective of the **Act** is to resolve industrial disputes and for this purpose, the Industrial Court is at liberty to apply other means to resolve industrial disputes a part from formal hearing of the same. It was under that power that the court below guided the parties to resolve their dispute. In doing so, they agreed to the procedure adopted by the court. **Mr. Muite** did not describe the proceedings as conciliation but an attempt or facilitation to resolve the dispute.

[97] The contentious issue between the parties, in counsel's view, was increase of basic salary which TSC proposed to be increased by between 50% and 60% but which unfortunately was resisted by SRC. Notwithstanding the stance taken by SRC, according to learned **Senior Counsel, Mr. Sitima**, who then represented TSC asked parties to conclude basic salary increment and in the alternative, the court to adjudicate the issue with the view of resolving the impasse then prevailing.

It was **Mr. Muite's** submission that the parties and their counsel agreed to the court's adjudication of the matter and recorded a consent in that regard on 14<sup>th</sup> January, 2015. Pursuant to that consent, counsel filed their memoranda which crystalized their various claims with TSC even filing reports of experts. The strike which had paralyzed learning in public schools nationally ended. In learned counsel's view, that process was regular.

[98] During adjudication, National Treasury too filed its report. TSC and SRC, according to learned counsel reversed, their position and claimed that consent had not been reached. The trial court was not impressed by the change of tune by both TSC and SRC who wanted to resile from the position taken on 14<sup>th</sup> January, 2015 when the consent order was recorded. In **Mr. Muite's** view, given the provisions of **Section 84** of the **Evidence Act**, the record of the trial court cannot be challenged now.

[99] On jurisdiction, learned Senior Counsel submitted that the same is donated by **Article 162 (2)** of the **Constitution** since the primary dispute was between employer and employee. Also invoked were the provisions of the **I C A (Sections 12 and 15)**, which empower the court to hear and determine disputes referred to it under **Article 162(2)** of the **Constitution**. With the requisite jurisdiction, in counsel's view, the trial court was bound to apply the provisions of **Article 41 (1)** on fair labour practices, **Article 41 (2) (a)**, on right to fair remuneration; **Article 41 (2) (d)** on right to resort to strike action and **Article 41(5)** on worker's right to collective bargaining. In this case, according to **Mr. Muite**, the unions asked the trial court to adjudicate on two constitutional rights namely; right to collective bargaining and right to fair remuneration which claims were clearly within the jurisdiction of the trial court.

[100] On whether the award was justified, learned Senior Counsel submitted that the teachers were earning less than what their colleagues were getting in the public service as they did not benefit from the annual increment which those in the civil service were given. The award, in counsel's view, was accordingly justified.

[101] With regard to evidence, **Mr. Muite** submitted that the salary increment given to teachers by the trial court originated from TSC during one of the many meetings the parties held in an effort to resolve the dispute. In the premises, according to learned Senior Counsel, the trial court was entitled to give judgment in terms of the TSC's own offer. It was also contended, on behalf of the unions, that if

corruption is eradicated funds would be available to pay teachers. In any event, so, the unions contended, SRC's contention that it required to carry out a job evaluation before recommending salary increment for teachers was without basis as TSC is the body with the mandate to do so and had, in fact, before making its offer, carried out relevant study on the matter.

[102] On the mandate of SRC, learned Senior Counsel submitted that the language of **Article 230 (4)** is plain that it offers advice to TSC on remuneration and benefits for teachers. It cannot go beyond giving advice and if it does so, it would be operating beyond its mandate and infringing upon the mandate of an independent constitutional body namely, TSC. **Mr. Muite** went further and contended that if SRC went beyond giving advice, it would offend the principles of the Rule of Law and undermine the entire education sector. Learned Senior Counsel urged us to dismiss the appeal.

[103] **Mr. Mbaluto** like his senior, **Mr. Muite**, opposed the appeal and directed his submissions against the submissions made by the Attorney General. On jurisdiction, learned counsel submitted that the same is conferred by either the Constitution or by Statute and with respect to the court below, **Article 162** of the **Constitution** donates jurisdiction.

**Section 12** of **I C A** describes the scope of what that court can hear and **Mr. Mbaluto** invoked it in support of his submission on jurisdiction.

[104] On the proceedings before the trial Judge, **Mr. Mbaluto** submitted that the parties and their advocates consented to the manner the proceedings were conducted and the accuracy of the court record could not be impeached. In his view, the trial Judge was specially qualified to handle the dispute between the parties and did so admirably.

[105] On alleged usurpation of SRC's role by the court, **Mr. Mbaluto** argued that that was not the case as the learned Judge was loyal to the Constitution and appreciated that SRC's role was limited to giving advice which advice was not binding on TSC. In his view **Article 259 (11)** of the **Constitution** had no application on advice given by SRC to TSC especially as both bodies are constitutional bodies independent of each other.

[106] Learned counsel further expressed the view that TSC had the obligation to make provision for the increment and seek allocation of funds as it was the party against which judgment had been passed. It could, even if necessary, seek urgent provision of funds under special provisions of the Constitution such as **Article 208** on contingencies and unforeseen and urgent needs. Learned counsel also referred to payments made by the Government to Anglo Leasing creditors which payments were made without allocation of funds for them.

[107] On alleged disregard of expert evidence by the trial Judge, **Mr. Mbaluto** contended that that was not the case as the same was considered before the award to teachers was made. In learned counsel's view, RW 3 was a baseless alarmist given that the court awarded what TSC itself had proposed.

In the end, **Mr. Mbaluto** prayed for dismissal of the appeal with costs.

[108] **Mr. Kilukumi**, in his submissions in response to submissions made on behalf of SRC targeted three areas namely; whether the advice of SRC to TSC is binding; whether SRC should be involved in job evaluation of teachers and whether the trial Judge exercised his discretion judiciously. On the advice of SRC to TSC, **Mr. Kilukumi** argued that under **Article 230 (4) (b)**, SRC's mandate was limited to rendering advice and in this case to TSC. As teachers are public officers who are not state officers, SRC in counsel's view, cannot fix their remuneration and benefits but is obliged to advice on the same which advice TSC is not bound to follow. It was counsel's cardinal argument that as an independent constitutional commission, TSC cannot be tied to advice given by another independent commission of equal status as to do so would offend against the same Constitution. To buttress that argument, learned counsel invoked the Supreme Court decision in the Matter of Principles of **Gender Representation in the National Assembly and Senate [2014] eKLR**. There, the Ugandan cases of **Besigye and Others –v- AG [2008] EA 37** and **Human Rights Initiatives –v-Attorney General [2006] EA 120**, were cited with

approval.

[109] The principles considered in those cases are to the effect that in interpreting the Constitution and statutes the “*widest construction possible in its context should be given according to the ordinary meaning of the words used*”; that the Constitution has to be read as an integrated whole and that all provisions having a bearing on a particular issue should be considered together to give effect to the purposes of the instrument. It was learned counsel’s view that the trial court correctly concluded that both SRC and TSC as independent commissions are protected by **Article 249** of the **Constitution** and are not subject to the direction or control of any other person or authority but subject only to the Constitution and the Law. And further, that under **Article 237 (1) (b)**, TSC as the employer of teachers has the mandate to negotiate and determine remuneration and benefits for teachers in terms of **Article 41(5)** of the **Constitution** as read with **Section 57** of **L R A**. In those premises, it was learned counsel’s submission that the trial court correctly held that TSC is not bound by SRC’s advice in the final determination of teachers’ remuneration and benefits which are products of collective bargaining between the unions and TSC.

[110] The learned counsel distinguished the decision in the **Ugandan case** on the basis that it was an election matter where different considerations apply. In any event, Mr. Kilukumi added, the advisory opinion of the Supreme Court was plain that advice alone is not binding. Also invoked by learned counsel are two Indian cases namely; **D’silva –v-Union of India [1962] AR 1130, [1962] SCR Sup 1 (1) 968** and **Nagaraj Shirarao Karjagi –v- Syndicate Bank Head Office Manipal & Another [1991] AIR 1507 [1991] SCR (2) 576**. The former involved consultation by the President with the Union Public Service Commission in disciplinary matters and the latter involved advice of the Central Vigilance Commission to the Finance Minister on a matter involving the bank. In both cases, the advice rendered was held not to be binding.

[111] **Mr. Kilukumi** distinguished the KUDHEHIA case (supra) relied upon by the appellants on the basis that the employees involved were those of state corporations and not Constitutional Commission employees. Learned counsel was of the opinion that KUDHEHIA case was in any event not good law and that the learned Judge had erred. That view was buttressed so counsel contended by the fact that other High Court Judges had decided differently on the same matter.

[112] In that regard, reference was made to the cases of **Chemilil Sugar Company Ltd & 2 Others –v- Kenya Union of Sugar Plantation Workers [Industrial Court Cause No. 1882 of 2004] (UR)**, where **Abuodha, J.** considered limitations to SRC’s advice.

[113] With regard to exercise of discretion by the trial Judge, **Mr. Kilukumi’s** simple answer was that the matter was not one of discretion but on interpretation of the Constitution and in doing so, according to learned counsel, the court should consider substantial justice rather than technicalities. In conclusion, learned counsel, citing a passage in **Stanley Munga Guthunguri -v- Republic [Criminal Application No. 271 of 1985] (UR)** stated that the rule of law is sacrosanct and if destroyed society itself would be destroyed. He urged us to uphold the rule of law and dismiss the appeal.

[114] On his part, **Mr. Sigei**, submitted that under the **TSC Act, Section 37 (3)** and **SRC Act Section 13(5)**, a statutory committee is empowered, in consultation with SRC, to determine terms and conditions of service for teachers and the committee in this case did meet and considered the TSC’s proposal which the Court adopted.

**Mr. Sigei** also made submissions on TSC’s cross appeal which was on costs. He contended that as costs follow the event, the appellants should have been condemned in costs. Distinguishing this case from the case of **Jasbir Singh Rai and Others –v- Tartochan Singh Rai and 4 Others [SC Petition No. 4 of 2012]**, where parties were ordered to bear their own costs, because an issue of public interest was involved, learned counsel submitted that this is not such a case. Costs should, therefore, have been ordered against the appellants and were not because of improper exercise of discretion.

[115] **Ms. Guserwa** in her submissions for KUPPET gave a lengthy background of the dispute

culminating in the judgment of the trial court. On jurisdiction, learned Counsel agreed with her colleagues for the unions that the constitution (**Article 262 (b)**) and the statute (**I C A Sections 12 and 15**), donated jurisdiction to the court below to hear the dispute between the parties, which dispute related to employment and the trial Judge cannot be faulted in that regard.

[116] On the proceedings of 14<sup>th</sup> January, 2015, **Ms Guserwa** submitted that the parties, indeed, consented to the order recorded by the learned Judge in the presence of the parties and all interested in this appeal. According to learned counsel, the process of adjudication originated from TSC's representative and an attempt to set it aside was properly rejected by the trial Judge. Pursuant to the consent order, parties filed their respective memoranda. Notwithstanding the consent order, **Ms Guserwa** submitted that the matter in dispute was addressed by all the parties and their counsel and the trial Judge dealt with the issues which arose, therefrom, and cannot be faulted.

On the role of SRC, **Ms Guserwa** reiterated what her colleagues had stated that the same was limited merely to advice which could not be binding on TSC, an independent commission like SRC.

[117] On implementation of the judgment of the trial court, learned counsel submitted that the decree which issued is a decree like any other and realization thereof is not the concern of the court. In learned counsel's view, teachers should not suffer because of the failures of TSC. She in the end urged for the dismissal of the appeal with costs.

### **Response from Appellants' Counsel**

[118] In his reply, learned **Senior Counsel Nowrojee**, submitted on the Notice of Motion seeking denial of audience to the appellant and the striking out of the appeal that the appellants were challenging the assumption of jurisdiction by the trial court and could not be shut out.

[119] On job evaluation, learned counsel reiterated that to determine fiscal sustainability, ability to pay and to take account of all relevant provisions of the Constitution relating to remuneration and benefits for public servants, job evaluation is paramount for, without it, the principles set out in the Constitution such as equal remuneration for equal value, would not be achieved. In learned Senior Counsel's view, job evaluation provides the framework or the structure to achieve uniformity. In this case, according to **Mr. Nowrojee**, the trial Judge had no capacity to achieve what he set out to do in his judgment.

[120] With regard to concluding a CBA, learned counsel contended that SRC's role has a limited role as it is not a negotiator. It has, however, a constitutional and statutory role to play under **Article 230 (5) (a)** of the **Constitution** to ensure sustainability. He reiterated that fixing remuneration for public servants is no longer an employer/employee affair as the total public wage bill has to be considered which invites the harmonizing role of SRC in which event, SRC's input in collective bargaining cannot be ignored.

[121] On SRC's advice in relation to public officers such as teachers, learned counsel contended, as he had contended earlier, that given the provisions of **Article 259 (11)** of the **Constitution**, the advice is binding and so is the consultation. In this case SRC gave advice which the lower court failed to appreciate. In that regard, it failed to take into account parameters set in **Article 230** of the **Constitution** and **Sections 11, 12 and 13** of the **SRC Act**. The trial Judge did not consider the effect of the award against total public wage bill thereby defeating the objective of **Sections 11, 12, 13** and **Article 259 (11)**. In conclusion, learned counsel submitted that if SRC's advice is not taken the resultant decision is a nullity.

[122] In his reply to the respondent's submissions, the learned Attorney General clarified that the court below, indeed, had jurisdiction to hear labour disputes but in this case, he contended, he lost the jurisdiction in the course of proceedings. According to him, the trial court believed that the parties had conferred jurisdiction upon him which unfortunately was misplaced as jurisdiction cannot be conferred even by consent. The learned Attorney General reiterated that in proceeding to consider the matter under **Section 15** of **I C.A**, the trial court erred as the parties did not agree on what the trial Judge was to do and how he was to proceed. According to the AG, the trial Judge proceeded as if he was applying alternative

dispute resolution process which in law he was not entitled to do. He contended that once the trial Judge noted disagreement between the parties, he should have discontinued the process and reverted to his role as a Judge as the economic dispute upon which the trial Judge invited pleading, was not before him.

[123] If, however, a proper dispute was before the trial Judge, the testimony of the experts should have been accepted in the determination of the same especially since the respondents offered no rebuttal evidence at the trial. With regard to RW 3, the learned AG submitted that his evidence was not considered nor were reasons proffered for not doing so. He also contended that other public bodies concerned with revenue source and expenditure would resist the increment if SRC's input was absent. On the existence of a contingency fund, the learned AG submitted that the same was not set up to settle court decrees but to take care of unforeseen calamities such as the "*El Nino*". On Government mega projects, the AG reiterated that the same grow the economy which in the long run is to the advantage of all. On money lost through corruption, he submitted that it was the duty of everyone to fight the same. In conclusion, the AG contended that the determination of this appeal would affect future co-existence of constitutional commissions and the stability of the Constitution and reiterated the prayer to allow the appeal with costs.

[124] Replying to submissions on the application to strike out the appeal and to deny the appellants' audience, **Mr. Ngatia** contended that TSC was not in contempt of the order made on its application for stay of execution under **rule 5 (2) (b)** of this **Court's Rules**. According to him, the order was a conditional one and the condition not having been met, the order had ceased to exist to be disobeyed.

[125] With regard to the contention made by the unions that TSC was in contempt of the judgment of the trial court, learned counsel submitted that proper proceedings for contempt were now ongoing before the court below with the result that the issue of contempt cannot be considered at this stage under the provisions of **Article 50** of the **Constitution** before the court below does so. In any event, according to learned counsel, inability to pay or negligence in not making provisions for budgetary allocation are not a basis for striking out an appeal and denying the appellant audience.

[126] With regard to the submissions of the unions against the main appeal, learned counsel reiterated his earlier submissions that the trial court could not conduct conciliation proceedings and could not lawfully compromise TSC's petition in his capacity as a neutral arbiter. In the premises, according to learned counsel, the resultant proceedings and judgment were a nullity.

[127] On his part, learned counsel, **Mr. Kiragu**, submitted that only the petition lodged by TSC was in the court. In his view, the memoranda filed by the parties were not in accordance with the rules made under **I C A** and could not constitute fresh pleadings. Learned counsel pointed out, with regard to salary increment claim made by the unions, that it is difficult to quantify their claim from the documents filed. **Mr. Kiragu** further submitted that the basis of the award of the trial court was an alleged offer of increment of between 50% and 60% made by TSC. Learned counsel contended that the 50% to 60% basic salary increment was not by consent as parties had yet to agree. There was therefore no basis for the award.

[128] In **Mr. Kiragu's** view, the trial Judge further fell into error when he ordered retrospective implementation of his award which offended the provisions of **Section 20 (5)** of the **I C A**. He further maintained that it was not open to the trial Judge to reject one CPMU report and accept another which was rejected by the author thereof.

[129] On **Section 84** of the **Evidence Act**, **Mr. Kiragu** contended that the same does not apply as the consent was in the judgment and not in proceedings leading to the same.

[130] On the argument that the appellants were in disobedience of this court's order on the application between the same parties, learned counsel contended that the application being under **rule 5(2) (b)** of this **Court's Rules** different considerations applied as here the merits of the appeal must be considered rather than mere arguability.

[131] On the alleged special qualifications of the trial Judge, learned counsel contended that the appeal is

not on whether or not the trial Judge had special qualifications.

## **Submissions on Application for Leave to Amend**

### **Memorandum of appeal**

[132] **Mr. Kiragu** prosecuted TSC's application for leave to amend the Memorandum of Appeal to include a prayer for costs. He contended that the application was procedurally made and should be allowed as it would not prejudice the unions and would be in consonance with the principle that disputes should be resolved with finality. Learned counsel, emphasized that application for leave can be made at any time before judgment.

[133] **Mr. Sigei** opposed the application for leave to amend the memorandum of appeal as he contended that the same was made too late without explanation for the delay and, therefore, offends the provisions of **rule 45** of this Court's Rules. **Mr. Sigei** received support from **Ms Guserwa** that the application for leave be declined.

## **DETERMINATIONS**

[134] I have now considered the record and the grounds of appeal. I have also analyzed and evaluated the evidence. I have further given due consideration to submissions of counsel, the authorities cited and the law. It is inevitable that I first consider KNUT's Notice of Motion lodged on 9<sup>th</sup> September, 2015 seeking an order striking out the appeal and in the alternative an order denying the appellants audience and/or stay of further proceedings until such time that TSC shall have fully complied with the judgment passed on 30<sup>th</sup> June, 2015 and consequential orders of the court below.

### **Notice of Motion to Strike out Appeal or stay Proceedings**

[135] The order disobeyed required TSC to, *inter alia*, pay teachers a 50% - 60% increment in basic salary which order had not been stayed. The Notice of Motion was premised upon the main grounds that despite demand for compliance TSC had refused to comply and its officers had publicly stated that it could not comply with the result that KNUT had now commenced contempt proceedings against them in the court below; that owing to TSC's disobedience, industrial unrest had gripped the country and learning had been paralyzed in public schools; that the disobedience threatens the foundations of the administration of justice and undermines the Rule of Law and that it is trite law that a contemnor has no right of audience before a court until the contempt is purged.

[136] The Notice of Motion is further supported by an affidavit sworn by **Wilson Sossion**, KNUT's Secretary General who has deponed, *inter alia*, that by a ruling of this Court, differently constituted, a conditional stay of execution of the judgment of the court below was granted to TSC and an application to stay this Court's order by the Supreme Court was declined with the consequence that the said judgment ought to be complied with since the condition for granting stay was not met; that TSC has wrongfully and unlawfully failed to comply with the said judgment and its officers have publicly said they will not do so despite demand for compliance; that as a result TSC is in contempt of court and proceedings in that regard have been commenced against its officers in the court below; that TSC's refusal to comply with orders of the court has caused industrial unrest in the entire nation and learning in public schools has been paralyzed; that the disobedience threatens the administration of justice and undermines the Rule of Law and that his advocates have advised him that a contemnor has no right of audience before the court until such time as she/he will have purged the contempt.

[137] **Mr. Kilukumi** who, together with SC **Mr. Muite**, **Mr. Mbaluto** and **Ms Guserwa** prosecuted the Notice of Motion before us, reiterated the stand point taken by KNUT Secretary General in his affidavit and emphasized that the disobedience of the court was deliberate as under the Constitution if TSC had made provision for the increment and applied for allocation of funds, the funds would have been availed especially since the increment which the court ordered had originated from TSC. Learned counsel cited various provisions of the Constitution including **Articles 223** and **208** under which funds could have been

availed despite there having been no budgetary allocation. The failure of TSC to avail itself of those Constitutional provisions, according to **Mr. Kilukumi**, suggested wilful and deliberate disobedience and should therefore not be given audience.

[138] **Mr. Kilukumi** expressed the view that for an order to issue denying audience to a party in disobedience, a finding of contempt is not essential. The court, in his view, should jealously guard its integrity and enforce obedience of its orders to maintain order. Reliance was placed on the case of **Hadkinson -v- Hadkinson [1952] 2ALL E.R. 567**, which involved a child who had been taken out of the jurisdiction of the court by his mother in disobedience of an order not to do so. The father of the child obtained an order for the return of the child. The mother appealed but the father objected to her being heard because she was in contempt of the court by failing to return the child. The court refused audience to the mother until the child was returned.

[139] **Mr. Kilukumi** also invoked the persuasive authority of **Miwani -v-Mawani [1977] KLR 159** which also involved children who were taken out of jurisdiction by their father. In another matter involving the same parties the father, through an attorney, sought to set aside an arbitration award against him. **Simpson J.**, relying on **Hadkinson -v- Hadkinson**, refused the father audience until the contempt was purged.

As in the two cases **Mr. Kilukumi** urged us to deny audience to TSC as it had willfully refused to pay and so should it be for the AG and SRC.

[140] On his part **Mr. Muite** deprecated the position taken by TSC, SRC and the Government which was “can’t pay won’t pay”. Senior counsel submitted that the Government is living large and is not honouring the court judgment because it did not want to and not because it had no money. To engender respect for orders of the court **Mr. Muite** urged that the appellants be denied audience until payment is made.

[141] **Mr. Mbaluto** agreed with his senior colleagues **Mr. Kilukumi** and senior counsel **Muite**. He expressed the view that if court orders are disobeyed at will the Rule of Law would be undermined and anarchy would set in. Learned counsel contended that TSC knew what it was engaging in as it had itself successfully prosecuted KNUT for contempt. **Mr. Mbaluto** further contended that a part from the salary increment, the court below had ordered conclusion of a CBA which TSC had failed to address despite the unions request to do so.

In those premises learned counsel urged that the appeals be struck out or judgment be delayed until the contempt is purged.

[142] **Ms Guserwa** in support of the Notice of Motion relied upon the affidavit filed by **Mr. Misori**, KUPPET’s General Secretar, which reiterated the unions stand point that TSC had to ensure the judgment of the court below is honoured; that it is upto TSC to engage other departments of State to ensure funds are availed and the decree satisfied. In her view therefore, TSC’s refusal to satisfy the decree of the court below is wilful and negligent and TSC should therefore not be heard before purging its contempt.

[143] In response to the above submissions, **Mr. Ngatia** contended that TSC could not be in contempt of the order of this court made under **rule 5(2) (b)** of this Court’s Rules, because the order was conditional and as the condition was not met, the order of stay of execution ceased to exist. With regard to the judgment of the court below, **Mr. Ngatia**, submitted that proper proceedings for contempt of court had been commenced before the court below and this Court cannot properly entertain the contempt plea as to do so would offend the provisions of **Article 50** of the Constitution before the contempt proceedings are concluded. In any event according to counsel, inability to pay or negligence to have made provision for the increment in salary is not a basis for striking out an appeal or denying audience to a party.

[144] With regard to the judgment of the court below **Mr. Ngatia** submitted that TSC is not in contempt thereof. Learned counsel referred to correspondence exchanged between TSC and the Treasury wherein TSC informed the latter of the judgment and the order of this Court made under **rule 5(2) (b)** of this Court’s Rules. Treasury in response pleaded inability to pay. In learned counsel’s view there is no

deliberate refusal to obey the orders of the courts and that TSC has not impeded the cause of justice. It was also learned counsel's view that TSC is challenging the lower court's judgment on several grounds, among them the ground that that judgment is a nullity and cannot therefore be denied audience or have their appeals struck out.

[145] **Mr. Kiragu** was in agreement. Learned counsel added with respect to the order of this Court under **rule 5 (2) (b)** that considerations thereat are narrow and all that a party needs to demonstrate is arguability in addition to showing that unless stay is granted the success of the appeal or intended appeal would be rendered nugatory, whilst in the appeal merits fall for consideration. In the premises, in his view, the question of contempt does not arise.

### **Consideration of the Unions' Notice of Motion**

I commence my consideration of this Motion with a quotation from the judgment of **Romer, LJ** in **Hadkinson -v- Hadkinson** (supra), at page 569:

***“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”***

[146] **Romer, LJ** gave two consequences which would follow from such breach namely, the party in disobedience would be in contempt and that no application to the court by such a person would be entertained until he has purged himself of his contempt.

I must however, hasten to add that that is the general rule. It is subject to exceptions which **Romer LJ** himself identified. The learned Judge stated:

***“a party can apply for the purpose of purging his contempt and another is that he can appeal with a view to setting aside the order on which his alleged contempt is founded.”***

[147] The two exceptions are not the only occasions when a party in breach will be heard before purging his contempt. Indeed **Romer LJ** provided them when he said “A person against whom contempt is alleged will also, of course be heard in support of a submission that having regard to the true meaning and intendment of the order which he is said to have disobeyed, his actions did not constitute a breach of it, or that, having regard to all the circumstances, he ought not to be treated as being in contempt.” It is obvious that the list of exceptions to the general rule is not exhaustive.

[148] **Denning L.J.**, who sat with **Romer L.J.**, in **Hadkinson -v- Hadkinson** (supra), was even more direct. He rendered himself as follows:

***“I need hardly say that it is very rare for this court to refuse to hear counsel for an appellant. No matter how badly a litigant has behaved, nevertheless generally speaking, if he has a right of appeal, he has a right to be heard, for the simple reason that if he is not heard, his right of appeal is valueless .....***

***It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy – when the contempt itself impedes the cause of justice and there is no other effective means of ensuring his compliance.”*** (underlining mine)

**Miwani -v- Miwani** (supra) did not fall within the exceptions given above and is in any event merely of persuasive value to us. See also **El- Busaidy -v- Commissioner of Lands & Others** [2002] 1EA 508 and **Naizsons (K) Ltd -v- China Road Bridge Corporation (K) Ltd.** [2002] 2EA 502 .

**Lord Denning's** dictum in **Hadkinson -v- Hadkinson** (supra) was applied in **Rose Detho -v- Ratilal Automobile & 6 Others** [Civil Application No. 304 of 2006, 171/2006] (UR). In the latter, this Court,

in a majority ruling, held that if the actions of an alleged contemnor in failing to obey court orders cannot impede the course of justice or make it difficult to ascertain the truth in respect of the matter, then the alleged contemnor may be heard.

[149] It is plain that KNUT's own cited authority for seeking the striking out of TSC's appeal and/or an order denying it audience until such time that it will have purged its contempt, does not really advance its case in the Notice of Motion. I say so, because TSC is clearly within the exceptions given above. This appeal seeks to set aside the judgment on which the contempt allegation is founded. It is also not in contention that TSC has no money of its own. It gets its funding from the National Treasury after an exhaustive Constitutional and Statutory process which is beyond its control. There is also some evidence that when the order of the court below and this Court were made, TSC informed the National Treasury of the same. In those premises and besides lodging this appeal, I think in the special circumstances of this case, TSC ought not to be treated as being in contempt as its inability to pay should not be equated to deliberate refusal to comply with the judgment of the court below. There is also no evidence that the conduct of the appellants impedes the course of justice.

[150] I must also add that I was taken aback by the submission that TSC was in contempt of this Court's order made under rule **5(2)(b)** of this Court's Rules.

Under that rule, all an applicant need prove is firstly that he has an arguable appeal and an arguable appeal does not mean one which must succeed and secondly, that unless the order sought is granted, the appeal or intended appeal if it eventually succeeds, its success will be rendered nugatory. In this case this Court determined that TSC's appeal is arguable. That finding would, with respect, not found a contempt complaint. The Court further determined that complying partly with the judgment of the lower court would not render the appeal nugatory even if it were eventually to succeed. The court therefore granted a conditional stay which TSC failed to meet.

The failure to meet the condition for stay did not take away TSC's right to appeal. In my view, and for the reasons given above KNUT has not demonstrated to my satisfaction that TSC's failure to comply with the conditional stay of execution was wilful or deliberate and in any event its appeal is still alive.

[151] I also observe that this Court's order made under **rule 5(2)(b)** of our Rules was made on 23<sup>rd</sup> July, 2015. Compliance was to be with effect from 1<sup>st</sup> August, 2015. So, by the time this application was lodged on 9<sup>th</sup> September, 2015, TSC's application for stay of execution stood dismissed – which in reality meant that no order on the application was in place by the time this application was lodged. I therefore agree with counsel for TSC that there cannot be any contempt of a non-existent order.

[152] At the hearing of this Notice of Motion counsel for the unions submitted that as this application is within a consolidated appeal, the order sought in the application should also be made against SRC and the AG. My simple response is that even if the application had succeeded against TSC, there is no way orders would have been made against SRC or the AG without formal complaints having been laid and served against them. The approach suggested by counsel for the unions is, with respect, not acceptable and is for rejection. An order made without any allegation in the pleadings and without notice in writing of impropriety to the parties to be affected by the order would in fact amount to judicial impunity which this Court has never and hopefully will never be associated with.

[153] In their submissions, counsel for the unions contended that in addition to disobeying the judgment of the court below and the order made by this Court under our **Rule 5(2)(b)**, TSC, SRC and the AG were in contempt of the order made by the Supreme Court when the appellants sought a stay of execution in that court i.e **TSC -v- KNUT & 3 Others [Civil Application No. 16 of 2015] (UR)**. The Supreme Court however, only stated that it had no jurisdiction to interfere with the exercise of discretion by this Court. No order was made against the appellants to pay the salary increment. I am at a loss as to how it can now be alleged that the appellants are in contempt of that order. The submission, in the premises, was misconceived.

[154] Finally and for avoidance of doubt, I am compelled to state as a general rule that save for very

limited exceptions such as a maintenance order against a party legally liable to maintain another, a judgment for payment of money is not to be enforced by contempt proceedings but by execution and a party appealing against an order upon which the contempt allegation is founded cannot be in contempt of that order as to hold otherwise would offend the provisions of **Articles 48 and 50(1)** of the **Constitution**.

### **Conclusion on Union's Notice of Motion**

[155] In the end and for the reasons adumbrated above, it is my finding that KNUT's Notice of Motion dated 8<sup>th</sup> September and lodged on 9<sup>th</sup> September, 2015 is misconceived and is dismissed.

### **APPEAL**

[156] I now proceed to consider the appeal on its merits.

I have considered the record, analyzed and evaluated the evidence. I have also given due consideration to the submissions of learned counsel and the law. Having done so, in my view this appeal turns on determination of the following four (4) issues:

- 1) *The validity of the proceedings of 14<sup>th</sup> January, 2015.*
- 2) *Whether the trial Judge had jurisdiction*
- 3) *The role of SRC in determining remuneration and benefits for teachers, and*
- 4) *The validity of the award of between 50% and 60% increment on basic salary for teachers.*

### **Proceedings of 14<sup>th</sup> January, 2015**

I commence my analysis with the nature and character of the proceedings which were before the trial Judge. It is not in contention that TSC lodged a petition and an application before that court. Both the petition and the application sought a prohibitory injunction restraining teachers from continuing with their strike which had paralyzed learning in public schools nation-wide. TSC also sought from the court below a declaration that the said strike was unprotected illegal, null and void for the principle reasons that it offended the provisions of the LRA 2007 and that there existed no legitimate trade dispute between the unions and TSC as the unions had refused/ignored/neglected to negotiate and execute a CBA with TSC.

[157] With benefit of hindsight one can see when things began to go wrong even at that early stage. When TSC's counsel went before the trial court *ex parte*, on 8<sup>th</sup> January, 2015 on its application aforesaid, the trial Judge in my view, properly certified the application urgent but instead of fixing it for hearing *inter partes*, he ordered that the application be mentioned for directions on 9<sup>th</sup> January, 2015 in the presence of union officials. Come that day, 9<sup>th</sup> January, 2015 all parties to the dispute appeared before the trial Judge by counsel who briefly addressed the court after which the trial Judge made the following order:-

***The court notes the willingness of the parties to engage in constructive engagement in terms of Section 15 of the Industrial Court Act (ICA) 2010 and the court directs that the officials of the two unions named in the order of the court of 8<sup>th</sup> January, 2015 and the officials of TSC in court today appear before me in chambers at 10.30 a.m., on 14<sup>th</sup> January, 2015 for that purpose.***

[158] I pause here for a moment to reflect on whether, at that stage, the trial Judge kept the expected objective judicial distance as a judge from the dispute. Indeed could he himself at that stage invoke **Section 15** of the **ICA** to determine TSC's application of which he was seized? Answers will emerge as analysis of the evidence and other material before the trial court progresses.

[159] In addition to the order quoted above, the trial Judge permitted the unions to file within seven (7)

days of his order, their response to TSC's petition and application. He also granted leave to TSC to file a supplementary affidavit if necessary within seven (7) days of service of the response by the unions. He did not give a hearing date of the application but instead fixed the matter for further mention on 28<sup>th</sup> January, 2015.

[160] The matter, in the interim, came up before the trial Judge on 14<sup>th</sup> January 2015 as he had ordered on 9<sup>th</sup> January, 2015. In view of the controversy surrounding the proceedings of that day and the order made by the trial Judge consequent upon those proceedings, I have examined them with a tooth-comp and entertain doubt whether the said order flowed from those proceedings.

[161] After those proceedings, which the trial Judge recorded were under **Section 15** of the **ICA**, he made the following orders:

***“(i) That the parties have agreed the economic dispute adjudicated by the court.***

***(ii) The KNUT and KUPPET will file their memorandum and serve by 19<sup>th</sup> January, 2015.***

***(iii) The Employer (TSC) to file their memorandum and serve on or before the 26<sup>th</sup> January, 2015.***

***(iv) The Central Planning and Monitoring Unit (CPMU) and SRC to file their report within 10 days from 26<sup>th</sup> January, 2015.***

***(v) Meanwhile the unions ie KNUT and KUPPET call off the teachers strike commenced on 5<sup>th</sup> January 2015.***

***(vi) For avoidance of doubt all teachers resume teaching by Monday 19<sup>th</sup> January, 2015.***

***(vii) TSC to undertake not to victimize any teacher/union official/unions who may have participated in the strike, including payment of salaries.”***

[162] A summary of what happened before the trial Judge on 14<sup>th</sup> January, 2015 will suffice. Learned Senior Counsel **Mr. Muite** addressed the court about 7 times. On all those occasions, learned senior counsel, *inter alia*, acknowledged that, at that point in time, the only documents on the record of the court related to TSC's petition. He identified as the principal issue getting TSC and the unions to negotiate and conclude a CBA and in the interim TSC to make an offer to teachers before unions would call off the strike. **Mr. Muite** also identified as issues the role of SRC and the unlocking of teachers' basic salary. He then referred to an offer of 50% - 60% made in a consultative committee meeting of TSC. He acknowledged the stance taken by TSC which was that it could not agree to negotiate basic salary. To unlock that issue he sought time for the unions and TSC to discuss the issue failing which it was his view that the court fixes salary for teachers. In the end he stated as follows, among other things:

***“The two unions would want an arrangement that has a package to sell to their members..... proposal by the Respondent is not tenable. An order which state(s) teachers go to work is untenable. The court here and now gives time lines in terms of option No.2. The parties put in their memoranda .....***

***In appreciation to court remarks that hostilities must cease, unions pray (for) little time be given to communicate to their constituency.”***

[163] It is plain from the above that no where did Senior Counsel state that the unions had agreed to call off their strike on any date or at all. His position was that they could only do so if an offer was made on basic salary by TSC. Counsel however, proposed the filing of memoranda. Learned counsel appreciated SRC's stance.

[164] **Mr. Sitima**, who then represented TSC on his part, identified the principal issue as the teachers'

basic salary. His urgent and immediate concern was, however, putting an end to the strike as negotiations proceeded under the guidance of the court. He also proposed the issue of basic salary be

*“subjected to a scientific criteria, “SRC or no SRC” and be taken back for negotiations by the parties with court guidance. On the 50% - 60% increment, he stated that the same was contained in an internal working document for purposes of seeking SRC’s advice. He then also stated:*

*“Court option is for parties to conclude the salary negotiations now. Option 2 is for the court to adjudicate on this matter provided there is cease fire.”*

*With respect to court adjudication, Mr. Sitima suggested that as parties embark on the adjudication there be a “cease fire”. He still maintained that TSC had to consult three (3) or four (4) agents.*

It is again plain that although **Mr. Sitima** urged calling off of the strike by the unions, he did not state anywhere on the occasions he addressed the court that TSC would undertake not to victimize any teacher/union or union official who may have participated in the strike or that TSC had undertaken to pay teachers their salaries for that period.

[165] For KUPPET **Mr. Jaoko** and **Ms Guserwa**, addressed the court. **Mr. Jaoko** agreed to the mode of the proceedings before the trial court and indeed referred to the approach of the trial Judge as “the need to arbitrate”.

None of the two learned counsel mentioned the calling off of the strike and resumption of duty by teachers or victimization.

[166] **Ms Munyi**, who represented the AG, merely stated that they would abide by court orders.

[167] **Mr. Sitienei**, for SRC, informed the trial Judge that they would submit themselves to the court process.

[168] Other parties who, the trial Judge allowed to address him, were: CS Labour, TSC chairperson, KNUT Secretary General, KUPPET Secretary General, Commissioner for Labour, CEO Teachers Service Commission and Salaries and Remuneration Commission Chairperson.

[169] The C.S Labour acknowledged that the crucial issue was the basic salary issue, which, according to him, was subject to job evaluation in order to harmonize pay for all teachers. He, did not appear to agree that SRC’s advice is binding on TSC.

[170] The chairperson of TSC agreed to conclude a CBA but wished for an end to the strike.

[171] The Secretary General of KNUT made a long statement on the history of the dispute between teachers and TSC and identified basic salary component in CBA as the prerequisite to fruitful negotiations. He further referred to the same document in which a proposal for a salary increment of 50% - 60% was made which the unions treated as an offer by TSC and which was agreeable.

[172] The Secretary General of KUPPET supported KNUT Secretary General. He however, acknowledged that basic salary for teachers had been negotiated under TSC’s consultative committee but that negotiations had not borne fruit blaming SRC for the failure as it took over the negotiations.

[173] The Commissioner for Labour was of the view that parties were expected to follow the structure provided for negotiations and exhaust that machinery before resorting to industrial action or before going to court. He contended that good industrial relations are not possible under threats.

[174] The CEO of Teachers Service Commission gave a background to the dispute and the role of SRC in salary negotiations. He acknowledged that TSC had proposed salary increment of 50% - 60% which had been rejected by SRC on the basis that a job evaluation had to be undertaken before negotiations could be

held. He further stated that TSC had itself carried out a study but SRC wanted their own study thereby precipitating a stale mate.

[175] The Chairperson of SRC defined SRC's role in agreeing on remuneration and benefits for all public officers who include teachers. She contended that in giving advice on remuneration and benefits, SRC takes into account equity, affordability, sustainability and harmony with the entire public sector. She further contended that teachers' salaries as at 2012 were at par with those of other public officers save for certain allowances. In her view, SRC's advice is binding on TSC. She acknowledged the document containing the 50% - 60% salary increment but said it was without her advice.

It was also her contention that further increments or reviews of salary would await a job evaluation across the board – which was to commence in due time.

[176] The above is a summary of what happened before the trial Judge on 14<sup>th</sup> January, 2015 and gave birth to the order recorded by the trial Judge as set out above. One does not require a microscope to find that there was no consensus on any of those orders.

[177] It is also plain that TSC did not abandon its petition and application.

Further, whereas the parties were unanimous that the dispute be adjudicated by the court or be negotiated by the parties under the guidance of the court, they were not unanimous on whether the adjudication would be within TSC's petition or in other proceedings. The learned Judge chose to adjudicate the matter under what he called "*economic dispute*." And invited memoranda from the parties and reports from CPMU and SRC. It is doubtful whether the trial Judge would lawfully drastically amend a party's pleading without an application in that regard. It is also doubtful whether the trial Judge would in the course of resolving a party's claim invite his adversary to lodge his claim to which the original claimant is invited to respond. Those are in my view novel proceedings indeed.

[178] The case of **Nairobi City Council -v- Thabiti Enterprises Ltd [1995-98] 2 EA 231 (CAK)** may illustrate the point. There, the respondent filed a suit against the appellant alleging trespass and sought an injunction and general damages. The suit ended in formal proof as the defence delivered by the appellant was struck out for being frivolous and an abuse of the court process. Negotiations were held between the parties with a view to transferring the subject property to the appellant and Kshs. 1 million was paid by the appellant after judgment was entered for the value of the suit property.

[179] The appellant applied for a review of the judgment on the basis that there was an error on the record as the judgment was in relation to market value compensation to the respondent for the suit property instead of damages for trespass. The review application was dismissed as, according to the learned Judge, the appellant had acquiesced at the hearing and even received part of the decretal sum.

On appeal the judgment was overturned as the respondent had not claimed the value of the land in its suit. The court further held that it was irrelevant that the appellant had acquiesced in the procedure adopted by the court. **Akiwumi JA** (as he then was) with whom **Tunoi JA** (as he then was) agreed, held that making a decision on an unpleaded issue amounts to wrongful assumption of jurisdiction by the learned Judge.

[180] What happened in the matter before us is somewhat similar. The learned Judge converted TSC's petition into an economic dispute which conclusion became the cornerstone of his eventual decision. It makes no difference that TSC appeared to acquiesce in what the trial Judge did and participated in the subsequent economic dispute proceedings as a respondent. The Court in the above case also discredited its decision in **Odd Jobs -v- Mubia [1970] E A 476** in which, under certain circumstances, a court can make its decision on unpleaded issue. That principle, according to the court, was not applicable to Kenya.

### **Conclusion on the Proceedings of 14<sup>th</sup> January, 2015**

[181] Like **Akiwumi JA** and **Tunoi JA**, I hold that it was not open to the trial Judge to convert TSC's petition into an economic dispute and in doing so I, find he assumed a jurisdiction which he did not have.

### **Other jurisdictional issues**

[182] There are other jurisdictional flows which, with respect, were committed by the trial Judge. After the recording of the order of 14<sup>th</sup> January, 2015, TSC felt predictably aggrieved. It therefore, on 23<sup>rd</sup> January, 2015 lodged an application by way of a Notice of Motion challenging that order. It sought stay and setting aside of those orders on the grounds already stated at the beginning of this judgment one of which, was that the orders went beyond the substance of the dispute presented in its petition and were made without jurisdiction. When **Mr. Sitima**, the then learned counsel for TSC, addressed the court, he wondered whether the court was a conciliator or an adjudicator and whether the roles could be undertaken simultaneously. He then cautioned that parties needed to adhere to the law in resolving the dispute.

[183] In view of what is discussed above, it cannot be gainsaid that learned counsel's concerns were legitimate. TSC had moved the court by way of a petition and could have expected any further proceedings subsequent to the proceedings of 14<sup>th</sup> January, 2015 to be in that petition. It was entitled to complain since by the order of 14<sup>th</sup> January, 2015 it became the respondent. TSC was also entitled to know what had become of its petition as the order made no mention of it. It is also plain that the order of 14<sup>th</sup> January, 2015 altered the parties' respective positions and claims. Indeed there was no relationship between TSC's petition which sought a declaration and an injunction and the order of 14<sup>th</sup> January, 2015.

[184] Counsel for the unions were disappointed with the turn of events caused by TSC's Motion and true to their professional calling as advocates of the High Court, applied for time to respond to the application. One would have expected the trial Judge to allow the filing of responses and fix TSC's application for hearing. The learned Judge did neither. He in fact reiterated the orders of 14<sup>th</sup> January, 2015 which he, for the first time said were by consent and had been subsequent to conciliation proceedings conducted under his auspicious in terms of **Section 15 of the ICA and Article 159 of the Constitution of Kenya, 2010**. The learned Judge therefore ordered full compliance of those orders. Although he ordered full compliance, he allowed parties to address issues raised in TSC's application and he would determine them during the hearing of the economic dispute. Yet it was the very course TSC sought to set aside in its application. That is another misstep by the trial Judge as he in effect dismissed legitimate complaints of TSC without hearing it.

[185] The substantive issues however, are whether indeed the parties had, on 14<sup>th</sup> January, 2015 recorded any consent order before the trial Judge and whether the trial Judge had jurisdiction to conduct conciliation under **Section 15 of ICA** and thereafter hear the same parties on an economic dispute. [186] With regard to the order of 14<sup>th</sup> January, 2015, the discussion above on whether the learned trial Judge could make a determination on unpleaded issues is relevant. As already found the parties were not in agreement save on the matter being handled by the court.

[187] In **Kasmit Wesonga Ongoma & Another -v- Wanga [1987] eKLR**, this Court differently constituted said:

***“A consent judgment is a judgment the terms of which are settled and agreed to by the parties to the action.”***

[188] In the appeal before us, as already observed, the order recorded on 14<sup>th</sup> January, 2015 did not flow from the proceedings held before the trial Judge. Save for the parties being in tandem that the court handles the dispute, they did not state the terms of the agreement. There was therefore no agreement on the terms of the alleged consent order. Indeed as pointed out already, none of the parties stated that the dispute had metamorphosed into an economic dispute and none said anything about TSC undertaking to pay salaries to teachers who took part in the strike nor did anyone mention that TSC had undertaken not to victimize teachers or otherwise not take any other disciplinary action against them. Indeed, on 14<sup>th</sup> January, 2015 when the order was recorded, no reference was made to the same being by consent. The word “*Consent*” only made its way to the record after TSC challenged the order in its application which was lodged on 23<sup>rd</sup> January, 2015. What happened before the learned Judge was nowhere near what took

place in **Harani -v- Kassam [1952] 19EACA 131** and **Flora Wasike -v- Destimo Wamboko (supra)** where consent or compromise orders flowed from proceedings ante the recording of the consent order.

### **Consequences of Proceedings of 14<sup>th</sup> January 2015**

[189] Without the consent allegedly recorded on 14<sup>th</sup> January, 2015, the subsequent proceedings would be without foundation. It is the alleged consent which the trial Judge believed clothed him with jurisdiction to further preside over the dispute. So, whereas a Judge of the **IC**, like the trial Judge, has jurisdiction under the Constitution (**Article 162 (2)(a)**), **Section 12** of **I.C.A.** and **Sections 10(b) & 73 (1) of the LRA**, to entertain disputes between employers and employees, the trial Judge in this dispute, in so far as he believed the parties had empowered him to proceed in the manner he did when no such power had been given, he lost jurisdiction to proceed with the dispute as he purported to do.

### **Jurisdiction under Section 15 of ICA**

[190] Related to the want of jurisdiction on the part of the trial Judge on the basis of the alleged consent order, is the trial Judge's finding that he had jurisdiction to proceed under the provisions of **Section 15** of the **I.C.A.** The section is in the following terms:-

#### ***“15 Alternative dispute resolution***

***(1) Nothing in this Act may be construed as precluding the court from adopting and implementing on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159 (2) (c ) of the Constitution.***

***(2) .....***

***(3) .....***

***(4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.”***

And **Article 159 (2) (c )** provides as follows:-

***“In exercising judicial authority the courts and tribunals shall be guided by the following principles –***

***( c ) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)” (clause (3) limits the application of traditional dispute resolution mechanisms).***

[191] The Constitution, in my view, appears to envisage alternative dispute resolution as an external process outside the normal court forum process. The language of the Constitution is plain and unambiguous. It leaves no room for a contrary interpretation. Yet the trial Judge in this matter invoked **Article 159** of the **Constitution** to preside over what he himself knew were conciliation proceedings. With respect to the learned Judge, the Constitution, 2010 did not empower him, as a Judge, to preside over conciliation proceedings.

[192] How about conciliation under **Section 15** of the **ICA**? The heading of the section is “Alternative dispute resolution”. In any event the section is self limiting as it expressly states the alternative dispute resolution has to be in accordance with **Article 159 (2) (c )** of the **Constitution**. There is nothing in the section therefore which would suggest that a judge of the Industrial Court himself whilst seized of a dispute between an employer and an employee may metamorphose into an alternative dispute resolution facilitator. A Judge must remain a Judge at whatever level he is seized of a dispute between parties before

him. It would be to expand, the scope of **Section 15** of **ICA**, to suggest that the section empowers a Judge to preside over a dispute as a judge at one stage and as a conciliator or other alternative dispute resolution facilitator at another stage within the same proceedings.

To do so would in any event, violate the provisions of **Article 159 (2) (c)** which is the source of authority for **Section 15** of **ICA**.

[193] All that **subsection 15 (1)** suggests is that a Judge of the I C instead of hearing a dispute himself has liberty to let another qualified person determine the dispute which determination the Judge may adopt or implement on his own motion or at the request of the parties. The internal methods envisaged in the subsection are not synonymous with methods within the court system. In my view, it merely refers to internal methods within the parties' own organizations. The subsection cannot expand the jurisdiction beyond what the Constitution provides.

[194] To put the matter beyond dispute, alternative dispute resolution is also provided for under **Section 58** of the **Labour Relations Act (LRA)**, Chapter 233 Laws of Kenya. Under **Subsection (1) (a)** and **(b)** of that section, a conciliator or an arbitrator must be independent. With respect to conciliators, their appointment is made under **Section 65** by the relevant Minister who does so from among persons set out in **Section 66**. A reading of that section shows that of the persons who may be appointed as conciliators, a Judge is not one of them.

[195] The Labour Relations Act (LRA) commenced on 26<sup>th</sup> October, 2007 whereas the Industrial Court Act (ICA) commenced on 30<sup>th</sup> August, 2011. The latter Act does not define conciliator or conciliation, whereas the former defines conciliation as "*the act or process of conciliating*". However, in my view the conciliation provided under the two acts must relate to the same process. I say so, because both LRA and ICA relate to the relationship between employers and employees with the former elaborating on registration, regulation, and management of employer/employee organizations, settlement of trade union and trade disputes and the latter defining the court's core functions as being hearing and determining disputes relating to employment and labour relations.

[196] In the absence of definition of conciliator or conciliation, in ICA, guidance as to who may qualify as conciliator or what conciliation means may be sought from LRA. **Section 66 (1)** of **LRA** is in the following terms:

***"66(1) A person appointed to conciliate a dispute under this part shall be –***

***(a) A public officer;***

***(b) Any other person drawn from a panel of conciliators appointed by the Minister after consulting the Board, or***

***(c) A conciliator from the Conciliation and Mediation Commission.***

**Section 66(1)**, in my view, would suggest that conciliation proceedings are inferior to proceedings before a Judge of the Industrial Court. I say so, because under **Section 73 (1)** of **LRA**, where a dispute is not resolved by a conciliator, any party thereto has the liberty to refer it to the Industrial Court. **Section 73(1)** implies that a conciliator cannot at the same time be a Judge to whom reference may be made.

[197] I have also perused Industrial Court, Cause No. 340 of 2014; **Kenya Concrete Structural, Ceramic Tiles Woodply and Interior Designs Employees Union (KCSW & I) -v- Laxmanbhoi Contruction Ltd & Another (UR)**, which is a ruling of the trial Judge dated 31<sup>st</sup> October, 2014 in earlier proceedings before him. There, the claimant filed suit before the Industrial Court before first referring the dispute to a conciliator for conciliation. On a preliminary objection taken by the Interested Party that the Court had no jurisdiction to entertain the matter before conciliation, **Nduma, J** held:

***"20. Accordingly, the court invokes the provisions of Section 15(2) of the Industrial Court Act***

**No. 20 of 2011 to refer the dispute to the Minister for conciliation under the provisions of Part VIII of the Labour Relations Act. Only if the dispute is not resolved and a certificate of unresolved dispute is filed with the Court, may the matter be proceeded on in Court. The preliminary objection is upheld.** (underline mine)

[198] So, the trial Judge as at 31<sup>st</sup> October, 2014 determined that he had no jurisdiction to hold conciliation proceedings. What happened between then and 14<sup>th</sup> January, 2015, a period of only three (3) months, when he purported to hold conciliation proceedings herein?

### **Conclusion on Jurisdiction under Section 15 of ICA**

[199] In the premises from whichever angle one looks at the matter, a Judge hearing a labour dispute is not expected to, at the same time, sit as a conciliator over the same dispute. A Judge should never drop the mantle of a Judge and assume quasi judicial robes to avoid being stained with the dirt of the conflict between parties.<sup>103</sup>

[200] In the end, it is my finding that the trial Judge in this case, with all due respect to him, had no jurisdiction to sit both as a Judge and as a conciliator in the dispute between TSC and the unions. Yet those proceedings the Judge held without jurisdiction produced the contentious “consent order” of 14<sup>th</sup>

January, 2015. So, in addition to there being no consent order between the parties which could be recorded on 14<sup>th</sup> January, 2015, the same order was as a result of proceedings held by the same Judge without jurisdiction. That order was the foundation of the subsequent proceedings which therefore also had no foundation. The result is that the proceedings and the resultant judgment are a nullity and a nullity confers no benefit to anyone.

### **SRC’s Advice to TSC**

[201] The learned Judge determined that SRC’s advice is not binding on TSC. I shall now examine whether that finding can hold. SRC is a creature of the Constitution, 2010. It was established under **Article 230** which provides:

***“230. (1) There is established the Salaries and Remuneration Commission.”***

With regard to its powers and functions, **sub-Article (4) (b)** provides:

***“(4) The powers and functions of the Salaries and Remuneration Commission shall be to –***

***(a) .....***

***(b) Advice the national and county governments on the remuneration and benefits of all other public officers”***

In performing its functions, SRC is mandatorily required to take into account principles set out in **sub-Article 5**, which reads:

***“(a) the need to ensure that the total public compensation bill is fiscally sustainable;***

***(b) The need to ensure that the public services are able to attract and retain the skills required to execute their functions;***

***(c) the need to recognize productivity and performance, and***

*(d) transparency and fairness*

[202] In addition to the powers and functions of the SRC enshrined in **Article 230 (4)** of the **Constitution**, the Salaries and Remuneration Commission Act, **Section II** donates further functions namely:

- “(a) inquire into and advise on the salaries and remuneration to be paid out of public funds;*
- (b) keep under review all matters relating to the salaries and remuneration of public officers*
- (a) 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;*
- (b) conduct comparative surveys on labour markets and trends in remuneration to determine the monetary worth of jobs of public offices;*
- (c) determine the circle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;*
- (d) make recommendations on matters relating to the salary and remuneration of a particular state or public officer;*
- (e) make recommendations on the review of pensions payable to holders of public offices; and*
- (f) perform such other functions as may be provided for by the Constitution or any other written law.”*

(203) The trial Judge, at paragraph 64 of his judgment, held:

*“64 It is the Courts considered view that TSC is not bound by the advice by SRC on the matter and only TSC has the constitutional and statutory mandate to conduct a job evaluation exercise of teachers. SRC has an advisory role on both the determination of basic salary and benefits payable to teachers, including the conduct of a job evaluation exercise. The court so finds.”*

[204] The trial Judge came to that conclusion because he said he had given the “widest construction” to **Article 230 (4) (d)** in the context of **Articles 41 (5), 237 (1) (b), 249 (2) (b)** and **259 (11)** of the **Constitution**. **Article 41(5)** as read with **Section 57(1)** of the **Labour Relations Act** makes provision for the employer and a recognized union to conclude a CBA setting out terms and conditions of service for all unionisable employees such as teachers in this case. **Article 237 (1) (b)** provides for recruitment and employment of registered teachers by TSC whilst **Article 249 (2) (b)** provides for the independence of constitutional commissions which are not subject to direction or control by any person or authority and **Article 259 (11)** is on the efficacy of exercise of power on advise, under the Constitution.

[205] In coming to that conclusion, the trial Judge would appear not to have considered the submissions made on behalf of TSC, AG and SRC and the evidence adduced by the AG and SRC. I will revert to this failure to consider contradicting evidence by the trial Judge later on in this Judgment. Suffice to say that although the trial Judge stated that he interpreted the Constitution holistically and gave the cited provisions the “widest construction” as decreed in the Supreme Court opinion No. 2 of 2012 in the **Matter of Principles of Gender Representation in the National Assembly and the Senate and in the Matter of the Attorney General** (on behalf of the Government) **as the Applicant, [2012] eKLR**, the reality suggests the contrary. I say so, because the trial Judge, with all due respect to him, did not appear to appreciate the import and purport of Constitutional provisions relating to remuneration of public officers in relation to public finance, despite citing some of the provisions himself. He, for instance, cited **sub-Articles 230 (5) and 259 (11)** of the **Constitution** without discussing how those provisions would be implemented by SRC without its advice being binding.

[206] The Constitution in **Article 230 (5)** gives the guiding principles under which SRC operates. I have already set out those provisions and the principles under SRC Act (Section 11). What is plain beyond peradventure is the fact that in giving its advice SRC takes into account the entire financial outlook of the nation. It must consider whether the total public compensation bill is fiscally sustainable **Article 230(5) (a)**. It is also mandatorily required to take into account principles of transparency and fairness (**Article 230 (5) (d)**) and the need to recognize productivity and performance (**Article 230(5) (c)**). The trial Judge did not give any consideration to the effect of failure to comply with SRC's advice nor did he pay any attention to how SRC would achieve its purpose if its advice is not binding.

[207] SRC's role is in consonance with the provisions of **Article 201** of the **Constitution** on principles of public finance. **Sub-Articles (a) and (b) (1)** are pertinent and are in the following terms.

*“201. The following principles shall guide all aspects of public finance in the Republic –*

*(a) there shall be openness and accountability, including public participation in financial matters;*

*(b) the public finance system shall promote an equitable society, and in particular –*

*(g) the burden of taxation shall be shared fairly;*

[208] It can immediately be noted that SRC is one of the bodies constitutionally mandated to achieve the objectives of **Article 201** because it must, in rendering its advice, take into account the need to ensure that the total public compensation bill is fiscally sustainable. It must also take account of principles of transparency and fairness.

[209] SRC's additional functions under the SRC Act( **Section 11 (a) (b) and (c)** (see above)), are intended to ensure that the overall objectives of the Constitution and SRC are achieved.

If the advice of SRC is not binding, the intendment of Constitutional provisions given above would be defeated. SRC would in fact be of no value. In my view it cannot have been the intention of the people of Kenya when they introduced SRC in their Constitution, 2010 for it to be worthless. The people of Kenya broke away from the former way of negotiating and agreeing on remuneration and benefits between public servants and their employers when each public sector employees negotiated and agreed on their separate remuneration packages with the result that disparities reigned.

[210] With regard to the argument that TSC and SRC are both independent Commissions and SRC cannot load it over TSC, the simple answer is that the two commissions have distinct mandates secured under the Constitution and lawful compliance with provisions of the Constitution cannot be termed as interference or control of any one even if it happens that the body affected is also a Constitutional Commission. That argument indeed collapses when it is considered that the Constitution itself has reposed in SRC more direct interventionist powers in matters of remuneration and benefits with respect to other Constitutional Commissions such as the Judicial Service Commission.

[211] It must also be remembered that the Constitution would not give power to SRC to carry out its functions under the Constitution in vain. The Constitution must also be interpreted in a manner designed to achieve its main purpose. As already observed in performing its functions SRC considers principles of sustainability of the total public compensation bill, productivity, performance, transparency and fairness which are values enshrined in **Article 10** of the **Constitution**. (See **In the Matter of the Principle of Gender Representation in the National Assembly and Senate** (supra).

[212] SRC is also protected under **Article 259 (11)** of the Constitution which reads:-

*“If a function or power conferred on a person under this constitution is exercisable by the person only on the advice or recommendation, with approval or consent of, or on consultation with another person, the function may be performed or the power exercised only on that advice,*

***recommendation, with that approval or consent or after that consultation except to the extent that this constitution provides otherwise”***

The record shows that despite citing the above provision, the trial Judge made no reference to it when he concluded that, TSC is not bound by SRC’s advice save for stating that he had given it, together with the other provisions, “*widest construction*”. In my view, this sub-Article makes it plain beyond peradventure that TSC is bound by the advice of SRC as the Constitution does not exempt TSC from that advice.

[213] There should also be loyalty to the time honoured common law doctrine of precedent. The Supreme Court of Kenya is the apex court in our court system and its decisions are binding on all courts below it. That court has rendered itself that its advisory opinion has binding force. In **the matter of the Interim Independent Electoral Commission [2011] eKLR**, the Supreme Court held, after reviewing several decisions emanating from other jurisdictions, as follows:

***“[93] In our discussion of advisory jurisdiction, we have adopted a circumscribed mandate in relation to the exercise of that jurisdiction. From such reserved position, and in view of the pragmatic and discretionary nature of the mandate as we conceive it, we perceive that the Supreme Court’s decision in this domain may significantly touch on legal, policy, political, social and economic situations. On this account, it is inappropriate that the Supreme Court’s Advisory Opinion should be sought as mere advice. Where a government or state organ makes a request for an opinion, it is to be supposed that such organ would abide by that opinion; the opinion is sought to clarify a doubt, and to enable it to act in accordance with the law. If the applicant were not to be bound in this way, then it would be seeking an opinion merely in the hope that the Court would endorse its position otherwise, the applicant would consider itself free to disregard the Opinion. This is not fair, and cannot be right.....***

***[94] For the above reasons, we decide that an Opinion of the Supreme Court is binding as much as any other decision of the court as herein indicated.”*** (Underlining mine)

[214] In the matter at hand, SRC takes into account the overall financial picture of the country before giving its advise. It would be alive to the salaries and remuneration being paid to State Officers as it is mandated to keep under review all matters relating to the salaries and remuneration of public officers in addition to setting the remuneration and benefits of all State Officers. Without being alive to the overall financial position of the country it would not be able to assess the need to ensure that the total public compensation bill is fiscally sustainable. To carry out the mandate, SRC would be expected to have specially qualified staff in economic financial, statistical, commercial, and banking fields in addition to other functionaries. TSC would not be expected to have among its personnel such highly qualified staff since its mandate is solely limited to matters involving teachers and the education sector. It therefore has no capacity to determine the overall financial and economic status of the nation. In the premises it cannot seek advice for the sake of it. It is expected to use the advice.

[215] Reliance was placed on two decisions of the Supreme Court of India for the proposition that advice means just that and no more. **Article 320** of the **Constitution** of India is in the following terms:-

***“(e) On any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity and any question as to the amount of any such award, and, it shall be the duty of a Public Service Commission to advise on any matter which the President or as the case may be the Governor of the state may refer to them....”***

In **A.N. D’Silva -v- Union of India [1962] AIR 1130 [1962] SCR Supl (1) 968**, upon which the unions placed reliance, the appellant was dismissed from his employment by the President notwithstanding advice by the Public Service Commission that he be retired. The court held ***“The President is by Art. 320***

***of the Constitution required to consult the Union Public Service Commission in disciplinary matters but the President is not bound by the advice of the Commission.”***

Also invoked by the unions is the case of **Nagaraj Shivarao Kurjagi -v- Syndicate Bank Head Office [1991 AIR 1507, 1991 SCC (3) 219; 1991 SCALE (1) 832; 1991 SCR (2) 576 and JT 1991 (2) 529]**. There, the appellant was retired on the advice of the Central Vigilance Commission but the Supreme Court held:

***2.1 But for the Finance Ministry’s directive dated 21.7.1984, the advice tendered by the Central Vigilance Commission is not binding on the Bank or the punishment authority; it is not obligatory upon the punishing authority to accept the advice of the Central Vigilance Commission.”***

[216] In my view these authorities are clearly distinguishable from the appeal before us. The two cases involved disciplinary measures taken by the employer against employees under circumstances drastically different from the circumstances in the matter before us. The positions of the advising authorities in the two cases, cannot be compared to SRC’s position in relation to TSC. The considerations which SRC must take account of are absent in the two Indian cases. In any event the decisions in the two case have no binding effect on us.

**In the matter of the Interim Independent Electoral Commission (Supra)**, the Supreme Court stated as follows, on the relationship between Independent Commissions under the Constitution:

***“While bearing in mind that the various commissions and independent offices are required to function free of subjection to “direction or control by any person or authority”, we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the commissions and independent offices, in carrying out their functions are not to take orders or instructions from organs or persons outside their ambit. These commissions or independent offices must however, operate within the terms of the Constitution and the law; the “independence clause does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law.”***

In the light of what I have discussed above, the argument that TSC is not bound by SRC’s advice because it is an independent commission equal in status to SRC, loses its luster. SRC’s advice to TSC is pursuant to Constitutional provisions and must be binding to achieve not only SRC’s objectives but also those of the Constitution.

### **Conclusion on SRC’s Advice to TSC**

[217] In the end and for all the reasons discussed above, I hold that the advice of SRC on the remuneration and benefits for teachers is binding on TSC.

### **Validity of the Award**

[218] I now examine whether the award made to teachers of basic salary increment of between 50% and 60% is valid. The learned trial Judge stated that it was for four (4) years and that it met the wage criteria he set out in the judgment. He further stated that the increase was effective from 1<sup>st</sup> July, 2013 and would expire on 30<sup>th</sup> June, 2017. The record shows that at paragraph 240 of his judgment the learned Judge stated.

***“240. It is common ground that TSC complied with these guidelines and submitted a detailed proposal to SRC with justification for a basic salary review of between 50-60% to be implemented in a four (4) year cycle.”***

The trial Judge further stated at paragraph 243, as follows:

**“243. The evidence before Court points to the contrary that indeed TSC made an offer to the unions of a basic salary increase of between 50-60% for a period of four (4) years.”**

At paragraph 273, the trial Judge cited with approval **Saeed R. Cocker’s** book *“The Kenya Industrial Court, Origin, development and practice”*, as follows:

**“The level of Economic benefits enjoyed by workers can never be static and the Court determines their level from time to time taking into consideration all the Economic factors plus social and to some extent political considerations.”**

**Saeed R. Cocker** continued:

**“It is an impossible task to lay down the criteria that are used in Industrial Court adjudications. Apart from the traditional concepts, there are always very strong social and political forces at play which have to be accorded due respect when the questions of determining the wage and salary levels and other fridge (sic) benefits for the work force in the country are being considered.....the principle Economic criteria that have emerged historically and which are commonly used in all cases are;**

**The basic needs of the workers on the family budget (the basket of goods); movements in the cost of living; wage comparisons; i.e. wages paid in other industries and places; money i.e. the financial position of the employer and the ability or inability to pay; productivity increase if any i.e. the workers efforts in productivity of an enterprise. The effect of a wage award on employment situations in the country and on the price of products of the undertaking, that is its effect upon consumer purchasing power and employment ..... The court’s main concern has been in the first place to ensure that the workers’ standard of living does not go down. This is done by restoring the loss of purchasing power that the workers may have suffered during the previous collective Agreements. When this is done the workers’ standard of living is maintained but wherever and whenever it is possible the Court considers it necessary that the workers real income should also increase so that their standard of living may see some improvement. This is done by granting the workers some percentage of wage increase over and above the compensation for increase in the costs of living.”**

[219] I may assume that the criteria the trial Judge stated to be in the judgment is the criteria in Cocker’s book. With respect, that criteria would not be appropriate in the circumstances and at the time the trial Judge applied the same.

(a) First, Cocker published his book in 1981. It is obvious that the book pre-dates the **Constitution, 2010** and the **Salaries and Remuneration Commission Act** which came into force in 2010 and 2011 respectively. The book also predates the **Teachers’ Service Commission Act No. 20 of 2012**. As would be expected, Cocker was addressing circumstances which were drastically different from the current circumstances.

(b) Second, even if the criteria suggested by Cocker in his book were applied, it is unlikely that the Judge would have had capacity to do so. I say so, because the trial Judge had no way of carrying out *“Wage comparisons i.e. wages paid in other industries and places; money i.e. the financial position of the employer and the ability or inability to pay; productivity increase if any i.e workers efforts on productivity of an enterprise. The effect of a wage award on employment situations in the country.....”*. Those considerations and more are the factors which SRC takes into account when rendering its advice.

(c) Third, at the time Cocker was suggesting the said criteria, there was no requirement for TSC seeking the advice of SRC or consulting it on basic salary increase for teachers.

(d) Fourth, the trial Judge made his award without the benefit of SRC’s advice. I have already determined that SRC’s advice to TSC on the salaries and remuneration to be paid to teachers is

binding and in the matter before the trial Judge, that advice had not been sought before the offer was made and TSC had specifically acknowledged that SRC had advised against any increase of basic salaries to teachers when the advice was sought. SRC also confirmed that position and gave reasons for its advice.

(e) Fifth, in awarding teachers an increase of basic salary of between 50% and 60%, the trial Judge merely picked the figures from the document which TSC had tabled in one of its consultative committee meetings. TSC had, as it sought approval of the figures, stated that it had carried out a study before proposing the figures. The data and material upon which TSC relied to make the proposal were not produced before the trial Judge. So, the trial Judge did not himself make a scientific finding that the increase met the criteria he purported to apply.

(f) Sixth, the trial Judge did not appreciate that at the time he made the said award to teachers their salaries had been harmonized with those of the civil service and that the increase would place teachers a notch above their colleagues in the rest of the public sector. That would defeat the objectives the Constitution set out to achieve by creating SRC as it would result in unfairness thereby offending **Article 230 (5) (d) of the Constitution, 2010**. The trial Judge may have desired to correct past errors (which could have been the subject of separate proceedings) and in attempting to do so failed to appreciate that he would precipitate another injustice to other employees in the public sector.

(g) Seventh, the trial Judge failed to appreciate the implications of his award. The consequences of implementing the award were unequivocally stated by RW 3. In his own words:

***“Demands before this court, consequences would be devastating. It would lead to serious macro-economic instability.***

***Demand range of 83% - 237% in this case would translate to 808 billion additional revenue. Other sectors would shut down. We would have to heavily borrow. Lead to high labour costs and uncompetitive economy or tax people by four times.***

***Economy would be unstable and may be collapse. All would be losers. The consequences would be immediate. This would be factored in capital markets. Exchange rate would go up; capital outflow and economy would not sustain it”.***

[220] The appellants called two other witnesses whose evidence the trial Judge discredited but with regard to RW 3, the trial Judge accepted his testimony as: *“Consistent in all material respects”*. Notwithstanding this assessment of RW 3, the trial Judge did not rely on his evidence. RW 3 was not an ordinary witness. He was, at the time of testifying, the Economic Secretary in charge of Budget and Fiscal Economic Affairs of the National Treasury. He would advise the Government on all economic policy matters especially the budget. He held a PHD in Economics, specializing in policy. He also held a Master’s Degree of the University of Nairobi and another Master’s Degree of the University of Magill, Canada. He had previously worked for the World Bank as a Senior Advisor (Board of the World Bank). He had also worked for UNESCO, and IMF as a Community Service Senior Accountant as well as having taught at the University of Nairobi in its Economics Department. In my view, he qualified to be described as an expert in the area of economics. I am alive to the fact that a court is not necessarily bound to accept the evidence of an expert. However, it can only do so for cogent reasons. The trial Judge did not proffer any reason for not accepting, as true, the testimony of RW 3. The record does not also show that the unions tendered any contradicting evidence in answer to that of RW 3.

In **Parvin Singh Dhalay -v- Republic [Criminal Appeal No. 10 of 1997] (UR)**, the court held:

***“It is now trite law that while the courts must give proper respect to the opinion of experts, such opinions are not binding on the courts.... Such evidence must be considered along with all other valuable evidence and if there is a proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so.”*** (underlining mine)

And in **Professor David Musyimi Ndetei t/a Oasis Mineral Water -v- Safepark Limited [Civil Appeal No. 159 of 2004]**, this Court held:

*“Of course, where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if the court is satisfied on good and cogent ground(s) that the opinion though it be that if an expert, is not solidly based, then a court is not only entitled but would be under a duty to reject it.”(underlining mine)*

The authorities are therefore unanimous that for a court to ignore expert evidence, there must be cogent reasons for the rejection. In the appeal before us, as already, observed, the trial Judge acknowledged that RW 3 was consistent and yet failed to rely upon his testimony in his judgment.

[221] My finding is therefore that it was not open to the trial Judge to ignore the evidence of RW 3 or fail to rely upon the same as there was no basis for not doing so.

### **Conclusion on Award**

[222] For those reasons, I find and hold that the award of salary increase to teachers of between 50% and 60% had no basis or justification.

### **SRC’s role in job evaluation and CBA negotiations**

[223] What I have discussed above on the binding effect of the advice of SRC on TSC when determining remuneration and benefits for teachers is relevant to the discussion on the role of SRC in job evaluation and negotiations to conclude a CBA. As already stated, under both **Article 230 (5) (b) and (c) of the Constitution** and **Section 11 (a), (b), (d) and (f) of the Salaries and Remuneration Commission Act**, in performing its functions, SRC takes into account, among other things, the need to recognize productivity and performance; the need to ensure that public services are able to attract and retain the skills required to execute their functions. To achieve those objectives, SRC keeps under review all matters relating to the salaries and remuneration of public officers; advises the national and county governments on the harmonization, equity and fairness of remuneration and conducts comparative surveys

on labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices. On the other hand, TSC’s role under the Constitution so far as relevant, is limited to recruitment, employment of registered teachers and their promotion. True, promotion entails an element of job evaluation but the same is limited to promotion within already established grades. I have already held that in determining remuneration and benefits TSC is bound by the advice of SRC for reasons already given.

[224] In carrying out a job evaluation, factors to be considered include; productivity, performance, job worth, the need to attract and retain skills and the like. SRC has constitutional and statutory sanction to carry out job evaluation for all public officers. It is, indeed, the constitutional commission best skilled to do so as it is constitutionally and by statute required to advise the two levels of government on harmonization, equity and fairness of remuneration taking into account fiscal sustainability of the public compensation bill.

In the premises, I have no hesitation in finding and holding that as job evaluation connotes determining job worth in order to ascertain appropriate remuneration, SRC is the body mandatorily required to carry out the exercise.

[225] With regard to SRC’s role in concluding a CBA, my simple answer is that SRC influences CBA negotiations through its mandatory advice to TSC on remuneration and benefits payable to teachers. It may be recalled that the unions’ stance on the matter was that they could not conclude a CBA without agreement on basic salary component. Yet TSC cannot lawfully negotiate and agree on the basic salary for teachers without approval of SRC whose advice binds it. So, whereas SRC is not a direct negotiator

with the unions on conclusion of a CBA, it influences the negotiations through its constitutional and statutory

mandate when advising TSC on remuneration and benefits payable to teachers. In practical terms, it means that before making any offer to the unions with respect to the remuneration and benefits payable to teachers, TSC must seek SRC's advice on the same.

[226] The trial Judge, therefore, erred when it held that SRC has absolutely no role whatsoever in the negotiations and determination of basic salary for teachers which holding, in my view, directly followed his earlier finding that SRC's advice to TSC is not binding. I reiterate that SRC, indeed, has a role in the conclusion of a CBA for if its approval of any offer is withheld, TSC would not negotiate the basic salary and benefits component in the CBA.

### **Whether the trial Judge usurped the role of Parliament and contravened Constitutional budget making process.**

[227] **The AG** and **Mr. Obura** contended, *inter alia*, that the trial court in awarding the teachers the 50% to 60% increase of basic salary, it usurped the role of Parliament and contravened the budget making process under the Constitution. The short answer is that the consequences of implementing the award would, indeed, disturb the budget making process in which process Parliament takes a significant part. This is not, however, the first time that a decree of a court was to be satisfied from public funds. Indeed, I agree with counsel for the unions that TSC and SRC are, in the eyes of the law, mere parties to the dispute before the court and the court is not concerned with how its decrees may be satisfied.

The trial Judge, indeed any Judge, is not expected to be infallible and where an error is detected, a party aggrieved has a constitutional right to seek redress from a higher court on appeal as the appellants have done in this appeal.

[228] In the appeal before us, the trial Judge determined that on the material before him, an award of salary increment of between 50% and 60% to teachers would be made. The learned Judge made that award on the basis of his appreciation of the budgetary process and Parliamentary involvement in the same. He also considered the "*working document*" tabled by TSC in one of the consultative committee meetings under **TSC Act**. My finding that his conclusions were not correct in law, cannot turn the trial Judge into a usurper of the roles of Parliament and the National Treasury in budget making process. As I have stated execution of court orders is the least concern of the court when determining disputes between parties who appear before it. The consequences of execution are merely incidental to a court decision if, in executing the same, other processes are upset. That is a small price to pay to sustain the Rule of Law which holds the government to account. In the event that I had found for the unions on the issues of jurisdiction, the role of SRC in determining remuneration and benefits for teachers and validity of the award of basic salary increment of between 50% and 60%, I would not have hesitated in confirming the judgment of the trial court even if it would have had the consequence of upsetting budgetary making process.

[229] I would, therefore, on my part, not fault the trial Judge on the ground that in making his award to teachers, he thereby usurped the role of Parliament and contravened the Constitutional budget making process.

### **Notice of Motion to Amend Memorandum of Appeal**

[230] Before considering the unions' cross appeals which seek to reverse the trial court's order denying them costs even though they had partly succeeded in their economic claim, I propose to first consider TSC's Notice of Motion lodged on 5<sup>th</sup> October, 2015, which seeks to amend prayer (b) of its Memorandum of Appeal to read:

***"THAT the judgment of the Employment and Labour***

***Relations Court dated 30<sup>th</sup> June, 2015 be set aside in entirety and be substituted by an order allowing the***

***Appellant's Petition in that Court with costs***".

[231] The Notice of Motion is based on two brief grounds contained in the body of the Chamber Summons namely, that the exclusion of the prayer for costs was as a result of a clerical mistake in the preparation of the Memorandum of Appeal and that the proposed amendment is meant to rectify the clerical error for the just determination of the Appeal.

[232] In the supporting affidavit sworn on 2<sup>nd</sup> October, 2015 by **Mansur Muathe Issa**, learned counsel for TSC, it is deponed, *inter alia*, that in the process of preparing the record of appeal, he discovered the said error which error, TSC wishes to correct by substituting prayer (b) of the Memorandum of Appeal with a prayer that the Petition before the Employment and Labour Relations Court be allowed with costs and that the intended amendment will cause no prejudice to the other parties in the appeal.

[233] **Mr. Kiragu** who prosecuted the Notice of Motion before us submitted that under the Constitution, 2010, disputes between parties should be determined with finality and on substance rather than on form. He reiterated the averment in the supporting affidavit that the proposed amendment would not cause prejudice to any of the parties to the appeal.

[234] The unions have filed two replying affidavits sworn by their Secretaries General in which it is deponed that the application has been brought too late in the day without explanation for the delay and without justification. In the unions' view, the Notice of Motion has not been brought in good faith and does not advance the interest of justice.

[235] **Mr. Sigei** and **Ms Guserwa** opposed the application on behalf of the unions. Both counsel contended that the application had been brought too late and was an afterthought. **Mr. Sigei** was of the further view that such an application is not provided for in the Court of Appeal Rules.

[236] Having considered the Notice of Motion, the affidavits filed both for and in opposition to the application and submissions of learned counsel, I take the following view of the matter.

[237] This is not the first time this court is considering such an application. The court is being asked to exercise its unfettered discretion. It is elementary that a party has little difficulty in obtaining leave to amend his own pleading provided the application is not left so late in the proceedings that to allow an amendment then would be unjust to the other side. However, an amendment may be allowed at any stage of the proceedings and, in exceptional circumstances, even after Judgment. The principle which has been applied by our courts is that generally, amendments are made for the purpose of determining the real question in controversy between the parties or of correcting any defect or error in any proceedings. Indeed, it has been held time without number that, however, negligent or careless may have been the first omission, and, however, late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other parties to the proceedings. There is no injustice if the other parties can properly be compensated for in costs. (See **Central Bank Ltd. –v- Trust Bank Ltd. & 4 Others [C.A. No. 222 of 1998 (UR). See also Bullen & Leake 4<sup>th</sup> Edition, p. 124].**)

[238] TSC in its petition before the court below prayed for costs. The conduct of these proceedings suggest to me that TSC would not have had a drastic change of heart regarding its position on costs. In any event, the unions have not demonstrated how the intended amendment would cause them prejudice as TSC merely wishes to restate the position it took in the court below.

### **Conclusion on TSC's Application to amend Memorandum of Appeal**

[239] For those reasons, I find that TSC is entitled to the order it seeks. With regard to the costs of the Notice of Motion, I would order each party to bear their own costs given the nature of the litigation.

[240] In the end, the Notice of Motion dated 2<sup>nd</sup> October, 2015 and lodged on 5<sup>th</sup> October, 2015 is allowed in terms of prayer 2 thereof. The Memorandum of Appeal is deemed duly amended.

## **CONCLUSION**

[241] Having found that the trial Judge assumed a jurisdiction which, under the circumstances, he did not have and further having found that the award of basic salary increment to teachers of between 50% and 60% was invalid and unjustified, I would allow this consolidated appeal. The judgment dated 30<sup>th</sup> June, 2015 and all consequential orders are hereby set aside. It follows like night follows day that the cross-appeal of KNUT and KUPPET cannot succeed. I would dismiss and order each party to bear their own costs.

The appeal raised legitimate issues of public interest regarding the role of SRC in the determination of remuneration and benefits payable to teachers indeed to any public officer. It has therefore contributed to a proper understanding of the law. In any event any costs payable by the unions would be passed on to their members who have legitimate concerns. I would therefore order that each party should bear their own costs.

The final orders of this Court in relation to the consolidated appeal are as proposed by Githinji, J.A.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF  
NOVEMBER, 2015.**

**F. AZANGALALA**

.....

**JUDGE OF APPEAL**

*I certify that this is a true Copy of the original*

**DEPUTY REGISTRAR**

## **JUDGMENT OF OTIENO-ODEK, J.A**

### **Background facts and Claims by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

1. Let all with one accord, in common bond, build a united Kenya and justice be our shield and defender. The central issue in this appeal is not whether or not teachers are entitled to an increment in basic salary and allowances; the fundamental issue is whether the judgment of the trial court dated 30<sup>th</sup> June 2015 is valid and in conformity to the Constitution, statute and the law. The juridical competence of the trial court to conduct conciliation proceedings is a pertinent issue. A further relevant issue is the nature and legal effect of advice given by the Salary and Remuneration Commission.

2. The background to this appeal is that on 22<sup>nd</sup> December 2014, the 1<sup>st</sup> respondent, **Kenya National Union of Teachers (KNUT)** issued a seven (7) day notice of strike to the Cabinet Secretary for Labour, Social Security and Services declaring the intention of its members, who are teachers, to go on strike with effect from 5<sup>th</sup> January 2015 following failure to agree with the appellant **Teachers Service Commission (TSC)** on the terms and conditions of service for teachers including negotiating and concluding a Collective Bargaining Agreement (CBA). A similar notice was issued on 31<sup>st</sup> December 2014 by the 2<sup>nd</sup> respondent **Kenya Union of Post Primary Education Teachers (KUPPET)**.

3. Upon expiry of the seven days' notice, teachers who are members of the 1<sup>st</sup> and 2<sup>nd</sup> respondent Unions went on strike following which TSC filed **Petition No. 3 of 2015** against both KNUT and KUPPET seeking *inter alia*, injunctive orders to restrain the officials and members of the two respondent Unions from continuing with the strike.

4. On 9<sup>th</sup> January 2015, the learned judge of the Employment and Labour Relations Court (Nduma Nderi, J.) declined to issue injunctive orders as sought by TSC in Petition No. 3 of 2015 and instead directed all necessary parties, including officials of the two Unions, to appear before him in Chambers on 14<sup>th</sup> January 2015 for purpose of conducting a conciliation exercise under **Section 15** of the **Employment and Labour Relations Act**. The proceedings took place in court on 14<sup>th</sup> January 2015 with the learned judge presiding. The juridical competence of the court and the nature of proceedings conducted on 14<sup>th</sup> January 2015 is a ground of appeal.

5. A pertinent fact cited by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in Items 2.25 and 2.26 of their Joint Memorandum of Claim is that during the 24<sup>th</sup> Consultative Meeting held on 9<sup>th</sup> September 2014, the appellant TSC tabled a document christened "working document" in response to the Unions' demand for basic salary increment and other allowances. In the "working document", an offer was made by TSC for increment of basic salary for teachers by 50% to 60%. The contractual, statutory and constitutionality of the offer is the subject of this appeal.

6. The 1<sup>st</sup> and 2<sup>nd</sup> respondent Unions state that subsequent to tabling of the "working document", the Unions proceeded to consider the same and scaled down their demand from a 300% basic salary increment and made a joint counter proposal of basic salary increment of 100% to 150%; that despite the Unions significant reduction of their demand for basic salary increment, subsequent meetings of the Consultative Committee yielded no response from TSC and in the circumstances, during the 2014 Annual Delegates Conference, the Union's respective delegates passed resolutions calling for industrial action by way of strike from the beginning of the 2015 academic term.

7. The 1<sup>st</sup> and 2<sup>nd</sup> respondent Unions claim the following awards as itemized in their Joint Memorandum of Claim. In Item 3, the Unions claim increment in: basic salary, house allowance, responsibility allowance, annual leave allowance, hardship allowance, hazard allowance, disturbance allowance, accommodation and night allowance, entertainment allowance, mileage claims, advance for motor vehicle purchase, medical allowance and township allowance. Other benefit claims include: additional teacher grades, study leave, sabbatical leave, advances for purchase of motor vehicles, salary advance for first appointment, medical loans and advances, advances to pay school/university fees, sick leave, employment of E.C.D.E teachers, employment of adult education teachers, retirement age to be re-considered with voluntary retirement at 45 years and compulsory retirement at 60 years; a contributory pension scheme where a teacher contributes 7.5% and the employer contributes 15%, the class size ratio to be set at 1:25 and provision of basic teaching aid such as smart board, LCD projectors and professional teaching infrastructural facilities. The Unions claim that the effective date of the awards should be backdated to 1<sup>st</sup> July 2013.

8. Upon hearing the parties, on 30<sup>th</sup> June 2015, the Employment and Labour Relations Court (Nduma Nderi, J.) delivered judgment in Petition No. 3 of 2015. The final orders in the judgment as stated at paragraph 281 thereof are as follows:

*".....Accordingly, the court has upon careful consideration of the evidence before it found as follows:*

*(a) A basic salary to the teachers between 50%-60% for four (4) years meets the wage review criteria set out herein before in this judgment and the court awards the teachers accordingly. This award in reality translates to an annual award of between 12.5% to 15%.*

*(b) In line with the Circular issued by SRC dated 4<sup>th</sup> July 2012, the Collective Bargaining*

Agreement containing the 50%-60% basic wage increase is effective from 1<sup>st</sup> July 2013 and the same will expire on 30<sup>th</sup> June 2017.

(c) The allowances increases already awarded to the teachers by TSC with effect from 1<sup>st</sup> July 2015 ..... and all other allowances and benefits that the parties may wish to be reflected in the Collective Bargaining Agreement as negotiable items are to be reflected in the Collective Bargaining Agreement for the period 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2017 in their current status.

(d) The term of the CBA to be reflected in the ultimate Clause of the CBA document to be from 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2017.

(e) The CBA duly signed by the parties to be registered with the Court in terms of Section 60(1) of the Labour Relations Act.

(f) For the avoidance of doubt, this judgment takes effect immediately notwithstanding any delay in preparation of the CBA document and its registration with the Court.”

9. Aggrieved by the judgment and orders of the trial court, three appeals were filed with the parties as follows: **Teachers Service Commissions (TSC) -v-Kenya National Union of Teachers (KNUT) & 3 others** being **Civil Appeal No. 196 of 2015**; **Salaries and Remuneration Commissions -v- The Kenya National Union of Teachers (KNUT) & 3 Others** being **Civil Appeal No. 195 of 2015** and **The Attorney General -v- Kenya National Union of Teachers & 3 Others** being **Civil Appeal No. 203 of 2015**. Pursuant to an Order of this Court made on 22<sup>nd</sup> September 2015, the three appeals were consolidated and the lead file is **Civil Appeal No. 196 of 2015**. This judgment relates to and disposes all the three consolidated appeals.

10. For ease of reference, the appellant’s name shall be abbreviated and referred to as TSC, the 1<sup>st</sup> respondent as KNUT, the 2<sup>nd</sup> respondent as KUPPET, the 3<sup>rd</sup> respondent as SRC and the 4<sup>th</sup> respondent as the AG respectively.

### **Grounds of Appeal**

11. The condensed grounds urged in the memorandum of appeal are as follows:

i. *The learned judge erred in law in not appreciating sufficiently or at all that he had no jurisdiction to determine an “economic dispute” that was neither in the appellant’s Petition nor pleaded by any of the parties by way of cross-petition.*

ii. *The learned judge erred in law and in fact in considering that counsel had recorded and or made consent that an “economic dispute” be decided by the court whereas no such agreement existed.*

iii. *The learned judge erred in law and in fact in not appreciating that he had no jurisdiction to determine the increment payable to teachers, an issue that was not within its mandate or the court’s jurisdiction under Sections 12 and 15 of the Industrial Court Act as read with Section 77 of the Labour Relations Act.*

iv. *The learned judge erred in law by invoking Section 15 of the Employment and Labour Relations Act as a basis for his jurisdiction.*

v. *The learned judge erred in law in purporting to frame issues that had not been pleaded and abandoned his role to adjudicate and determine the issues in the appellant’s Petition.*

vi. *The learned judge erred in law in disregarding the advice of SRC and the evidence tendered that the proposed salary increment was not sustainable.*

vii. *The learned judge erred in law in compelling the appellant to increase teachers’ salary by 50% to 60*

% with effect from 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2017 in violation of Articles 230 (4) and 259 (11) of the Constitution.

viii. *The learned judge erred in law in disregarding the expert testimony tendered in court to the effect that any increment that was not budgeted for would violate the provisions of Articles 220, 221 and 249 of the Constitution and create macroeconomic imbalance.*

ix. *The learned judge erred in law by misinterpreting Article 237 & (3) of the Constitution.*

x. *The learned judge erred in law in relying on the erroneous report by the Central Planning and Monitoring Unit (CPMU) and disregarded the expert evidence of National Treasury and SRC despite finding that TSC could only review remuneration of teachers upon advice by SRC.*

xi. *The learned judge erred in law in misinterpreting and wrongly invoking Article 41 (5) of the Constitution on the right to engage in collective bargaining.*

xii. *The learned judge erred in law by awarding salary increment to teachers without observing constitutional safeguards imposed on public expenditure by Articles 201 and 202 of the Constitution.*

xiii. *The learned judge erred in law and in fact in awarding a wage increase to teachers in disregard of the harmonized scales thereby occasioning discrimination against the rest of the public service contrary to Section 5 (3) (b) of the Employment Act No. 11 of 2007.*

xiv. *The learned judge erred in law and fact in not appreciating that the increment of salaries to teachers would violate the principles set out in Article 230 (5) of the Constitution and Section 11 of the Salaries and Remuneration Commission Act (hereinafter referred to as the SRC Act).*

xv. *The learned judge erred in law in finding that SRC had no role in the negotiation and determination of basic salary for teachers contrary to Article 230 (4) of the Constitution and Section 11 of the SRC Act. The judge erred in usurping the role of SRC.*

xvi. *The learned judge erred in law in finding that TSC is not bound by the advice given to it by SRC in the final determination of the remuneration and benefits of teachers in total disregard to the provisions of Articles 230 (4) and 259 of the Constitution. The learned judge erred in finding that the role of SRC is merely advisory.*

xvii. *The learned judge erred in law in finding that only TSC has the constitutional and statutory mandate to conduct a job evaluation exercise.*

xviii. *The learned judge erred in law in disregarding the government budget process and holding that the 50% to 60% basic salary increment is to take effect immediately. He further erred in failing to appreciate the constitutional role and functions of the National Treasury in budget making process under Article 220 and 221 of the Constitution.*

xix. *The learned judge erred in law in failing to take into account the fiscal sustainability of the salary increment it awarded to the Unions contrary to Articles 201 and 230 (5) of the Constitution.*

xx. *The learned judge erred in law in setting out the terms of a collective bargaining agreement for the parties in total disregard of the provisions of Article 41 (4) and (5) of the Constitution and Section 57 (1) and (2) of the Labour Relations Act.*

xxi. *The trial court erred when it took into account extraneous matters which were not part of Petition No. 3 of 2015.*

xxii. *The trial judge erred in law by equating recognition agreements under the Labour Relations Act as equal to or above the Constitutional Provisions with specific reference to Article 259 (11).*

xxiii. *The learned judge erred by taking into account the TSC Secretariat staff terms and conditions as proof of disparity of revenue allocations which was outside the scope of the adjudication and pleadings before the court.*

xxiv. *The learned judge erred in failing to apply its mind to constitutional principles.*

### **Acknowledgment of Counsel**

12. I am indebted to all learned counsel who appeared in this matter. The learned counsels are: The Honourable Attorney General Prof. Githu Muigai who appeared for the 4<sup>th</sup> respondent; Senior Counsels Mr. Paul Muite for KNUT and Mr. Pheroze Norowjee for SRC respectively; learned counsels Messrs Fred Ngatia, Issa Mansur, Kiragu Kimani, Geoffrey Obura, Mr. Paul Nyamodi, Ms. Wanjiku Mbiyu and Mr Muiruri for appellants; learned counsels Messrs. Kioko Kilukumi, John Mbaluto and Hilary Sigei for KNUT and learned counsel Ms Judith Guserwa for KUPPET.

### **Right of Audience**

13. As a preliminary issue, by Notice of Motion dated 8<sup>th</sup> September 2015, KNUT sought orders to strike out the appellant's (TSC) Record of Appeal and alternatively, that the appellant be denied audience and or there be a stay of further proceedings until such time that the appellant shall have fully complied with the judgment and consequential orders of the Employment and Labour Relations Court given on 30<sup>th</sup> June 2015.

14. The grounds in support of the application are that the appellant (TSC) is in blatant and willful contempt of the Employment and Labour Relations Court Judgment and consequential orders *inter alia* that the appellant has failed to pay teachers a 50% to 60% increment in basic pay as ordered by the trial court; that the judgment of the trial court has never been stayed; that the appellant was served with a demand letter to pay the 50% to 60% basic salary increment; that the appellant is under a public duty to abide by decisions of any court of law and its refusal to abide by judicial decisions is an affront on the constitutional power and mandate vested in the judiciary; that the appellant has made bold statements that it will not pay the salary increment awarded by the trial court; that contempt of court proceedings have been commenced against the appellant's Chairperson, its Chief Executive Officer and senior officers; that disobedience to court orders threatens the very foundations of the administration of justice and undermines the Rule of Law. The appellant having disobeyed court orders should not be heard until it purges its contempt.

15. The second respondent (KUPPET) filed an affidavit in support of the motion to deny the appellant audience before this Court. In its replying affidavit deposed by **Mr. Akello M.T. Misor**, it was stated that the TSC is bound under **Article 41 (5)** of the Constitution to enter into collective bargaining with the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are entitled to enjoy the fruits of the judgment by the trial court; that KNUT's application to deny the appellant the right of audience is well grounded and meritorious; that it is in the interest of justice that the application should be allowed and the orders sought granted.

16. TSC filed a Notice of Preliminary Objection to the application to deny it audience. In its objection, it states that no court has held and found TSC to be in contempt of any order; that since no funds have been made available by Parliament to TSC to enable it pay the basic salary increment award, TSC cannot be said to be in contempt of any order; that KNUT's application seeks to obstruct TSC from access to justice and is a violation of **Article 48** of the Constitution; that the legal correctness of the judgment of the trial court is the subject of this appeal and its legality should be resolved in a fair hearing before this Court; that KNUT's application seeks to obstruct TSC's attainment of its constitutional right to a fair trial and fair hearing enshrined in **Articles 25** and **50** of the Constitution.

17. A replying affidavit dated 17<sup>th</sup> September 2015 deposed by **Ms Nancy Macharia** was filed in opposition to the application to deny TSC audience. It is deposed that KNUT has filed contempt

proceedings before the trial court seeking to compel numerous persons who were not parties in the suit to pay the basic salary increment awarded by the trial court; that the present motion filed by KNUT seeks to obstruct the hearing of the appeal; that the orders of this Court made on 23<sup>rd</sup> July 2015 directing the appellant to pay the basic salary increment of 50% to 60% was made pursuant to an application for stay of the judgment of the trial court; that the orders by this Court made on 23<sup>rd</sup> July 2015 provided a sanction that if no basic salary increment was paid, the appellants application for stay of execution stood dismissed; that there are no orders by this Court to pay the teachers the basic salary increment awarded by the trial court; that TSC does not generate any funds from any of its functions and is entirely dependent on public funds; that TSC is not in contempt as no funds have been availed to it by Parliament for immediate commencement of payment of the basic salary increment awarded by the trial court.

18. The 3<sup>rd</sup> respondent SRC filed grounds of preliminary objection and grounds of opposition to KNUT's application. In its objection, it is stated that application is an abuse of court processes because KNUT had commenced contempt proceedings before the trial court; that this Court lacks the ability to entertain enforcement proceedings in respect of orders of courts other than itself and has no jurisdiction to grant orders sought in the motion dated 8<sup>th</sup> September 2015; that the Orders of this Court issued on 23<sup>rd</sup> July 2015 were self executing in that they contained sanction for non-compliance and there can be no contempt of the said orders; that contempt and the sanctions that flow from a court order can only be established after a formal hearing and not summarily; that KNUT's application to strike out the Record of Appeal is beyond the provisions prescribed by **Rule 84** of the Court of Appeal Rules; that the application is a denial of the parties constitutional right of access to courts under **Article 48** of the Constitution; that there is no finding of contempt of court against any party; that the application is defective, misconceived and bad in law.

19. The AG filed grounds of opposition urging that the application is misconceived, bad in law and an abuse of court process; that no court has made a determination or finding in respect of the alleged contempt; that the present appeals are properly before this Court by dint of the Appellate Jurisdiction **Act Cap 9** and the Rules thereto; that there is no evidence of any execution proceedings having been heard that can give rise to the alleged contempt; that compliance with a court order/decreed by TSC necessitates the taking of certain procedural steps which have not been taken and or approved by Parliament; that striking out any matter is a drastic remedy usually reserved in matters that are hopeless and which no court can upon application of the oxygen rule salvage; that though the trial court ordered immediate payment, the absence of immediate settlement is not a proper ground for grant of the remedy to strike out.

20. The respondents' application to deny the appellant audience was urged by learned counsel Mr. Kioko Kilukumi. He emphasized that the appellant should have no audience as it has deliberately ignored a court order; that the appellant was and is aware that there is a judgment dated 30<sup>th</sup> June 2015 by the trial court and which judgment requires the appellant to pay teachers 50% to 60% basic salary increment; that the appellant has not abided by the judgment and has deliberately refused to pay the award; that being fully aware of its obligation to pay, the appellant was entitled in law to seek stay of execution of the judgment before this Court on 23<sup>rd</sup> July 2015; that presently no stay orders are in force to prevent execution of the judgment of the trial court; that this Court on 23<sup>rd</sup> July 2015 granted a conditional stay ordering the appellant to pay the 50% to 60% basic salary increment with effect from 1<sup>st</sup> August 2015 and in default its application for stay of execution to stand dismissed. That the replying affidavit of Nancy Macharia confirms that teachers have not been paid and the judgment dated 30<sup>th</sup> June 2015 remains unsatisfied; that the explanation by TSC is not merited as it reveals negligence on its part; that in its explanation TSC states it has complied with the judgment and done all that it could do; that it wrote a letter dated 25<sup>th</sup> August 2015 to the Cabinet Secretary to appraise the National Treasury of the orders made by this Court; that the National Treasury by letter dated 28<sup>th</sup> August 2015 advised that no funds were available for immediate commencement of payment of the salary increment.

21. Counsel for the 1<sup>st</sup> respondent emphasized that considering that the date of judgment by the trial court is 30<sup>th</sup> June 2015 and the date of the conditional stay granted by this Court is 23<sup>rd</sup> July 2015, it was incorrect for TSC to state that they did all that they were required to do. Counsel submitted that between

30<sup>th</sup> June 2015 and 25<sup>th</sup> August 2015 TSC did nothing to notify the National Treasury of the judgment by the trial court and the Ruling by this Court made on 23<sup>rd</sup> July 2015; that the reply dated 28<sup>th</sup> August 2015 from the Cabinet Secretary National Treasury stating that there were no funds cannot vary or amend a court order; that the judgment by the trial court ordered the immediate payment of the 50% to 60% basic salary increment; that a Cabinet Secretary is not capable of varying or amending a judgment of a competent court.

22. The 1<sup>st</sup> respondent took issue with the contents of the letter dated 28<sup>th</sup> August 2015 from National Treasury stating that there was no money in the budget to pay the basic salary increment award and that there are complex budgetary processes that have not been followed. Counsel submitted that the national budgetary process is simple, straight forward and not complex as alleged by National Treasury; that pursuant to **Article 249 (3)** of the Constitution, TSC gets its money from Treasury and Parliament has to allocate adequate funds to enable TSC perform its functions; that the budget of TSC is a separate vote. Counsel urged that adequacy of funds can only be determined by the needs of the requesting party and in this case the requesting party is the TSC; that the obligation to make a request to Parliament is on TSC and not upon the courts or the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that it was incumbent upon TSC to have budgeted for the 50% to 60% basic salary increment or budgeted for a contingency sum to meet any award by the trial court; that the demand for basic salary increment by the teachers was made way back in 2014 before the 2015/16 financial year commenced on 1<sup>st</sup> July 2015; that if TSC was prudent, it should have budgeted and provided for a contingent liability since the teachers demand for basic salary increment was a fact well known to TSC; that TSC made the 50% to 60% offer in 2014/15 fiscal year; that having made the offer, it was upon TSC to make a budgetary proposal to Parliament through National Treasury for the amount on offer; that in the Joint Memorandum of Claim filed before the trial court in January 2015, the 1<sup>st</sup> and 2<sup>nd</sup> respondents tabulated their claim well before the 2015/16 fiscal year commenced on 1<sup>st</sup> July 2015. The 1<sup>st</sup> and 2<sup>nd</sup> respondents had made their claim known to the appellant at least two months before the end of the 2015/16 financial year as required by **Article 221 (1)** of the Constitution; that TSC should have sent a budgetary proposal to Treasury for inclusion in the 2015/16 budget; that TSC knew there were figures before the trial court in support of the claim by teachers for basic salary increment and TSC should have factored contingent liability in its budgetary proposals for the 2015/16 fiscal year; that whereas pursuant to **Article 221 (3)** of the Constitution, the National Assembly is required to consider the budget, it was upon TSC to take its budget to the National Assembly.

23. Counsel for KNUT and KUPPET submitted that there are two other reasons why it is not open to the appellant or the national government to assert that there are no funds to pay the 50% to 60% basic salary increment award. The first is that Supplementary Appropriation can be done under **Article 223 (1)** of the Constitution which permit the national government to spend money that has not been appropriated by an Act of Parliament; and second, there is Contingencies Fund established under **Article 208** of the Constitution that can be used to pay the award of 50% to 60%; that Article 208 permits advance expenditure for items that are urgent and unforeseen and for which there is no other authority. It was submitted because the 50% to 60% award was neither budgeted for nor appropriated by the National Assembly; the Contingencies Fund can be used to pay the award of the trial court.

24. Counsel submitted that the Constitution through **Articles 223( 1)** and **208** has given the National Treasury and Government provisions that legally permit payment of the 50% to 60% salary increment; that what we have is an attitude by the appellant and national government of “can’t pay, won’t pay and what can you do”; that it is this attitude that is contemptuous, willful, deliberate and wanton disobedience of court orders that should be punished by refusing audience to the appellant in this appeal. It was submitted that the willful disobedience of the trial court order by the appellant is an act that undermines the integrity and authority of the judiciary. Counsel submitted that in the present application, all that the applicant needs to show is that there is disobedience of a court order and not that a person has been found guilty of contempt; that the appellant is a recalcitrant litigant who does not obey court orders; that there is no requirement in law that you must first have enforcement and contempt proceedings before audience can be denied; that TSC is part of the national government and one cannot execute the judgment and decree against the government and for this reason, the applicant is seeking to cite for contempt the chairperson and senior officers of TSC and the National Treasury who are refusing to satisfy the

judgment and decree of the trial court.

25. Various judicial authorities were cited by the applicant in support of its application. The authorities cited include: Hadkinson -v- Hadkinson (1952) 2 All ER 567; Justus Kariuki Mate & Another -v- Martin Nyaga Wambora & Another (2014)eKLR; Mwani -v- Mawani (1977) KLR 159; Ramesh Popatlal Shah & 2 Others -v- National Industrial Credit Bank Limited (2005) eKLR; Econet Wirelss Kenya Ltd -v- Minister for Information & Communication of Kenya & Another (2005) eKLR; and Teachers Service Commission -v- Kenya National Union of Teachers & Others (2013)eKLR.

26. The applicant urged this Court to follow the decision in Hadkinson -v-Hadkinson (1952) 2 All ER 567; where it was stated:

**“that a party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it....That the course of a party knowing of an order, which was null or irregular and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed, it must not be disobeyed....Two consequences... flow from its breach. The first is that anyone who disobeys an order of the court is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt.”** (Emphasis by KNUT).

27. Counsel for KNUT urged this Court to follow the decision in Hadkinson - v-Hadkinson (1952) 2 All ER 567; where the appeal was stayed until the appellant purged the contempt. It was submitted that the dicta and good law in Hadkinson -v- Hadkinson (1952) 2 All ER 567 was followed in Kenya in the case of Mawani -v- Mawani (1977) KLR 159 in which the contemnor was not to be heard until he purged his contempt. This Court was urged to follow the persuasive decision in Ramesh Popatlal Shah & 2 others -v- National Industrial Credit Bank Limited (2005) eKLR where a preliminary objection was upheld declining to hear the contemnor until he purged his contempt. The applicant urged this Court to uphold the Rule of Law as stated in the case of Justus Kariuki Mate & Another -v- Martin Nyaga Wambora & Another (2014) eKLR where this Court observed that disobedience of court orders seriously undermines the rule of law and every time a person or an institution disobeys a court order, there should be no celebration; that disobedience of a court order should be treated as a funeral, with compassion for the death of the rule of law. Counsel cited the dicta in Econet Wirelss Kenya Ltd -v- Minister for Information & Communication of Kenya & Another (2005) eKLR where this Court expressed itself thus:

**“ where an application for contempt is made...the court will more often suspend any other proceedings until the contempt matter is dealt with; an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard...., a contemnor would have no right of audience in any court of law unless he is punished or he purges the contempt.** (Emphasis by applicant).

28. Senior Counsel Mr. Paul Muite and learned counsels Mr. John Mbaluto and Ms Judith Guserwa associated themselves with submissions by learned counsel Mr. Kilukumi in support of the application to deny audience to the appellant. Senior Counsel Muite observed that it is deeply troubling when it is the Government of the day that does not obey court orders and this goes to the very root of the rule of law which is enshrined in the Preamble to the 2010 Constitution that recognizes the aspirations of all Kenya to be governed by the rule of law. Counsel submitted that the national government budget is Ksh. 1.3 trillion and there is no question of there being no money to pay teachers the basic salary increment of 50% to 60%; that what we have is lack of prioritization of teachers basic salary increment and an unapologetic government that does not obey court orders; that under the provisions of **Sections 21 and 22 of the Public Finance Management Act**, the Cabinet Secretary for Finance can make payment from the Contingencies Fund provided he goes to the National Assembly within two months. Senior Counsel submitted that when a court is adjudicating, it does not go about finding if the person has an ability to pay; this Court was urged to take judicial notice that Kenya paid Ksh. 1.4 billion to Anglo-leasing companies when the said

money had neither been budgeted for nor appropriated by Parliament; that by taking judicial notice, it is apparent that failure by TSC or National Treasury to budget for the teachers' basic salary increment is not a good basis to assert "can't pay won't pay" because the increment was neither budgeted for nor appropriated by the National Assembly. Learned counsel Mr. Mbaluto urged us to note that apart from the basic salary increment of 50% to 60%, there was an order by the trial court that the appellant should conclude a Collective Bargaining Agreement with the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that the appellant is in contempt for not obeying this Order. The applicants urged this Court to either strike out the Record of Appeal or stay or arrest delivery of judgment in the appeal until the appellant purged its contempt.

29. The appellant and the 3<sup>rd</sup> and 4<sup>th</sup> respondents opposed the application to deny them audience before this Court. The lead submission was made by learned counsel Mr. Fred Ngatia. He emphasized that there are no orders from this Court directing TSC to pay the basic salary increment awarded by the trial court; that the conditional stay order granted by this Court on 23<sup>rd</sup> July 2015 was self executing with a default clause; that TSC was not in contempt of the trial court's judgment dated 30<sup>th</sup> June 2015 as it had done all that it could do by writing the letter dated 25<sup>th</sup> August 2015 to National Treasury; that no act has been demonstrated as having been committed by TSC to impede the course of justice; that TSC did everything to bring to the attention of National Treasury the judgment of the trial court.

30. I have considered the application to deny the appellant audience and the grounds of objection and grounds in opposition filed by the parties. I have also considered submissions by counsel, the authorities cited, the provisions of **Rule 84** of the **Appellate Jurisdiction Act** and the law in general. The application before this Court seeks two reliefs:

*(a) An order to strike out the appellants Record of Appeal and in the alternative, and*

*(b) Order that the appellant be denied audience and or there be a stay of further proceedings until such time that the appellant shall have fully complied with the judgment and consequential orders of the Employment and Labour Relations Court given on 30<sup>th</sup> June 2015.*

31. It is not in dispute that the judgment of the trial court remains unsatisfied. I remind myself that the instant proceedings are not contempt of court proceedings and I shall not make a determination as to whether the appellant is or is not guilty of contempt. The present application is premised on the argument that a valid judgment by the trial court dated 30<sup>th</sup> June 2015 exists and the judgment require the appellant to pay teachers a basic salary increment of 50% to 60%.

32. I now consider whether there is any ruling or order by this Court or the Supreme Court upon which contempt can be founded requiring the appellant to pay the 50% to 60% award. On 23<sup>rd</sup> July 2015, this Court granted a conditional stay of the judgment of the trial court; the condition was to the effect that the appellant was to pay the 50% to 60% basic salary increment with effect from 1<sup>st</sup> August 2015 in default the appellant's application for stay to stand dismissed with costs. The conditional stay had a self executing default provision and I hereby find that the order to pay the 50% to 60% automatically lapsed when the default clause self-activated. There is no order by this Court that can form the basis of any contempt proceedings. The appellant approached the Supreme Court seeking an order to stay the conditional stay granted by this Court. (See **Supreme Court Civil Application No. 16 of 2015 Teachers Service Commission- v- Kenya National Union of Teachers (KNUT) & 3 Others**).

The Supreme Court observed that it had no jurisdiction to interfere with the exercise of the discretionary power by this Court. The Supreme Court did not make any order requiring the appellant to pay teachers 50% to 60% basic salary increment. I find that there is no ruling or order by the Supreme Court upon which contempt proceedings can be founded.

33. The order relevant to the instant application is judgment of the trial court dated 30<sup>th</sup> June 2015 wherein TSC is required to immediately pay the 50% to 60% basic salary increment award. The issue for my consideration is whether a party who has not satisfied a judgment/decreed is in contempt and should be denied the right of audience before this Court until he satisfies the judgment/decreed.

34. The applicable general rule is stated in the case **Gordon -v- Gordon (1904-7) All ER Rep. 702** and in **Hadkinson (supra)** as followed in Kenya in **Mawani (supra)** and as applied in **Ramesh Popatlal Shah (supra)**. The general rule is that a party in contempt cannot be heard, or take any proceedings in the same cause until he has purged his contempt. Lord Romer in **Hadkinson (supra)** cited exceptions that allow a person to be heard: that a person alleged to be in contempt can be heard and be allowed to apply for the purpose of purging his contempt; that such person can be heard in an appeal with a view to setting aside the order on which his alleged contempt is founded; the person can be heard in support of a submission that, having regard to the true meaning and intendment of the order which he is said to have disobeyed, his actions did not constitute a breach of it, or that having regard to all the circumstances, he ought not to be treated as being in contempt; that the alleged contemnor can be heard to enable him defend himself when some application is made against him.

35. Lord Denning in **Hadkinson (supra)** while giving the historical background to the general rule cited additional exceptions. He said:

*“...it is very rare for this court to refuse to hear counsel for an appellant. No matter how badly a litigant has behaved, nevertheless generally speaking, if he has a right of appeal, he has a right to be heard, for the simple reason that if he is not heard, his right of appeal is valueless....The rule that a party in contempt will not be heard – was never a rule of the common law. It was a rule of the cannon law which was adopted by the ecclesiastical courts and the chancery courts....The application of the general rule is a matter for the discretion of the court in all circumstances of the case, whether to hear him or not. What is the modern rule? ... It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which the court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance.... Applying this principle, I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the order which it might make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed. (Emphasis mine).*

36. The decisions in **El-Busaidy -v- Commissioner of Lands & Others (2002) 1 EA 508** and **Naizsons (K) Ltd. -v- China Road Bridge Corporation (K) Ltd. (2001)2 EA 502** establish the principle there are exceptions to the general rule that a person in contempt should not be heard; that whether the contemnor is to be heard is at the discretion of the court. Lord Vaughan Williams in **Gordon - v- Gordon (1904-7) All ER Rep. 702** cited a further exception to the general rule and expressed that “... when you come to an order which it is suggested may have been made without jurisdiction, if upon, looking at the order one can see that that is the ground of appeal, it seems to me that such a case has always been treated as one in which the court will entertain the objection to the order, though the person making the objection is in contempt.” The purpose of giving the court discretion is to ensure that there is a flexible approach in determining whether to hear a contemnor who has not purged his contempt.

37. I have taken into consideration the general principles and the exceptions thereto. I now determine whether in the instant application the appellant’s case falls within the general rule or any exception. The decision to hear or not to hear an alleged contemnor is at the discretion of the court. Lord Denning in **Hadkinson (supra)** expressed that a contemnor should not be heard unless there is a grave justification based on considerations of public policy and the court will stop the contemnor from being heard when the contempt itself impedes the course of justice. . In **Gordon (supra)**, an exception to the general rule is that a contemnor may be heard if it is suggested that the court order may have been made without jurisdiction and jurisdiction is a ground of appeal.

38. Examining the present application and the Memorandum of Appeal, it is *prima facie* apparent that jurisdiction of the trial court is a ground of appeal. Three exceptions cited by Lord Romer in **Hadkinson (supra)** are relevant to the present application. His Lordship expressed that a person alleged to be in contempt can be heard in an appeal with a view to setting aside the order on which his alleged contempt is

founded or he can be heard if according to the true meaning and intendment of the order which he is said to have disobeyed, his actions did not constitute a breach of it, or that the alleged contemnor can be heard to enable him defend himself when some application is made against him. It is my considered view that the three exceptions cited by Lord Romer in *Hadkinson (supra)* and Lord Vaugahn Williams in *Gordon (supra)* are applicable to the facts of this case. The appellant submitted that its actions do not amount to contempt and that there are contempt proceedings pending before the trial court; the appellant has appealed with a view to setting aside the judgment and order upon which the contempt is founded; there is an allegation that the court order the subject of contempt was made without jurisdiction and jurisdiction is a ground of appeal in this appeal.

39. In ***Rose Detho -v- Ratilal Automobiles & 6 Others, Civil Application No. 304 of 2006 (171/2006UR)***, this Court in a bench majority (Githinji and Onyango-Otieno JJA; with Hon. Tunoi JA, as he then was dissenting) observed that if the actions of the alleged contemnor in failing to obey court orders cannot impede the course of justice or make it difficult to ascertain the truth in respect of the matter, then the contemnor can be heard. In the instant case, the applicant has not demonstrated how the conduct of the appellant impedes the course of justice or how it is difficult to ascertain the truth in this case if the alleged contempt is not purged. It is instructive to note that in the case of ***Justus Kariuki Mate & Another -v- Martin Nyaga Wambora & Another (2014) eKLR*** cited by the applicant, the alleged contemnor was given a hearing and not denied audience before this Court.

40. Guided by the exceptions identified in *Hadkinson (supra)* and *Gordon (supra)*; and the dicta in *Rose Detho (supra)*, I am satisfied that the appellant comes within the exceptions to the general rule and I hereby exercise my discretion and find that the appellant has a right of audience before this Court. I am further fortified in this finding because there is no general rule that a party who has filed an appeal cannot be heard merely because he/she has not satisfied a judgment/decree. There is no rule of law that a right of appeal must be taken away because an appellant has not satisfied a judgment/decree. It is not good practice for a party to litigate before two different levels of courts concurrently on the same issue. The applicant has filed against the appellant contempt proceedings that are now pending before the trial court. It would be pre-emptive and pre-judging the outcome of the contempt proceedings before the trial court if this Court were to make a finding of contempt against the appellant.

41. One of the prayers by the applicant in its Motion is for an order to strike out the appellant's Record of Appeal. **Rule 84** of the Rules of this Court provide the grounds for striking out an appeal. One of the grounds is that an appeal may be struck out if some essential step in the proceedings has not been taken or has not been taken within the prescribed time. The instant application to strike out the Record of Appeal does not meet any of the grounds cited in **Rule 84**. For these various reasons, I exercise my discretion in favour of the appellant and hereby dismiss the 1<sup>st</sup> respondent's (KNUT) Notice of Motion application dated 8<sup>th</sup> September 2015. It is hereby ordered that the appellant shall and is hereby granted audience before this Court. The costs of the 1<sup>st</sup> respondent's application shall abide by the outcome of the appeal.

#### **Application to amend Memorandum of Appeal and the Respondents Cross-Appeal on Costs**

42. Before dealing with the substantive merits of the three consolidated appeals, it is prudent to deal with the issue of costs that is subject of the appellant's application to amend its Memorandum of Appeal and the Cross-Appeal by the 1<sup>st</sup> and 2<sup>nd</sup> respondent which also relate to costs.

43. By Notice of Motion dated 2<sup>nd</sup> October 2015, the appellant (Teachers Service Commission) made an application for leave to amend prayer (b) of its Memorandum of Appeal. Prayer (b) in the Memorandum is a prayer that reads "the Judgment of the Employment and Labour Relations Court dated 30<sup>th</sup> June 2015 in Petition No. 3 of 2015 be set aside in entirety and be substituted by an order allowing the appellant's Petition in that Court with no costs." The leave sought by the appellant is to amend prayer (b) so that it should read "the Judgment of the Employment and Labour Relations Court dated 30<sup>th</sup> June in Petition No. 3 of 2015 be set aside in entirety and be substituted by an order allowing the appellant's Petition in that Court with costs."

44. The gist of the appellant's proposed amendment as urged by learned counsel Mr. Kiragu Kimani is to delete the word "no" so that if this Court were to allow the instant appeal and order the appellant's Petition at the trial court allowed, the said Petition should be allowed with costs to the appellant. The ground in support of the amendment is that insertion of the word "no" was a clerical mistake in the preparation of the Memorandum of Appeal and the proposed amendment is to rectify the clerical error for the just determination of the instant appeal.

45. Senior Counsel Mr. Paul Muite in opposing submitted that the application was made late in the day after the appellant had finalized its submissions; that the proposed amendment was not a clerical error but a substantive amendment to the Memorandum of Appeal.

46. I have considered the application, the grounds in support thereof and submissions by counsel. In **Omar -v- EA Cargo Handling Services Limited (1985) KLR 837**, it was held that amendments may be allowed at any time before judgment and that applications for amendment of pleadings should generally be viewed sympathetically provided that any damage which may arise as a result of the amendment can be cured by way of costs. In the case of **Uhuru Highway Development Ltd. -v- Central Bank of Kenya, (2002) 1 EA 314 at 315** this Court held that a primary document cannot be amended under the Court of Appeal Rules. It was further held that a Memorandum of Appeal is not a primary document under ***Rule 85 (1) (a) to (k)*** or ***Rule 85 (2) (i) to (iv)*** which is now ***Rule 87*** of the Rules of this Court's Rules. It was further held in **Uhuru Highway Development Ltd. (supra)** that a Memorandum of Appeal, subject to the interests of justice, is amenable to amendment.

47. The appellant has made the instant application to amend its Memorandum of Appeal before judgment has been delivered; the appellant cannot be faulted for making the said application. On the merits of the application, whereas the proposed amendment on the face of it appears to be clerical, it is a prayer for costs whose practical effect is substantial. There are two general rules on costs: first, costs are at the discretion of the court; second, costs follow the event. Whether or not a party prays for costs, the court has the final discretion to award costs. (See **Singh -v- Qurbanlite Limited (1985) KLR 920**). In **Eastern Bakery Ltd. -v- Castellino (1958) EA 461** and in **Central Kenya Ltd. -v-Trust Bank Ltd. & 8 Others Civil Appeal No. 222 of 1998 (C.A)**, it was stated that amendment to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs.

48. Guided by the dicta in **Uhuru Highway Development Ltd. (supra)** that a Memorandum of Appeal is not a primary document and is amendable to amendment, I allow the application to amend the Memorandum of Appeal. Accordingly, the TSC Memorandum of Appeal dated 11<sup>th</sup> August 2015 be and is hereby deemed amended as prayed for in the Notice of Motion dated 2<sup>nd</sup> October 2015. Costs in the application shall abide by the final orders of the Court.

49. I note that the Memorandum of Appeal filed by the Attorney General in **Civil Appeal No. 203 of 2015** prays for the setting aside of the judgment of the trial court and allowing of the present appeal with no order as to costs. No application to amend its Memorandum of Appeal has been made by the Attorney General.

### **Cross –Appeal on Costs**

50. The 1st and 2nd respondents' cross-appeal seek orders to vary the judgment of the trial court dated 30<sup>th</sup> June 2015. The cross-appeal states that the learned judge having found in favour of the 1st and 2nd respondents in the Economic Dispute before him, ought to have awarded costs to the 1st and 2nd respondents as costs follow the event. The gist of the 1st and 2nd respondents' cross-appeal is to seek orders that costs of the proceedings before the trial court be awarded to the 1st and 2nd Respondents.

51. I have considered the cross-appeals and I am of the view that the costs of the proceedings before the trial court and all costs in this appeal shall be at the discretion of this Court.

### **Appeal Lies on both Matters of Fact and Law**

52. Prior to 8<sup>th</sup> December 2014, appeals from the Employment and Labour Relations Court to this Court was only on matters of law as per the then **Section 17 (2) of the Industrial Court Act**. Section 17 (2) was deleted by **Statute Law (Miscellaneous) Amendment Act No. 18 of 2014**. Consequently, appeals from the Employment and Labour Relations Court to this Court lie on matters of fact and matters of law. This is pursuant to Section 17 (1) of the Industrial Court Act which provides as follows:

*Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.*

54. The jurisdiction of this Court to hear appeals from the Employment and Labour Relations Court is thus as stated in **Selle -vs- Associated Motor Boat Co. [1968] EA 123** as follows:

*“An appeal to this Court ...is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”*

### **Industrial Court (Procedure) Rules and the Respondents’ Joint Memorandum of Claim**

55. **The Industrial Court (Procedure) Rules 2010**, under **Rule 4** thereof stipulates that a party who wishes to refer a dispute to the court under any written law shall file a statement of claim. **Rule 5 (1)** stipulates that a statement of claim filed under **Rule 4** shall be accompanied by an affidavit verifying the facts relied on. In **Rule 6 (2)**, where the trade dispute has been a subject of conciliation and the conciliator has not issued a certificate of conciliation, the statement of claim shall be accompanied by an affidavit sworn by the claimant.

56. I have perused the Joint Memorandum of Claim filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The Joint Memorandum is not accompanied by a verifying affidavit as per **Rule 5 (1)** of the **Industrial Court Procedure Rules**. The Supreme Court in **Law Society of Kenya -v- Centre for Human Rights & Democracy & Others, S.C. Petition 14 of 2013 at paragraph 36**, expressed that the use of the word “shall” suggest the mandatory nature of the rule requiring strict adherence to the components of the rule. **Rule 5 (1)** of the Industrial Court Procedure Rules is mandatory in its requirement that there shall be a verifying affidavit. In **D.T. Dobie & Co. (K) Ltd. -v- Muchina (1982) KLR 1**, this Court stated that a court of justice should aim at sustaining a suit rather than terminating it. Noting that **Rule 5 (1)** is a rule of procedure, I am persuaded by the dicta in **Microsoft Corporation -v- Mitsumi Computer Garage Ltd. & Another (2001) KLR 470** that “rules of procedure are the handmaidens and not mistresses of justice. They should not be elevated to a fetish...Deviations from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected.”

I am further guided by the Supreme Court dicta in **Nicholas Kiptoo arap Korir Salat -v- IEBC & 7 Others, S.C. Petition No. 23 of 2014** where the Court invoked the provisions of **Article 159 (2) (d)** of the Constitution that justice is to be administered without undue regard to procedural technicalities. Whereas the Joint Memorandum of Claim does not comply with **Rule 5 (1)** of the **Industrial Court Procedure Rules**, I hereby invoke **Article 159 (2) (d)** of the Constitution and ignore violation of **Rules 4, 5 and 6** of the Industrial Court Procedure Rules. By ignoring the foregoing violations, I am not stating that the mandatory requirements are inapplicable; rather, I am invoking **Article 159 (2) (d)** of the Constitution to enable substantive rather than technical justice to be administered in this case.

### **Undisputed Issues**

57. There are undisputed issues that I wish to emphasize upfront. First, teachers are not state officers as defined in **Article 260** of the Constitution. Second, pursuant to **Article 260** of the Constitution, teachers hold public office and are public officers because their remuneration and benefits is paid directly out of money provided by Parliament. (Emphasis mine). (See **Kenya Union of Domestic, Hotels, Education and Allied Workers (KUDHEHIA WORKERS) -v-Salaries and Remuneration Commission & Another, Nairobi HC Petition No. 294 of 2013; 2014 eKLR.**)

### **Contractual validity of the offer by TSC to pay 50% to 60% basic salary increment**

58. At no time during the proceedings before the trial court did TSC make an offer for a 50% to 60% basic salary increment. However, a proposal was made by TSC at the Consultative Committee meeting held on 9<sup>th</sup> September 2014 for a 50% to 60% basic salary increment. The contractual validity of the proposal or offer by TSC is an issue in this appeal. The issue is whether in contract law, there is a valid and subsisting offer by TSC to increase the basic salary of teachers by 50% to 60%. TSC tabled a “working document” containing the proposal at the Consultative Committee meeting held on 9<sup>th</sup> September 2014. After seeking advice from SRC, TSC withdrew the document and no subsequent offer has been made to the Unions for a basic salary increment of 50% to 60%.

59. During the proceedings held on 14<sup>th</sup> January 2015, the then Chief Executive Officer of TSC Mr. Gabriel Lengoiboni stated as follows:

*“We told the Salaries and Remuneration Commission (SRC) we had proposed 50% to 60% pay rise. They asked if it was sustainable. SRC said we do a job evaluation...We tabled the “working document” in negotiations meeting. Union requested for a week; Union came back with a 100% to 150% demand...We have not made any offers thereafter.”*

60. Commenting on the “working document”, the Secretary General of KNUT Mr. Sossion stated that:

*“TSC on 7<sup>th</sup> October 2014 (sic) tabled a document christened “working document” that contained a wide range of proposals including 50%-60% pay rise and various allowances. We asked for time out and give a counter response. We agreed to develop a joint response via a secretariat by KNUT and KUPPET. We scaled down our salary demand from 300% to 150%. This is the key component of our package. The document was withdrawn by the TSC hence the genesis of this dispute...We treat the 50%-60% as an offer. (Emphasis mine).*

61. I hereby warn and remind myself that submissions by counsel are not evidence. Senior Counsel Paul Muite commenting on the “working document” expressed himself as follows:

*“The offer of 50% to 60% was a result of deliberations by a committee created under Section 13 (5) of the TSC Act...That was the thinking then. Teachers came down to 100% to 150%.”*

62. In their Joint Memorandum of Claim at Items 2.25, 2.26 and 2.27, the 1<sup>st</sup> and 2<sup>nd</sup> respondents concede that after the “working document” containing the TSC offer of 50% to 60% was tabled on 9<sup>th</sup> September 2014, the Unions made a counter proposal for basic salary increment of 100% to 150%.

63. A binding contract comes into existence when there is an offer and acceptance; the offer must be unconditionally accepted. If the “working document” containing the proposal for 50% to 60% basic salary increment is to be considered an offer; the said offer was not unconditionally accepted by the respondent Unions. The 1<sup>st</sup> and 2<sup>nd</sup> respondents made a counter offer of 100% to 150% basic salary increment. A counter offer is not acceptance of an offer. (**Pharmaceutical Society of Great Britain -v- Boots Cash Chemists Southern Ltd. (1952) 2 All ER 456**). The Secretary General of KNUT stated that despite TSC withdrawing the “working document”, they still treated the 50% to 60% as an offer. A counter offer destroys the original offer so that the offeree cannot after making a counter offer accept the original offer. (See **Hyde -v- Wrench (1830) 3 Beav 334**; see also **G.C. Chesire and C.H.S. Fifoot, The Law of Contract, Sixth ed. London, Butterworths, 1964 at page 32**). When the 1<sup>st</sup> and 2<sup>nd</sup> respondents made a

counter offer of 100% to 150%, the original offer to pay 50% to 60% was destroyed and it is not open to the 1<sup>st</sup> and 2<sup>nd</sup> respondents to unilaterally assert that they still consider the “working document” as an offer and peg or hinge any claim for basic salary increment on the offer contained in the “working document.” The offer made by TSC ceased to exist in contract law when the counter offer was made by the Unions.

### **Constitutional and Statutory validity of the TSC offer to pay 50% – 60% Basic Salary Increment**

64. The trial court at paragraphs 240 to 244 of the judgment expressed itself *inter alia* in relation to the TSC Offer of 50% -60% basic salary increment:

**“It is common cause that TSC complied with these guidelines and submitted a detailed proposal to SRC with justification for a basic salary review of between 50%-60% to be implemented in a four (4) year cycle. It is also not in dispute that the document also contained proposals with regard to allowances and benefits. It is also not in dispute that a good number of proposals made by TSC on allowances and benefits were approved upon advice by SRC by the National**

**Treasury....TSC has made a good attempt to repudiate the proposal it tabled at the negotiations meeting held on 9<sup>th</sup>**

**September 2014....The evidence before court points to the contrary that indeed TSC made an offer to the Unions of a basic salary increase between 50% -60% for a period of 4 years. It is also evident that the Unions made a counter proposal between 100% to 150% increase. Thereafter the negotiations collapsed leading to the strike and this suit.”**

65. **Article 230 (4) (b)** of the Constitution and **Section 37 (3)** of the TSC Act require TSC to seek advice from and have consultation with SRC in the determination of remuneration and benefits of teachers. The advice from SRC is a constitutional procedural requirement under **Article 230 (4) (b)** of the Constitution. The constitutional and statutory validity of the offer by TSC to pay 50% to 60% basic salary increment is dependent on whether the offer was made prior to TSC seeking advice from SRC or if SRC’s advice was sought after TSC had made the offer.

66. When TSC made the offer of 50% to 60% at the Consultative Committee meeting held on 9<sup>th</sup> September 2014, TSC had neither sought nor obtained the mandatory constitutional SRC’s advice required under **Article 230 (4) (b)** of the Constitution and **Section 37 (3)** of the TSC Act. TSC sought advice from SRC after it had made the offer and not before. SRC by letters dated 23<sup>rd</sup> September 2014, 26<sup>th</sup> September 2014 and 9<sup>th</sup> December 2014 gave its advice indicating that it did not concur with TSC’s proposal to increase the basic salary for teachers by 50% to 60%. (See Civil Appeal No. 203 of 2015 at page 768 for letter dated 26<sup>th</sup> September 2014 and Civil Appeal No. 195 of 2015 for letter from SRC dated 9<sup>th</sup> December 2014 at page 1404).

67. In **Kenya National Commission on Human Rights -v- AG & Another, Petition No. 132 of 2013; 2015 eKLR**, the High Court in a persuasive authority stated that SRC’s advice ought to be obtained BEFORE any action is undertaken and that failure to seek input from SRC prior to action is a violation of the Constitutional Provisions of **Articles 10** and **Article 230 (4) (a)** and **(b)** and by so doing usurping the role of SRC.

68. Under **Article 230 (4) (b)** of the Constitution and **Section 37 (3)** of the TSC Act, seeking advice from and acting in consultation with SRC is a mandatory procedural constitutional requirement. The advice or consultation must be sought prior to any offer and prior to the determination of remuneration and benefits by the TSC Consultative Committee. The prior seeking of SRC’s advice is a pre-condition for the constitutional and statutory validity of the offer by TSC. It is unconstitutional to make an offer and then seek SRC’s advice; one has to seek advice first and thereafter make an offer. The TSC offer tabled at the Consultative Committee meeting held on 9<sup>th</sup> September 2014 was statutorily illegal under **Section 37 (3)**

of the TSC Act; the offer was unconstitutional as it was made prior to the seeking of advice from SRC. The offer was *ultra vires* **Article 230 (4) (b)** of the Constitution and *ultra vires* **Section 37 (3)** of the TSC Act. No enforceable right arises and accrues from an *ultra vires* action. The TSC offer was a constitutional and statutory nullity, and nullity begets nullity. The learned judge erred in not evaluating the offer by TSC to determine if it was *intra vires* the Constitution and *intra vires* the TSC Act. The learned judge erred in finding that there was a valid offer made by TSC to pay a 50% to 60% basic salary increment.

### **Juridical validity of the conciliation proceedings conducted on 14<sup>th</sup> January 2015**

69. In the memorandum of appeal, one of the jurisdictional grounds of appeal is expressed as follows:

*“i. The learned judge erred in law in not appreciating sufficiently or at all that he had no jurisdiction to determine an “economic dispute” that was neither in the appellant’s petition nor pleaded by any parties by way of cross-petition.*

*ii. The judge erred in law and in fact in considering that the counsel had recorded and/or made consent that an “economic dispute “be decided by the trial court whereas no such agreement existed.*

*iii. The judge erred in law and in fact in not appreciating that he had no jurisdiction to determine the increment payable to teachers, an issue that was not within his mandate or the court’s jurisdiction under Sections 12 and 15 of the Industrial Court Act as read with Section 77 of the Labour Relations Act.*

*iv. The judge erred in law in purporting to frame issues that had not been pleaded and abandoned his role to adjudicate and determine the issues urged in the appellant’s petition.”*

70. The appellant assert that the trial judge lacked jurisdiction to preside and proceed with the case in the manner he did on 14<sup>th</sup> January 2015. The capacity in which the trial judge presided over the proceedings is contentious. The record shows that on 9<sup>th</sup> January 2015, the trial court made the following order:

**“The court notes the willingness of the parties to engage in constructive engagement in terms of Section 15 of the Industrial Court Act, 2010 and the court directs that the officials of the two unions...and the officers of TSC...appear before me in chambers at 10.30 am on 14<sup>th</sup> January 2015 for that purpose.”**

71. On 14<sup>th</sup> January 2015, the following order is on record:

**“The officials named herein above to participate in the proceedings under Section 15 of the Industrial Court Act in the court chambers for that purpose. The officials named are KNUT 3 officials and 4 representatives; KUPPET 3 officials and 2 representatives; TSC 3 commissioners and CEO, 2 officials and 3 lawyers; Cabinet Secretary Labour, Commissioner of Labour, Attorney General and 2 lawyers and SRC 2 officials.”**

72. By Orders made on 26<sup>th</sup> January 2015 and 11<sup>th</sup> March 2015, the trial court expressed the following in relation to the nature of proceedings conducted on 14<sup>th</sup> January 2015. Order of 26<sup>th</sup> January 2015:

**“(i) that the parties fully abide by/honour the consent orders entered into on 14<sup>th</sup> January 2015 pursuant to conciliation proceedings conducted under the auspices of the court in terms of Section 15 of the Industrial Court Act and Article 159 of the Constitution of Kenya 2010.”**

Order of 11<sup>th</sup> March 2015:

**“...The directions given by this court...were in tune with Section 15 of the Industrial Court Act, as read with Section 159 of the Constitution.**

73. On 14<sup>th</sup> January 2015, with the trial judge presiding, statements were made by the lawyers present for the parties namely Senior Counsel Mr. Paul Muite, Mr. Sitima, Mr. Anyour, Ms Stella Munyi, Mr. Sitienei and Ms Jaoko. Speeches were made by the Cabinet Secretary for Labour Mr. Kazungu Kambi; the Chairperson of TSC Ms Nzomo; Mr. Sossion the Secretary General for KNUT; Mr. Misoro spoke for KUPPET; Mr. Sammy Nyabari the Commissioner for Labour and Mr. Lengoiboni the CEO of TSC all made speeches before the trial judge.

74. At the end of the statements and speeches the trial court entered *inter alia* the following Orders:

**“(i) That the parties have agreed to have the economic dispute adjudicated by the court.**

**(ii) The KNUT and KUPPET will file their memorandum and serve by 19<sup>th</sup> January 2015.**

**(iii) The Employer, TSC, to file its memorandum and serve on or before the 26<sup>th</sup> January 2015.**

**(iv) The Central Planning and Monitoring Unit (CPMU) and SRC to file their report within 10 days from 26<sup>th</sup> January 2015.”**

75. The nature of the proceedings presided over by the trial judge on 14<sup>th</sup> January 2015 is a contentious issue in this appeal. Two competing interpretations have been urged. The appellant asserts that the proceedings were conciliation proceedings and all subsequent proceedings after 14<sup>th</sup> January 2015 were part of conciliation proceedings; that the trial judge having presided as a conciliator could only deliver an award and not a judgment; that the judgment delivered on 30<sup>th</sup> June 2015 was not a judgment because it did not arise out of adjudicatory proceedings but was a product of conciliation proceedings.

76. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that the proceedings of 14<sup>th</sup> January were facilitative proceedings where the trial judge presided as a facilitator to help the parties resolve their dispute; that the facilitation proceedings collapsed on 14<sup>th</sup> January 2015 and the final orders recorded by the trial court ended the facilitation proceedings and all subsequent proceedings after 14<sup>th</sup> January 2015 were adjudicatory proceedings with the judge sitting as a judge of the Employment and Labour Relations Court adjudicating the economic dispute between the parties and he delivered a valid judgment on 30<sup>th</sup> June 2015.

77. The juridical competence of the trial judge to preside over facilitation or conciliation proceedings and then become an adjudicator in the same proceedings is a matter for consideration. Whether the trial judge had jurisdiction to conduct conciliation proceedings is a ground of appeal.

78. The appellant contends that the trial court had no jurisdiction to conduct facilitative or conciliation proceedings; that the judge had no jurisdiction to convert the appellant's Petition No. 3 of 2015 into an economic dispute and to hear the alleged economic dispute which was not contained in the appellant's Petition.

79. The appellant emphasized that on 8<sup>th</sup> January 2015, it approached the trial court and filed Petition No. 3 of 2015 and lodged an interlocutory application seeking two reliefs namely: that the strike by the 1<sup>st</sup> and 2<sup>nd</sup> respondent members was an unprotected strike and injunction to issue to prevent the teachers from continuing with the strike. That on 14<sup>th</sup> January 2015, the trial court conducted the proceedings under Section 15 of the Industrial Court Act; that in the judgment delivered on 30<sup>th</sup> June 2015, the trial court at paragraphs 11, 13, 14 and 15 states that the parties consented to have the “economic dispute” adjudicated by the court and that the appellant's petition was compromised.

80. It is the appellant's contention that there was no consent by the parties to compromise the Petition; and no consent by the parties to confer jurisdiction to the trial court to hear the alleged "economic dispute"; that the alleged consent is not supported by the evidence on record; that the consent was a creation of the trial court and, even if there was consent, consent cannot confer jurisdiction which can only be conferred by law.

81. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that at the end of the proceedings conducted on 14<sup>th</sup> January 2015, a valid consent and issues for adjudication were agreed between the parties; that the consent and agreed issues conferred adjudicatory jurisdiction to the trial court; that the consent converted the facilitative/conciliation proceedings into adjudicatory proceedings.

82. The jurisdiction of the Employment and Labour Relations Court as established under **Article 162 (2) (a)** of the Constitution is expressed in **Sections 12 and 15** of the **Industrial Court Act No. 20 of 2011**.

"Section 12 – Jurisdiction of the Court

**The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including:**

- (a) disputes relating to or arising out of employment between an employer and an employee;**
- (b) dispute between an employer and a trade union;(Emphasis mine).**
- (c) .....**
- (d) .....**
- (e) .....**
- (j) dispute relating to the registration and enforcement of collective agreements." (Emphasis mine).**

"Section 15 of the Industrial Court Act – Alternative Dispute Resolution

- (1) Nothing contained in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159 (2) of the Constitution.**
- (2) ....**
- (3) ....**
- (4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration. (Emphasis mine).**
- (5) In the exercise of its powers under this Act, the Court may be bound by the national wage guidelines on minimum wages and standards of employment and other terms and conditions of employment that may be issued, from time to time, by the Cabinet Secretary for the time being responsible for finance.**
- (6) Nothing in this section shall preclude the Court from making reference to the guidelines**

**as may be published from time to time by the Salaries and Remuneration Commission to the extent to which they may be relevant to the dispute.**” (Emphasis mine).

83. The Supreme Court **In Re The Matter of the Interim Independent Electoral Commission S.C., Constitutional Application No. 2 of 2011; [2011] eKLR** and in **Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others S.C. Application No. 2 of 2012; [2012] eKLR**, held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the Constitution, statute law, and judicial precedent. The Court stated:

**“A Court’s jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity”.**

84. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that the “consent” order recorded on 14<sup>th</sup> January 2015 conferred jurisdiction on the trial court to hear and determine the “economic dispute”. Learned counsel for the appellant and respondents strenuously submitted on facts and cited different parts of the record to convince this Court that either there was no consent or that there was consent by the parties as recorded on 14<sup>th</sup> January 2015.

85. Consent or no consent, parties cannot confer jurisdiction to any court of law as jurisdiction is a question of law. The extent of the jurisdiction of the trial court is determined by **Article 162 (2) (a) and (3)** of the Constitution as read with **Sections 12 and 15** of the Industrial Court Act. The constitutional and juridical competence of the nature the proceedings conducted by the trial court on 14<sup>th</sup> January 2015 is dependent on the interpretation of **Article 162 (2) (a)** of the Constitution and **Sections 12 and 15** of the Industrial Court Act.

86. The order made on 9<sup>th</sup> January 2015 states that parties were willing to engage in terms of **Section 15** of the **Industrial Court Act**. The order recorded on 14<sup>th</sup> January 2015 states that the parties were to appear before the learned judge to participate in proceedings under **Section 15** of the Industrial Court Act. Senior Counsel Muite submitted that the proceedings conducted on 14<sup>th</sup> January 2015 were pursuant to **Section 15** of the Industrial Court Act. The Joint Memorandum on Economic Dispute Claim filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in its preamble at paragraphs 1.4 and 1.5 states that the proceedings of 14<sup>th</sup> January 2015 were conciliation proceedings pursuant to **Section 15** of the Industrial Court Act. The trial court in the Orders made on 26<sup>th</sup> January 2015 and 11<sup>th</sup> March 2015 states that the proceedings were pursuant to Section 15 of the Industrial Court Act.

87. I have considered the Orders made by the trial court on 9<sup>th</sup>, 14<sup>th</sup> and 26<sup>th</sup> January 2015 and 11<sup>th</sup> March 2015. I have also considered paragraphs 1.4 and 1.5 of the Joint Memorandum on Economic Dispute Claim by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. **Section 15** of the Industrial Court Act is titled Alternative Dispute Resolution (ADR). ADR proceedings are not adjudicatory proceedings. **Section 15 (1)** allows the trial court to *inter alia* adopt and implement on its own motion internal methods or conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159 (2) (c) of the Constitution.

88. The nature of proceedings conducted on 14<sup>th</sup> January 2015 was pursuant to **Section 15** of the Industrial Court Act as Alternative Dispute Resolution and were not adjudicatory proceedings. Whether one calls the proceedings facilitation or conciliation, the proceedings were not adjudicatory. The proceedings conducted on 14<sup>th</sup> January 2015 were conciliation proceedings and the trial court through its orders made on 26<sup>th</sup> January 2015 and 11<sup>th</sup> March 2015 appreciated this fact. The parties also understood that the proceedings were conciliation proceedings. This is confirmed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in their Joint Memorandum of Claim; the appellant is not disputing that the proceedings conducted on 14<sup>th</sup> January 2015 were conciliation proceedings.

## **Jurisdiction of the trial judge to be Conciliator**

89. A pertinent issue is whether the trial court had jurisdiction to conduct conciliation proceedings. As per the Orders made on 26<sup>th</sup> January 2015 and 11<sup>th</sup> March 2015 the trial judge was of the view that he had jurisdiction to sit as a conciliator pursuant to **Section 15 (1)** of the Industrial Court Act as read with **Article 159 (2) (c)** of the Constitution. At paragraph 16 (1) of the judgment, the trial judge affirms that the proceedings conducted on 14<sup>th</sup> January 2015 were conciliation proceedings under **Section 15** of the Industrial Court Act.

90. TSC contends that the trial judge had no jurisdiction to sit as conciliator, mediator or engage in any traditional dispute resolution. It was submitted that prior to the promulgation of the 2010 Constitution, the jurisdiction of the Industrial Court to conduct conciliation proceedings was founded on **Sections 20 (1) (b)** of the **Labour Institutions Act of 2007** which section was deleted vide **Statute Law (Miscellaneous Amendment) Act of 2014**.

91. The then **Section 20 (1) (b)** provided that:

**“20 (1) If at any stage after a dispute has been referred to the Industrial Court, it becomes apparent that the dispute ought to have been referred for conciliation, the Industrial Court may:**

**(a) Stay the proceedings and refer the dispute for conciliation or**

**(b) Proceedings with the Industrial Court sitting as a conciliator in which case the Industrial Court may only make any order that a conciliator would have been entitled to make.”**

92. TSC submission is that the deleted **Section 20 (1) (b)** of the **2007 Labour Institutions Act** is the provision that conferred jurisdiction to a judge of the Industrial Court to sit as conciliator and such jurisdiction was activated by consent of the parties. That the present **Industrial Court Act of 2011** in **Section 15 (1)** thereof does not contain a provision similar to the deleted **Section 20 (1) (b)** of the **2007 Labour Institutions Act** with the legal consequence that consent or no consent, a judge of the Employment and Labour Relations Court has no jurisdiction to sit as a conciliator.

93. Founded on this reasoning, the appellant contends that the proceedings conducted by the trial court on 14<sup>th</sup> January 2015 were a nullity in law as the judge could not sit as a conciliator; that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have conceded in their Joint Memorandum of Claim that the proceedings conducted on 14<sup>th</sup> January 2015 were conciliation proceedings. It is the appellant’s contention that the proceedings of 14<sup>th</sup> January 2015 were a nullity in law with the legal consequence that the orders made on 14<sup>th</sup> January 2015 are also a nullity and all consequential proceedings founded on the null and void orders of 14<sup>th</sup> January 2015 up to and including the judgment dated 30<sup>th</sup> June 2015 are a nullity.

94. Senior Counsel Mr. Paul Muite for the respondents urged this Court to find that the proceedings conducted on 14<sup>th</sup> January 2015 were not conciliation proceedings but discussion between the parties facilitated by the trial court; that although **Section 20 (1) (b)** of the 2007 Labour Institutions Act was deleted, **Section 15 (1)** of the 2011 Industrial Court Act expanded the jurisdiction of the Employment and Labour Relations Court; that the expansion gave jurisdiction to the trial court to adopt and implement appropriate means of dispute resolution which means include facilitation of the parties, conciliation or mediation; that the deletion of **Section 20 (1) (b)** of the 2007 Labour Institutions Act should not be looked at in isolation but as a whole taking into account that the deletion was of the entire PART III of the 2007 Act which established the old Industrial Court prior to the effective date of the 2010 Constitution.

95. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent’s contends that pursuant to **Section 15 (1)** of the 2011 Industrial Court Act, the trial court (and any judge of the Employment and Labour Relations Court) has

jurisdiction to be a facilitator, conciliator, mediator or engage in any traditional dispute resolution because such jurisdiction has been conferred by **Article 159 (2) (c)** of the Constitution as read with **Section 15 (1)** of the 2011 Industrial Court Act.

96. The issue for my determination is whether **Section 15 (1)** of the Industrial Court Act of 2011 envisages that ADR proceedings can be conducted and presided over by a judge of Employment and Labour Relations Court or that ADR pursuant to **Section 15 (1)** must be outsourced and can only be conducted by a person who is not a judge of the Employment and Labour Relations Court. The answer would be straight forward if the ADR mechanism in the present case was conducted pursuant to the provisions of **Part VIII the Labour Relations Act Chapter 233 of the Laws of Kenya**. Under **Section 66** of the **Labour Relations Act**, a person to be appointed as conciliator shall be a public officer or any other person drawn from a panel of conciliators appointed by the Minister...or a conciliator from the Conciliation and Mediation Commission.

97. The proceedings before the trial court on 14<sup>th</sup> January 2015 were not conducted pursuant to **Part VIII of the Labour Relations Act** but as the trial court states in the Orders made on 26<sup>th</sup> January 2015 and 11<sup>th</sup> March 2015, the proceedings were conducted under **Section 15 (1)** of the Industrial Court Act. It is no wonder that there is no Conciliator's Certificate under **Section 69** of the Labour Relations Act indicating that the dispute between the parties had not been resolved.

98. A reading of **Section 15 (4)** of the Industrial Court Act shows that a judge of the Employment and Labour Relations Court has discretion to either stay the proceedings or refer the dispute to conciliation, mediation or arbitration. This inference arises from the use of the phrase "the Court may stay the proceedings." **Section 15 (4)** is subject to **Section 15 (1)**. **Section 15 (1)** states that "Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanism."

99. The Employment and Labour Relations Court in the case of **Dr. Kennedy Amuhaya Manyonyi -v- African Medical and Research Foundation Industrial Court at Nairobi Cause No. 53 of 2014** had occasion to pronounce on the extent of jurisdiction of the Employment Court under **Section 15 (1)** of the Industrial Court Act where Maureen Onyango, J. expressed herself thus:

**"Section 15 (1) of the Industrial Court Act requires this court to promote appropriate means of dispute resolution including internal methods, conciliation, mediation and traditional dispute resolution mechanisms. This Section specifically omits to mention arbitration as an alternative method of dispute resolution in the Industrial Court. In my mind, this was a deliberate omission as both the Employment Act and Labour Relations Act provide for both internal dispute resolution mechanisms and conciliation...Section 75 of the Labour Relations Act expressly states that the Arbitration Act shall not apply to proceedings before the Industrial Court.... Section 15 (1) of the Industrial Court Act recognizes this position when it requires that disputes be referred to other appropriate means of dispute resolution by the court on its own motion or by the parties. The Act does not refer to one party. This means that where the reference is by the parties, it should be by consent of both parties.**  
(Emphasis mine).

100. The extent of jurisdiction of the trial court under the provisions of **Section 15 (1)** of the Industrial Court Act should be interpreted bearing in mind the omitted words that were in the deleted **Section 20 (1) (b) of the Labour Institutions Act of 2007** and which words do not appear in **Section 15 (1)** of the Industrial Court Act. Under the then **Section 20 (1) (b)**, with the consent of the parties and if it were expedient to do so, the Industrial Court judge could "***continue with the proceedings with the Industrial Court sitting as conciliator...***" These italicized words are missing in the current 2011 Industrial Court Act.

101. These missing words invite the interpretation that a judge of the Employment and Labour Relations Court has no jurisdiction to sit as a conciliator with or without the consent of the parties. The learned

judge Nduma Nderi, J. in **Kenya Concrete, Structural, Ceramic Tiles Wood Ply and Interior Design Employees (K.C.S.C.W. & I) -v- Laxmanbhai Construction Ltd Industrial Cause No. 340 of 2014** had the occasion to consider if the Employment and Labour Relations Court had jurisdiction to be conciliator under **Section 15 (1)** of the **Industrial Court Act**. The learned judge expressed that subject to the exceptions in **Section 62** of the Act, all disputes must first follow the dispute resolution mechanism provided for in the Labour Relations Act prior to being filed before the court; that the purpose of the Labour Relations Act is defeated where parties run to court without taking advantage of the elaborate dispute resolution mechanism provided under the Labour Relations Act; that indeed, **Rule 6 (3)** of the **Industrial Court (Procedure) Rules 2010** provides for the filing of an affidavit by the claimant attesting to the reasons why the dispute was not referred to conciliation.

102. The case of ***Kenya Concrete, Structural, Ceramic Tiles Wood Ply (supra)*** is in *pari materia* with the instant appeal on the issue of jurisdictional competence of the trial court to conduct conciliation. The learned judge Nduma Nderi, J. in the case of ***Kenya Concrete, Structural, Ceramic Tiles Wood Ply (supra)*** in a preliminary objection founded on the ground that the trial court had no jurisdiction to hear a dispute filed when conciliation had not taken place under **Part VIII** of the **Labour Relations Act**, held that the trial court had no jurisdiction to hear a labour dispute that offends **Part VIII** and **IX** of the **Labour Relations Act**. At paragraph 20 of his ruling the judge expressed himself thus:

**“Accordingly, the Court invokes the provisions of Section 15 (2) of the Industrial Court Act, No. 20 of 2011 to refer the dispute to the Minister for conciliation under the provisions of Part VIII of the Labour Relations Act. Only if the dispute is not resolved and a certificate of unresolved dispute is filed with the court, may the matter be proceeded on in court. The preliminary objection is upheld.** (Emphasis mine).

103. Applying the foregoing interpretation and persuaded by the reasoning of the learned judge in ***Kenya Concrete, Structural, Ceramic Tiles Wood Ply (supra)***, I find that pursuant to **Section 15 (1)** of the Industrial Court Act, the trial court had no jurisdiction to conduct conciliation proceedings held on 14<sup>th</sup> January 2015. As Maureen Onyango, J. correctly observes in the persuasive decision in **Dr. Kennedy Amuhaya Manyoni -v- African Medical and Research Foundation Industrial Court at Nairobi Cause No. 53 of 2014, Section 15 (1)** of the Industrial Court requires that disputes be referred to other appropriate means of dispute resolution by the court. The submission that the trial court in this matter could sit as facilitator is untenable and the trial court has no such jurisdiction. I reiterate my finding that the trial court had no jurisdiction to conduct conciliation proceedings held on 14<sup>th</sup> January 2015. As the court did not have jurisdiction, it follows that the orders made on 14<sup>th</sup> January 2015 are null and void; all subsequent proceedings founded on a null order are also null and void. I note that the trial judge expressed the view that the proceedings and orders made on 14<sup>th</sup> January 2015 were based on extra-ordinary circumstances. Extra-ordinary circumstances cannot vest jurisdiction on a court of law or justify violation of the Constitution or statute. It is during extra ordinary circumstances that a court of law must jealously guard the Constitution, statute and rule of law otherwise what will prevail is not the rule of law but the law of the jungle.

104. The *dicta* of Nyarangi J. in **Owners of the Motor Vessel “Lillian S” v. Caltex Oil, (Kenya) Ltd [1989] KLR 1** is to the effect that if a court has no jurisdiction it must down its tools. The *dictum* requires me to ground my tools. However, noting the procedure adopted by the bench majority in the Supreme Court case of **Hon. Lemanka Aramat -v- Hon. Harun Meitamei Lempaka & 2 Others (S.C. Petition No. 5 of 2014;** and persuaded that the instant case generates matters of general public interest touching on the role of SRC in collective bargaining, the binding nature of SRC’s advice and taking into account that the appeal involves constitutionality of the judgment by the trial court, I am inclined to proceed and evaluate the merits of this appeal *ex abundati cautela* as a matter of general public interest.

#### **Nature of Proceedings after 14<sup>th</sup> January 2015**

105. At the end of the proceedings held on 14<sup>th</sup> January 2015, an order is recorded that: (a) the parties

have agreed to have the economic dispute adjudicated by the court and (b) KNUT and KUPPET to file their memorandum of claim. Without renegeing on my finding that the proceedings and orders made on 14<sup>th</sup> January 2015 were a nullity in law, I note that in the judgment delivered on 30<sup>th</sup> June 2015 at paragraph 11 thereof, the order recorded on 14<sup>th</sup> January 2015 is referred to as a “consent order”.

106. The appellant contends that there was no consent order as recorded; conversely, the 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that there was a consent order. Subsequent to the order of 14<sup>th</sup> January 2015, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a joint memorandum of claim and the appellant filed a Notice of Motion seeking to stay the order on ground that the order was beyond the substance of the appellant’s Petition No. 3 of 2015; that the trial court commenced adjudication process outside the issues raised in the Petition. As directed by the trial court, SRC, TSC and the AG filed written submission to the Joint Memorandum of Claim of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

107. The trial court describes the proceedings after 14<sup>th</sup> January 2015 as adjudicatory proceedings. At paragraphs 13 (i) (a), 14, 15, 16, 19 and 22 of the judgment, the trial court states that the Petition was compromised on 14<sup>th</sup> January 2015 and TSC became the Respondent while both KNUT and KUPPET became claimants in the economic dispute; that neither of the parties were averse to the trial court hearing the economic dispute and that the parties fully participated in the process that culminated in the consent order; that appellant is estopped in law and fact from renegeing on the consent it had fully participated in crafting.

108. Without prejudice to my finding that the proceedings after 14<sup>th</sup> January 2015 were founded on a nullity, it is my considered view that after 14<sup>th</sup> January 2015, the proceedings before the trial court was adjudicatory in nature. The trial court’s jurisdiction to conduct the adjudicatory proceedings is conferred by **Section 12 (1) (b)** of the **2011 Industrial Court Act** that empower the court to hear and determine disputes between an employer and a trade union. (See **Prof. Daniel N. Mugendi v. Kenyatta University & Others (2013) eKLR** and **United States International University v. Eric Rading 2012 eKLR**). I find and hold that all proceedings after 14<sup>th</sup> January 2015 were adjudicatory proceedings pursuant to **Section 12 (1) (a), (b), (j)** and **Section 12 (2)** of the **2011 Industrial Court Act**.

### **Correlation between SRC and TSC as Independent Commissions**

109. The 1<sup>st</sup> and 2<sup>nd</sup> respondents urge that TSC is an independent constitutional commission not amenable to control and direction of SRC. This leads me to consider the link between SRC and TSC both being Independent Commissions established under **Articles 230** and **237** of the Constitution respectively. Both SRC and TSC are listed as Independent Commissions in **Article 248 (2) (h)** and of the Constitution respectively. Under **Article 249 (2) (b)** of the Constitution, Independent Commissions are independent and not subject to direction or control by any person or authority. The content, meaning and limitations to the phrase “Independent Commissions” is an issue in this appeal.

110. The limitations on the authority of Independent Commissions is provided in **Article 249 (2) (a)** of the Constitution which stipulates that the Independent Commissions are subject only to the Constitution and the law. (Emphasis mine). In addition to the functions and powers conferred by the Constitution, **Article 252 (1) (d)** permits Independent Commissions to perform any functions and exercise any powers prescribed by legislation.

111. The Supreme Court ***In Re The Matter of the Interim Independent Electoral Commission S.C., Constitutional Application No. 2 of 2011; [2011] eKLR*** expressed that the “real purpose of independence clause with regard to commissions and independent offices established under the Constitution was to provide a safeguard against undue interference with such commissions or offices, by other persons, or other institutions of government. The several independent commissions and offices are intended to serve as “people’s watchdog” and, to perform this role effectively; they must operate without improper influence, fear or favour.”

112. The concept of Independent Commissions is a public good that is utilitarian in nature - it is for the good of the general public. In the 2010 constitutional dispensation, Independent Commissions are theoretically separate and distinct with complementary and not competitive roles. Independence is a relational term whose substantive thrust is negative - negative because it prevents a third party from interfering with exercise of constitutional functions of an Independent Commission. Such independence does not mean that a Commission is entitled to act in an arbitrary manner without due regard to the Constitution and the law. Independence does not mean that constitutional and statutory procedures and rule of law limitations to the authority of the independent commission are neither enforceable nor justiciable. Independence does not mean that independent commission must neither heed nor pay attention to other constitutional organs or other players in public governance.

113. In Namibia Supreme Court case of Minister of Defence, Nambia -vs-Mwandinghi- (1992) 2 SA 355) it was stated that:

**“The independence clause” does not accord independent “carte blanche” to act or conduct ... on whim; ... independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, “independence” does not mean “detachment”, “isolation” or “disengagement” from other players in public governance”.**

114. The Supreme Court in *Re Matter of the Interim Independent Electoral Commission* (supra) expressed itself in the following terms as regards independent commissions;

**“While bearing in mind that the various commissions and independent offices are required to function free of subjection to “direction or control by any person or authority”, we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law...”**

The Court went further to state that:

**....Indeed, for practical purposes, an independent commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of Government, or other commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of Government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question.**

The Supreme Court concluded:

**“The moral of this recognition is that commissions and independent offices are not to plead “independence” as an end in itself; for public-governance tasks are apt to be severely strained by possible “clashes of independences.”**

115. In The Matter of An Application by The Speakers of The 47 County Assemblies of The Republic of Kenya -v- Commission on Revenue Allocation & 3 Others, Nairobi HC Petition No. 368 of 2014, in a persuasive dicta the High Court stated that Independent Commissions ought to perform their functions as provided for under the four corners of the Constitution and the law and in meeting its objectives, an Independent Commissions is bound by the provisions of *Article 249 (1)* and *Article 10* on national values. In The Matter of Judicial Service Commission -v- Speaker of the National Assembly of Kenya, Nairobi HC Petition No. 518 of 2013, it was expressed that whereas a constitutional commission is not subject to control or direction of any person, the court has jurisdiction to inquire into any alleged constitutional violations or contraventions while upholding and protecting the financial and administrative independence of the constitutional commission.

116. **In the Matter of Advisory Opinion of the Court, Constitutional Application No. 2 of 2011 at paragraph 61** the Supreme Court expressed that seeking advice or being required to do so does not compromise the independence of a State organ in any way, nor does it vest a veto power in that office; the applicant seeking and obtaining advice is not necessarily bound by the same but the fact that such advice was sought in the first place, demonstrate the applicant's commitment, as well as fidelity to due process.

117. The status of TSC as an Independent Commission does not mean the Commission is not subject to the Constitution, the rule of law or taking advice when the Constitution so requires. The independence of TSC under **Article 249** is not a carte blanche to be cited in total disregard of other Constitutional Articles. Despite being an Independent Commission, the Constitution requires TSC under **Article 230 (4) (b)** and **Article 252 (1) (d)** as read with **Section 37 (3)** of the TSC Act to take advice and or consult SRC. In this regard, the Constitution imposes a limitation on the independence of TSC and requires it to obtain advice from SRC pursuant to **Article 230 (4) (b)**. Both the TSC Act and SRC Act have their constitutional underpinning in **Article 252 (1) (d)**, **Article 230 (4) (b)** of the Constitution and **Section 37 (3)** of the TSC Act impose a limitation on the independence of TSC and requires that teachers recruited by TSC shall serve under such terms and conditions as determined in consultation with SRC.

118. Whereas **Article 249 (2) (b)** confer independence upon Independent Commissions, the independence conferred is functional, operational and jurisdictional in nature. The Article is not a supremacy or hierarchical Article. Each of the independent commissions is functionally and operationally autonomous; the Article promotes separation of functions with constitutional limitations making provision for interdependence among constitutional organs. The independence of Constitutional Commissions under **Article 249 (2) (b)** should not be interpreted to render any constitutional Article or state organ otiose, superfluous, ineffective or impotent. The seeking of advice from SRC does not infringe on the status of TSC as an independent commission. The seeking of advice is a constitutional limitation on the independence of TSC in so far as remuneration and benefits of public officers is concerned.

### **Economic Dispute and Compromise of Petition No. 3 of 2015**

119. The appellant contend that the trial court erred in hearing and determining an "economic dispute" because "economic dispute" is neither a terminology nor a nomenclature known to Kenya's legal system. The Attorney General in his oral submission urged that there is no such creature as an "economic dispute" known to Kenyan law; that the trial court erred in coining and adopting the phrase "economic dispute" and proceeding to adjudicate upon it. TSC urged that the trial court erred by radically changing the proceedings to an "economic dispute" and abandoned the appellant's Petition No. 3 of 2015; that no pleadings by the parties contain an "economic dispute"; that the only dispute before the trial court was the issues raised in Petition No. 3 of 2015. It is contended that the issues framed and determined by the trial judge as stated in paragraph 23 of the judgment have no foundation in law because there are no pleadings from which one can deduce the issues; that the trial court erred in replacing the appellant's Petition with an economic dispute; that there was no consent by the parties to confer jurisdiction to hear and determine an economic dispute; that the trial court proceeded on a false premise that the appellant's Petition had been compromised.

120. In support of its submissions, the appellant cited the decisions in **Nairobi City Council -v- Thabiti Enterprises Limited (1995-1998) 2EA 23**; **Captain Harry Gandy -v- Caspar Air Charters Limited (1956) 23 EACA 139** and **Kenya Commercial Bank Limited -v- Osebe (1976-195) EA 706**. The general principle in these cases is that a judge has no jurisdiction to decide on an issue that has not been pleaded.

121. The 1st and 2nd respondents contend that the proceedings conducted by the trial court on 14<sup>th</sup> January 2015 resulted into consent by the parties. That one of the terms of the consent is that the parties agreed to have the economic dispute adjudicated by the court. The 1<sup>st</sup> and 2<sup>nd</sup> respondents urged this Court to examine the record and note the statements made by learned counsels for the appellant, the 3<sup>rd</sup> and 4<sup>th</sup> respondents before the trial court on 14<sup>th</sup> January 2015. That the learned counsels in their statements submitted to the jurisdiction of the trial court; that it is counsel for TSC Mr. Sitima who stated that "the elephant in the house is basic salary". Counsel for the respondent Unions submitted that basic

salary dispute was the “economic dispute” that parties agreed by consent to have the trial court to adjudicate, hear and determine.

122. The 1<sup>st</sup> respondent submitted that this Court can only set aside the consent order recorded on 14<sup>th</sup> January 2015 on principles upon which consent order can be set aside. In **Flora Wasike -v- Destimo Wamboko (1982-88) 1 KAR 625** this Court while approving the dicta in **Hiran -v- Kassam (1952) 19 EACA 131** stated that any order made in the presence of and with consent of counsel is binding on all parties to the proceedings or action and on those claiming under them and the consent cannot be varied or discharged unless it was obtained by fraud or collusion or by an agreement contrary to policy of the court or if the consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement. The case of **H. Clark (Doncaster) Ltd. -v-Wilkinson (1) (1965) 2WLR** was cited to support the submission that where a compromise or settlement has been made by counsel acting within his ostensible authority, it is binding. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that none of the conditions for setting aside consent order had been proved and the consent order recorded on 14<sup>th</sup> January 2015 remains valid.

123. Pertaining to the phrase “economic dispute”, the 1<sup>st</sup> respondent submitted that the phrase is known to Kenyan law; that the International Labour Organization (ILO) classifies labour disputes into two categories namely: (a) individual and collective disputes and (b) disputes about rights and disputes about interests (also known as economic disputes). It is the 1<sup>st</sup> respondent’s case that the dispute with the appellant is one which arises from differences over determinations of future rights and obligations which is usually a result of failure of collective bargaining; that the Unions dispute with the appellant on basic salary increment and signing of a collective bargaining agreement falls squarely within the ILO classification of an economic dispute. That Kenya is a member of the ILO and has ratified ILO Conventions and under **Article 2 (6)** of the Constitution, the ILO categorization on labour disputes are part and parcel of the laws of Kenya.

124. The dispute between the parties in this appeal relate to increment in basic salary and signing of a collective bargaining agreement. The substratum of the dispute or “the elephant in the room” was increment in basic salary and signing of a collective bargaining agreement. It is immaterial by which name, phrase or terminology these issues are called. The nomenclature does not go to the substratum of the dispute. I am reminded of the phrase “a rose by any other name is still a rose” and borrowing from this, I state that a basic pay dispute by whatever name called be it a remuneration dispute, trade dispute, labour dispute or economic dispute is still a basic pay dispute. The ground of appeal that “economic dispute” is unknown to Kenyan law cannot succeed as it is a red herring, semantic and a splitting of hairs.

125. The trial court held that the order recorded on 14<sup>th</sup> January 2015 compromised the appellant’s Petition No. 3 of 2015 and conferred jurisdiction to adjudicate, hear and determine the economic dispute. At paragraph 13 as read with paragraphs 19 to 22 of the judgment, the trial court expresses as follows:

**“The consent entered into by the parties and recorded as an order of the court on 14<sup>th</sup> January 2015 was conceived in extra-ordinary circumstances....In the court’s view, the import and effect of the consent on the pending Petition and interlocutory application was manifestly clear as follows:**

**(i).....**

**(a)the Petition was compromised and replaced by an economic dispute.**

**(b) the Unions (KNUT and KUPPET) became the claimants in the economic dispute and the TSC being the employer became the respondent.**

**14. Neither of the parties was averse to the same court hearing the economic dispute and as the proceedings will show, counsel for the parties thanked the court profusely for the role it had played....”**

126. Counsel for TSC contends that there was no valid consent entered into by the parties on 14<sup>th</sup> January 2015 compromising the Petition and permitting the court to hear an economic dispute. Conversely, the 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that there was a valid consent that compromised the Petition and allowed the trial court to hear and determine the economic dispute.

127. Subsequent to the orders recorded on 14<sup>th</sup> January 2015, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a Joint Memorandum of Claim on Economic Dispute dated 19<sup>th</sup> January 2015. TSC filed its Memorandum of Response dated 28<sup>th</sup> January 2015. The Attorney General a response dated 20<sup>th</sup> February 2015 and at paragraph 5 thereof annexed a “Technical Report from the National Treasury to be considered by the trial court during the adjudication process”. SRC filed its response on 9<sup>th</sup> February 2015.

128. TSC states that it had filed its response without prejudice to its right to challenge the process followed by the trial court in adjudicating the matter. The response by the AG acknowledges that there is an ongoing adjudication process and a Technical Report is attached for the court’s consideration. It is incumbent upon this Court to make a determination whether the order recorded on 14<sup>th</sup> January 2015 compromised Petition No 3 of 2015.

129. The appellant contends that the orders made on 14<sup>th</sup> January 2015 were basically a court order made by the trial court on its own motion. That the practice in recording proceedings is that when a court makes an order it is recorded as an “Order” and when the order is by consent of the parties, it is recorded as “Consent Order”. That in the instant appeal, the record of proceedings for 14<sup>th</sup> January 2015 does not contain the word “Consent Order” but “Order” and this properly reflect practice and is a confirmation that the orders made on 14<sup>th</sup> January 2015 was not by consent of the parties.

130. The appellant urged this Court to examine the record and from which it would be apparent that all parties made diverse submissions particularly on the “way forward”. It was submitted that out of nowhere, the learned judge recorded the “order” as a court order and then proceeded to adjudicate on matters not pleaded in Petition No. 3 of 2015.

That the order as recorded on 14<sup>th</sup> January 2015 does not refer to the Petition as having been compromised; the statement that the Petition was compromised appears for the first time in the judgment; that the appellant as Petitioner has not been given an opportunity to be heard on its Petition which the trial court erroneously and unilaterally declared to have been compromised.

131. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that there was a valid consent recorded by the court; that the consent was dictated by Senior Counsel Mr. Paul Muite; that TSC was ably represented by learned counsel Mr. Sitima when the consent was dictated and recorded; that Mr. Sitima who was present before the trial court has never filed an affidavit to challenge the orders made on 14<sup>th</sup> January 2015.

132. Consent or no consent; valid or invalid, the order recorded on 14<sup>th</sup> January 2015 cannot confer jurisdiction upon the trial court. The jurisdiction of the trial court to adjudicate on the dispute between the parties is founded and premised on **Article 162 (2) (a) and (3)** of the Constitution as read with **Section 12 (1) (a), (b) and (j)** and **Section 12 (2)** of the 2011 Industrial Court Act. The appellant as Petitioner having moved to court on 8<sup>th</sup> January 2015 clearly appreciated that the trial court’s jurisdiction was founded on **Section 12** of the Industrial Court Act and this jurisdiction can neither be enlarged nor taken away by an order of the court or consent of the parties.

133. Compromise of a suit or petition can only be done either by the party instituting the suit or consent of the parties. A court *suo moto* has no power to compromise a suit. Whereas compromise of a suit or petition is open to both sides to a contention throughout their litigation, the parties are not to be seen to be precluded from pursuing their respective contentions unless barred by law as per Miller, JA in **Kenya Commercial Bank Ltd. -v- Karanja (1981) KLR 209 at 218**.

134. The holding by the trial court that the appellant’s Petition No. 3 of 2015 had been compromised

appears for the first time in the judgment at paragraphs 13 (i) (a) and 19. At paragraph 13, the trial court interprets and explains the order recorded on 14<sup>th</sup> January 2015 and expresses the “import and effect of the order on the pending Petition.” After a court has made an order, the court cannot subsequently *suo moto* interpret the order and explain its “import and effect.” The order recorded on 14<sup>th</sup> January 2015 speaks for itself and no extrinsic statements can be added to, vary, explain or subtract from the express words of order. There is no latent or patent ambiguity on the order recorded and the slip rule was never invoked to rectify the order. There was no clerical error to be corrected on the order recorded on 14<sup>th</sup> January 2015.

135. A suit or petition cannot be compromised by inference or implication. Compromise can only be done by express consent of a party. When the parties were engaged in conciliation proceedings conducted before the trial court on 14<sup>th</sup> January, 2015, there is nothing on record to show that one of the items for discussion was compromise of Petition No. 3 of 2015. Notwithstanding that a Joint Memorandum of Claim was been filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the trial court erred in *suo moto* holding that Petition No. 3 of 2015 was compromised. The Joint Memorandum of Claim could as well have been a cross-petition.

### **Competence of TSC and SRC in determination of remuneration and benefits of teachers**

136. Ground 8 of the Memorandum of Appeal states that the trial court erred in misinterpreting TSC’s constitutional mandate in **Articles 237 (2) and (3)** of the Constitution. The relevant constitutional function of TSC and SRC are provided for in **Articles 237 (2) and 230 (4) (b)** of the Constitution respectively. In **Article 237 (2) (b)**, one of the functions of TSC is to recruit and employ registered teachers. In **Article 230 (4) (b)**, one of the functions of SRC is to advise the national government on the remuneration and benefits of all public officers. **Article 252 (1) (d)** of the Constitution mandate TSC to perform any functions and exercise any powers prescribed by legislation and the enabling enactment is the **TSC Act No. 20 of 2012.**

137. TSC and SRC contend that although TSC has the mandate to determine the remuneration of teachers pursuant to **Section 37 (3)** of the TSC Act, TSC can only determine the remuneration upon advice by SRC. If SRC advice is not sought, then TSC cannot determine and fix the remuneration and benefits of teachers who are public officers. The binding nature of the advice given by SRC is considered elsewhere in this judgment.

138. The 1<sup>st</sup> and 2<sup>nd</sup> respondents urge this Court to find that the constitutional mandate to determine remuneration and benefits of teachers is vested upon the TSC by virtue of **Article 237 (2) (b)** of the Constitution that empower TSC to recruit teachers; that the power to recruit incorporates the power to determine and fix remuneration and benefits. It is contended that SRC has no authority to determine the remuneration of teachers and its role is purely advisory with respect to remuneration of public officers; that in terms of **Article 237 (1) (b)** of the Constitution, TSC is the employer of teachers and has the constitutional and statutory mandate to negotiate, determine and fix the remuneration and benefits of teachers.

139. The trial court at paragraph 270 of the judgment expressed as follows:

**“The Court therefore reiterates that the TSC has the mandate to set and review the remuneration of teachers upon advice by SRC. The court further restates that TSC is not bound by the advice of SRC in setting and reviewing remuneration of teachers. ....”**

140. Pursuant to the provisions of **Article 252 (1) (d)** of the Constitution, TSC Act was enacted and **Section 37 (3)** of the Act stipulates:

**“The registered teachers recruited by the Commission under Article 237 (2) (b) of the Constitution shall serve under such terms and conditions as the Committee established under Section 13 (5) of this Act in consultation with the Salaries and Remuneration Commission**

may determine.” (Emphasis mine).

141. **Section 13** of the TSC stipulates that the Commission may from time to time establish such committees as may be necessary for the carrying out of its functions. Under **Section 13 (5)** of the Act, TSC shall constitute a Consultative Committee on terms and conditions of service of the registered teachers employed by the Commission.

142. Counsel for the appellant submitted that the Consultative Committee established under **Section 13 (5)** of the TSC Act is akin to a welfare committee and does not determine remuneration and benefits of teachers. The literal and ordinary construction of **Section 13 (5)** of the Act does not support the submission and I hold that the Consultative Committee is not a welfare committee - it is a statutory committee whose singular function in consultation with SRC is to determine the terms and conditions upon which teachers recruited by TSC shall serve.

143. Interpretation of **Article 237 (2) (b)** of the Constitution as read with **Article 252 (1) (d)** and **Section 37 (3)** of the TSC Act, reveals that TSC through its Consultative Committee has the mandate to determine the remuneration and benefits of teachers. However, pursuant to **Article 230 (4) (b)** of the Constitution and **Section 37 (3)** of the TSC Act, the function of the Consultative Committee to determine remuneration and benefits of teachers is exercisable in consultation with SRC. The function of TSC Consultative Committee is not a carte blanche; it is restricted by the constitutional and statutory prerequisite that advice from SRC must be sought.

### **Job Evaluation and Role of SRC in Collective Bargaining Negotiations**

144. SRC in grounds 3 and 4 of its Memorandum of Appeal urges that the trial court erred in finding that only TSC had the constitutional and statutory mandate to conduct job evaluation exercise for teachers; that the learned judge misdirected himself in finding that the role of SRC in the determining remuneration and benefits payable to teachers, including the conduct of job evaluation is merely advisory.

145. SRC’s role in conducting job evaluation for teachers is subject to interpretation of the functions of SRC provided for in **Articles 230 (5) (b) and (c)** of the Constitution as read with **Section 11** of the SRC Act. The constitutional guiding principles in **Article 230 (5) (b) and (c)** on the need to recognize productivity and performance in public service and the need to ensure that public service is able to attract and retain skills required to execute their functions are relevant considerations in job evaluation.

146. Productivity is the relationship between inputs and output; it focuses on overall capabilities, it is units of outputs divided by units of inputs. Productivity and performance cannot be determined without measurement and evaluation. Productivity measurement requires development of an index that identifies the input contribution of each factor of production to the final output. Measurement and evaluation require data collection and analysis and this is an exercise in evaluation. SRC cannot execute its mandate to recognize productivity and performance in public service without measurement and evaluation. SRC cannot perform its constitutional function to attract and retain skills required in the public service without undertaking a skills gap evaluation analysis and a comparative analysis of equal pay for work of equal value.

147. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that whereas SRC has the mandate to conduct job evaluation, SRC does not have mandate to conduct job evaluation for teachers because this is the preserve and exclusive mandate of TSC under **Article 237 (2) (b) and (d)** of the Constitution; that TSC’s constitutional power to recruit and promote teachers vests it with the exclusive mandate to conduct job evaluation for teachers; that anything to do with teachers is in the exclusive mandate of TSC and SRC’s role is limited to giving advice as per **Article 230 (4) (b)** of the Constitution.

148. Under **Article 230 (4) (b)** of the Constitution, TSC is amendable to the advice of SRC in so far as remuneration and benefits of teachers who are public officers is concerned. (See **Kenya Union of Domestic, Hotels, Education and Allied Workers (KUDHEHIA WORKERS) -v- SRC & Another, Nairobi HC Petition No. 294 of 2013 at Para. 35**). Whereas TSC has the constitutional mandate under

**Article 237 (2) (b) and (d)** to *inter alia* recruit and promote teachers, the Constitution does not require TSC in the discharge of its functions to be guided by the need to recognize productivity and performance or be guided by fiscal sustainability of the total public compensation bill. The constitutional requirement that SRC must be guided *inter alia* by productivity and performance *ipso jure* mandates SRC to conduct surveys, collect and evaluate data and then give advice not only on productivity and performance but also on fiscal sustainability. This *inter alia* entails job evaluation by SRC in the public service. The role and mandate of SRC when it conducts job evaluation in public service transcends the role of TSC in recruitment and promotion of teachers.

149. The objective of the job evaluation exercise conducted by SRC and TSC are different; for SRC the guiding principles include fiscal sustainability, productivity and performance. Even if TSC were to conduct job evaluation for teachers, if the TSC job evaluation relates to remuneration and benefits of teachers, the remuneration aspects are subject to SRC advice. The trial court at paragraph 59 of the judgment correctly observes that “the objective of job evaluation is to determine which jobs should get more pay than others....and that job evaluation is the basis for wage and salary negotiations.” This statement aptly shows that any job evaluation by TSC has a remuneration aspect. Teachers being public officers, it is SRC that has the exclusive constitutional mandate to determine fiscal sustainability of their remuneration and benefits.

150. It is my considered view that SRC has a constitutional mandate to conduct job evaluation in the entire public service (which includes teachers) and SRC job evaluation on matters relating to remuneration and benefits override and supersede any other job evaluation exercise conducted by TSC or any person, state organ or independent commission. In the discharge of its job evaluation function, SRC must take into account transparency and fairness and the national values in **Article 10 of the Constitution** that encompass inclusivity, non-discrimination, equality and public participation. SRC must also bear in mind that it is subject to judicial review powers of the High Court under **Article 165 (6)** of the Constitution.

151. On the role of SRC in collective bargaining negotiations, at paragraphs 48, 49, 52 and 51 of the judgment, the trial court finds that SRC has no role whatsoever in negotiations and determination of basic salary for teachers; that SRC has no business intervening in collective bargaining negotiations between TSC and the Unions. These findings by the trial court echo the dicta by Lenaola, J. in **Kenya Union of Domestic, Hotels, Education and Allied Workers (KUDHEHIA WORKERS) (supra) at Para. 43** where the learned judge stated that there is no lawful basis why SRC should negotiate directly with trade unions and that it is not the place of SRC to negotiate with non-state and non-state public service organs such as trade unions.

152. Both the trial court and Lenaola, J’s findings are true to the extent that SRC has no role to play in private sector CBA negotiations. In public service, the findings of the two learned judges need clarification. Lenaola, J. correctly observes that SRC’s role is limited to invoking **Article 230 (5) (a)** of the Constitution to ensure that the total public compensation bill is fiscally sustainable. In public service CBA negotiations, it is in this limited role that the function of SRC is constitutionally mandatory and any CBA negotiation touching on remuneration and benefits to public officers is subject to the constitutional advice of SRC as per **Article 230 (4) (b)** of the Constitution. No determination of remuneration and benefits payable to public officers is constitutional without advice from SRC. I find that SRC has a constitutional role to play in CBA negotiations involving public officers and this role is limited to giving advice on fiscal sustainability of the remuneration and benefits payable to public officers. Within this context, SRC has a role in collective bargaining negotiations between TSC and the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ Unions. I concur with Lenaola, J. that SRC is not to negotiate directly with the Unions but its role is to give advice as required under **Article 230 (4) (b)** of the Constitution.

### **Right to Collective Bargaining**

153. TSC in grounds 10 to 12 of its appeal urge that the trial court erred in invoking the right to engage in collective bargaining provided for in **Article 41 (5)** of the Constitution; that the judge failed to appreciate that **ILO Convention No. 98** restricts enjoyment of the right to collective bargaining by public servants;

the court did not appreciate that the right to collective bargaining in **Article 41 (5)** of the Constitution is limited by measures appropriate to national conditions and such measures include the role of SRC as set out in **Article 230 (4) (b)** and **(5)** of the Constitution; that a further limitation on the right to collective bargaining are the restrictions imposed by procedures and principles of public expenditure.

154. At paragraph 64 of its written submissions, TSC contends that the trial court misinterpreted **Article 41 (5)** of the Constitution which does not give the trial court plenary powers to take over collective bargaining and impose terms on parties. Learned counsel Mr. Geoffrey Obura cited **ILO Chapter IV on Substantive Provisions of Labour Legislation on Settlement of Collective Labour Disputes** that emphasize voluntary nature of collective bargaining process in which a conciliator or mediator is not empowered to impose a settlement on the parties. It was submitted that **Article 4** of the **ILO Convention No. 98** encourages voluntary negotiations; that none of the Articles in the ILO Convention envisages a compulsory or mandatory award of salary by the employer in the course of negotiations; that any award by a court must be preceded by voluntary negotiations and if there is no agreement, the statutory procedure is to invoke **Section 66** of the Labour Relations Act and the dispute is to be referred to conciliation; that it is only after conciliation has failed that a dispute can be referred to adjudication process. Counsel submitted that there is no provision in law that allowed the trial judge to take cognizance of a trade dispute, record that there is a disagreement and then proceed with adjudication; that given the voluntary nature of conciliation, the attempt by the learned judge to suggest that **Article 41 (5)** of the Constitution is mandatory is a misdirection.

155. The appellant further submitted that in the present dispute, there were no conciliation proceedings under **PART VIII and IX of the Labour Relations Act** pursuant to **Section 67** thereof ; there was no conciliator appointed by the Minister under **Sections 65, 66 or 70** of the Act; that there was no conciliators certificate under **Section 69** of the **Labour Relations Act** and consequently, the trial court had no jurisdiction to undertake adjudication before conciliation was done under **Sections 66, 67 and 69** of the **Labour Relations Act**. That **Section 73** of the **Labour Relations Act** deals with referral of disputes to the Industrial Court and this step was not undertaken in the instant proceedings. It was submitted that the exceptions permitting urgent referrals to the Employment Court in **Section 74** of the Labour Relations Act are inapplicable as per the facts of this case.

156. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that conciliation proceedings had taken place and a certificate of unresolved trade dispute dated 27<sup>th</sup> March 2013 was issued by the Conciliator a **Mr. J.N. Makaa**. The subject matter of conciliation upon which the Certificate of Unresolved Dispute was issued by **Mr. J.N. Makaa** is not the dispute on basic salary that is the subject of this appeal. The present dispute on basic salary increment arose after the Consultative Meeting held on 9<sup>th</sup> September 2014 and the Certificate of Unresolved Dispute dated 27<sup>th</sup> March 2013 could not have been issued in reference to the present dispute.

157. **Article 41 (5)** of the Constitution stipulates that “every trade union, employers’ organization and employer has the right to engage in collective bargaining.” **Article 41 (5)** is contained in Chapter Four of the Constitution titled **THE BILL OF RIGHTS**. **Article 24 (2) (a)** and **(b)** of the Constitution make provisions on limitations on fundamental rights and freedoms. A provision enacted on or amended after the effective date shall not be valid to limit a fundamental right unless the legislation specifically expresses the intention to limit the right or fundamental freedom and the nature and extent of the limitation; that such provision shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation.

158. The appellant urged that there are limitations to the exercise of the right to engage in collective bargaining under **Article 41 (5)** of the Constitution. That one of the limitations is the advice given by SRC pursuant to **Article 230 (4) (b)** and **(5)** of the Constitution. It was submitted that the trial court erred in not taking into account the voluntary nature of collective bargaining negotiations and the court misdirected itself on the role of SRC in collective bargaining negotiations in regard to remuneration of public officers.

159. It is my considered view that collective bargaining is neither compulsory nor automatic. It is the source of voluntarily negotiated terms and conditions of service for employees. Collective bargaining is a

platform upon which trade unions can build to provide more advantageous terms and conditions of service to their members. The Constitution in **Article 41 (5)** recognizes the right to engage in collective bargaining. The right is founded on the concept of social dialogue, freedom of contract and autonomy of parties in collective bargaining. **Article 41 (5)** recognizes that collective bargaining is the preferred method of determining terms and conditions of employment. The Article emphasizes the ability of the employer and trade unions to operate as partners rather than adversaries. The constitutional recognition of the right to collective bargaining is not a right to blackmail a party into collective bargaining. Whereas **Section 57 (1)** of the **Labour Relations Act** mandates TSC as an employer to conclude a collective bargaining agreement (CBA), the terms of such an agreement cannot be sought through blackmail and coercion, the terms must be voluntarily negotiated. If a dispute as to the terms of the CBA arises, the provisions of the **Labour Relations Act** *inter alia* in **Sections 57 (1) and (5)** and **Section 58, 62 to 74** are applicable. There is a clear distinction between the right to collective bargaining which is voluntary and lawful; and blackmail, undue influence, coercion and compulsion which are unlawful. Constitutional recognition of collective bargaining is premised on voluntariness and negotiation and it is not recognition of collective bargaining as a tool for blackmail, duress or compulsion. This view is reinforced by the provisions of **Section 78 (1) (e) of the Labour Relations Act** which stipulates that no person shall take part in a strike or lockout if the trade dispute was not referred for conciliation in accordance with the Act.

160. On my part, having considered **Article 41 (5)** and **Article 24 (2) (a) and (b)** of the Constitution as read with **Section 57 (1)** of the **Labour Relations Act** and **Section 12 (1) (a), (b) and (j)** and **Section 12 (2)** of the **Industrial Court Act**, I find that the trial court did not err in his finding at paragraph 37 of the judgment that TSC has a duty to conclude a collective bargaining agreement with the 1<sup>st</sup> and 2<sup>nd</sup> respondents. I am comforted in this finding because I have no reason to doubt the statement by the trial court at paragraph 272 of the judgment that “the Employment and Labour Relations Court has since its establishment in 1964, adjudicated upon economic disputes between employers and unions and made basic salary and other monetary awards.”

161. The appellant submitted that trial court had no jurisdiction to undertake adjudication before conciliation was done under **Sections 66, 67 and 69** of the **Labour Relations Act**. I concur and cite the decision in **Kenya Concrete, Structural, Ceramic Tiles Wood Ply (supra)**, in which it was held that the trial court had no jurisdiction to hear a labour dispute that offends **Part VIII and IX** of the **Labour Relations Act**. Subject to statutory exceptions, the correct jurisdictional procedure is as followed in **Tailors and Textile Workers Union -v- Ashton Apparels (EPZ) Ltd. Mombasa Industrial Cause No. 340 of 2014** where the parties did not resolve the dispute at their own level and the claimant reported the existence of the dispute to the Labour Minister; the parties were not able to agree upon conciliation and the Conciliator issued a Certificate of Disagreement paving way for referral of the dispute to the Employment and Labour Relations Court.

### **Consideration of Expert Evidence**

162. Three expert witnesses testified before the trial court. They are RW1 (**John Kennedy Munyochu**), RW2 (**Charles Nyauki Obuki**) and RW3 (**Dr. Geoffrey Mwau**). A common ground of appeal is that the trial court erred in ignoring expert evidence. The Attorney General in his written submissions at paragraph 3 thereof urges this Court to find that the trial judge erred in disregarding the expert testimony of RW2. SRC in its written submissions at paragraph 44 thereof state that the trial court erred in failing to consider expert evidence that demonstrated fiscal un-sustainability of increase in the remuneration of teachers and its resultant effect upon harmonization of public officers’ salaries.

163. The 1<sup>st</sup> respondent in its written submissions at Items 6.4 and 6.5 emphasizes that the trial judge dedicated a lot of time in analyzing and considering the *viva voce* evidence of RW1, RW2 and RW3 and the court did not take into account any extraneous mater.

164. Several issues arise from these submissions. One is whether the trial court considered the evidence of the three expert witnesses RW1, RW2 and RW3; second, did the trial court evaluate and weigh the expert testimonies of RW1, RW2 and RW3 and consider them along with all other evidence on record; third, did the trial court adopt or depart from the conclusions of the experts; finally, did the trial judge

give satisfactory and cogent reasons for departing from the expert evidence and conclusions?

165. In **Sanitam Services (EA) Ltd. -v- Rentokil [2006] 2 KLR 70**, this Court stated that it would not lightly differ with the trial court's finding of fact unless the conclusion is based on no evidence or misapprehension or on application of the wrong principles. The appellant is urging this Court to determine the probative value and credibility of the testimony of RW1, RW2 and RW3. The record of appeal in this case establishes the following facts:

a) the trial court did consider the expert evidence of RW1, RW2 and RW3 – for RW1 evidence see paragraphs 176 to 192 and 205 of the judgment; for RW 2 see paragraphs 193 to 212 of the judgment; and for RW 3 see paragraphs 212 to 229 of the judgment;

b) the trial court evaluated the expert evidence of RW1, RW2 and RW 3 – see paragraphs 247, 252, 254, 260, 261 and 262 of the judgment.

166. An appellate court rarely interferes with findings of the trial on matters of credibility of witnesses. The record reveals that the trial court considered and evaluated the expert evidence of RW1, RW2 and RW3. At paragraphs 261 and 262 as read with paragraphs 216 and 217 of the judgment, the trial court summarizes the expert conclusions of RW 3 (Dr. Geoffrey Mwau) as follows:

**“The salient points in the evidence by RW3 is the need to ensure fiscal sustainability by keeping the public wage bill to less than 7% to the GDP, this currently stands at 10%. To keep ratio of wages to revenue at no more than 35%, the current ratio is at 52%. To keep gross public debt ratio to GDP below 45%, the current ratio stands at 42%. RW 3 concluded that meeting the demands by the teachers will lead to increased taxation or borrowing to meet the increased recurrent expenditure. RW 3 cautioned against any increase in public salaries without considering the principles outlined in the Constitution and in particular fiscal sustainability.”**

167. The record shows that RW1 concluded that if the demands by the Unions were acceded to, over 70 per cent of the government revenue would be used to pay salaries in the public sector (see paragraph 176 of the judgment). At paragraph 188 of the judgment, the trial court established as a fact that RW1 had no information from the National Treasury on the affordability of 50% to 60% when SRC advised against its implementation; and at paragraph 206 of the judgment, the trial court established that RW1 could not give plausible explanations of the analysis given. As regards RW2, the trial court found contradictions in his evidence notably that RW2 was at pains to explain omissions in the 2<sup>nd</sup> CPMU report and could not show what new instructions he had received from TSC between 20<sup>th</sup> and 24<sup>th</sup> January 2015 when the contents of the 1<sup>st</sup> CPMU report was changed and replaced with the 2<sup>nd</sup> report. (See paragraphs 204, 205 and 211 of the judgment).

168. Relating to the expert testimony of RW3, the trial court finds RW3 to be a credible witness; at paragraph 222 of the judgment, the court states that the testimony of RW3 upon cross examination was fairly consistent in all material respects; that RW3 confirmed that allowances that have been approved for the teachers will be paid as scheduled by 1<sup>st</sup> July 2015; that the Government provides for 4% increase in budgetary allocation to cater for salary increase for all sectors annually; that given the 52% wage bill the country has at the moment, what is sustainable is what the budget can provide and anything more is not sustainable; that Treasury had provided a budget for increase in teachers allowances; that the 4% annual provision for inflation is not part of wage review but a cover for wage drift.

169. It is evident from the record that the trial court considered and dealt with credibility of RW1, RW2 and RW3 and weighed their testimonies. It is also evident that the court did not adopt conclusions by the expert witnesses. The legal issue is whether the court was satisfied on good, firm, proper and cogent grounds to depart from the expert conclusions made by RW1, RW2 and RW3.

170. The testimonies of RW1, RW2 and RW3 were expert opinions. In the case of **Parvin Singh Dhalay -v- Republic Criminal Appeal No. 10 of 1997**, this Court stated:

**“It is now trite law that while the courts must give proper respect to the opinion of experts, such opinions are not, as it were, binding on the courts .... Such evidence must be considered along with all other valuable evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so.....(See also Elizabeth Kameme Ndolo -v- George Matata Ndolo Civil Appeal No. 128 of 1995).”**

171. In Professor David Musyimi Ndeti t/a Oasis Mineral Water – v- Safepark Limited, Civil appeal No. 159 of 2004, this Court expressed as follows:

**“...Of course, where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it.”**

172. In Juliet Karisa -v- Joseph Barawa & Another , Civil Appeal no. 108 of 1988 this Court stated:

**“Expert evidence is entitled to the highest possible regard and though the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.”**

173. In Charles Agoi Sakwa -v- Fanuel Kifuna Angote & Another, Civil Appeal No. 34 of 1997, this Court held that an expert’s report cannot be impeached by evidence from the bar.

174. In the instant case, the trial court discounted the evidence of RW1 and RW2 and gave reasons impugning their credibility and the probative value of their testimony. The trial judge gave reasons that RW2 was contradictory in his evidence and RW1 could not explain the analysis. The trial judge did not place much reliance on the expert testimony of RW1 and RW 2. I am satisfied that the trial court gave good and cogent reasons for not adopting the conclusions of RW1 and RW 2. The court did not err in evaluating and discounting the expert testimony and conclusions of RW1 and RW2.

175. As regards RW3, the trial court found as a fact that he was credible and fairly consistent. The court correctly summarized RW3 expert conclusions at paragraphs 261 and 262 of the judgment. The emphatic opinion of RW3 was to caution against any increase in public salaries without considering the principles of fiscal sustainability outlined in the Constitution. RW3 concluded that any increase in the national wage bill beyond the current 52% was not sustainable. (See paragraphs 262 and 223 of the judgment).

176. RW3 was a credible witness, the probative value of his evidence was not challenged; he gave reasons upon which his opinion and conclusions were based; there is no other evidence in conflict with RW3s expert opinion and conclusions. RW3 was the expert witness on fiscal sustainability, which is a fundamental constitutional criterion in the determination of remuneration and benefits in public service. In line with the dicta of this Court in *Professor David Musyimi Ndeti (supra)*, the trial court in its judgment does not give firm, cogent or any good reason why the expert opinion and conclusions of RW3 was not followed. The court did not give any reason for departing from, ignoring or rejecting the testimony and conclusions of RW3. For this reason, I find that the trial court erred in not following the expert opinion and conclusions of RW3 on fiscal sustainability of the total public compensation bill. **Article 10 (d) of the Constitution** refers to the constitutional value of sustainable development. The trial court by ignoring the expert evidence and conclusions of RW3 erred and ignored the constitutional criterion on fiscal sustainability and erred and ignored the constitutional value of sustainable development.

177. A ground of appeal urged by the Attorney General as grounds 10, 11, 12 and 13 in the in **Civil Appeal No. 203 of 2015** is that the trial court erred in taking into account the two reports by the Central Planning and Monitoring Unit. I have considered the submissions on this ground. The learned judge was entitled to consider and evaluate all the evidence and material that had been placed before him. At

paragraphs 174 and 203-206 of the judgment, the trial court properly evaluated the weight to be accorded to the two reports.

### **Constitutional Role of Parliament in Budget Making Process**

178. The Attorney General in Appeal No. 203 of 2015 at grounds 3 and 5 of the Memorandum urges that the trial court erred in failing to appreciate the constitutional role and functions of Parliament and National Treasury in the budget making process under **Articles 220** and **221** of the Constitution; that the court further erred in total disregard of the government budgeting process provided in the Constitution of Kenya and the Public Finance Management Act. These ground of appeal challenge the finding by the trial court at paragraphs 270 and 281 (g) of the judgment as follows:

**“270: .....TSC needs only prepare a budget for allocation of funds by the National Treasury and approval by the National Assembly...”**

**281 (g): For avoidance of doubt, this judgment takes effect immediately... and TSC is to pay the 50% to 60% basic salary increment awarded to the teachers.”**

179. The AG submitted that by directing TSC to immediately pay the 50% to 60% basic salary increment award, the trial court erred in law by failing to take into account that TSC funds must be appropriated by Parliament; that in exercising its jurisdiction and ordering immediate payment, the trial court usurped the role of Parliament and this flies in the face of the doctrine of separation of powers; that the court erred in failing to appreciate that National Treasury lacks the constitutional capacity to implement the trial court’s award in that the judgment totally disregarded constitutional provisions in **Articles 201, 202, 206, 220, 221, 223, 225 (1) (2) and 228 (4), (5)** of the Constitution.

180. The Hon. AG submitted that **Article 206** establishes the Consolidated Fund and monies may be withdrawn from the Fund ONLY on appropriation by an Act of Parliament in accordance with **Articles 206 (2) (a) and 206 (4) or as per Article 222 and 223** of the Constitution. It was submitted that the budget making process and the budget cycle are complex and regulated by the Constitution and the Public Finance Management Act and the trial court erred and put aside the constitutional budget making process provided for in **Article 225 (1) and (2)** of the Constitution. It was submitted that expenditure for basic salary increment for teachers is not reflected in the 2015/16 Budget Policy Statement or the Expenditure Estimates for 2015/16 approved by Parliament or the Appropriation Act of 2015; that the trial court erred in stating that “TSC needs only prepare a budget for allocation of funds by the National Treasury and approval by the National Assembly.” The AG submitted that by making this statement, the trial court erred and introduced a new budget making process that is *ultra vires* the Constitution and the Public Finance Management Act.

181. The 1<sup>st</sup> and 2<sup>nd</sup> respondents through learned counsel Mr. Kioko Kilukumi submitted that the trial court did not err in making the statement that “TSC needs only prepare a budget for allocation of funds by the National Treasury and approval by the National Assembly”. That this statement is grounded on **Article 249 (3)** of the Constitution which stipulates that Parliament shall allocate adequate funds to enable each commission to perform its functions and the budget of each commission shall be a separate vote. Counsel submitted that adequacy of funds is determined by the needs of the requesting commission which is the TSC; that the obligation to source funds from Parliament is upon the TSC and is neither upon the Unions nor the trial court; that having made the offer to pay 50% to 60% basic salary increment, it was incumbent upon TSC to make its budgetary proposals to National Treasury to cater for the increment.

182. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the budgetary process outlined in **Article 221** of the Constitution is straight forward and not complex as urged by the Attorney General; that **Article 221(1)** requires that at least two months before the end of the financial year; a budget should be sent to Parliament. It was submitted that the financial year ended on 30<sup>th</sup> June 2015 and TSC knew well ahead of the stipulated two months that there was a claim by teachers for basic salary increment and it ought to have factored this in its budgetary proposals to the National Treasury; that it was upon TSC to take its budget to the National Assembly under **Articles 221 (1) and (3)** of the Constitution as read with **Article**

249 (3) of the Constitution.

183. The respondent Unions further submitted that whereas **Article 223** of the Constitution allows for Supplementary Appropriation and **Article 208** establishes a Contingencies Fund, both or either Supplementary Appropriation or Contingencies Fund can be utilized for immediate payment of the award by the trial court. Counsel submitted that the trial court did not err in ordering immediate payment of the 50%-60% salary increment because the Constitution through **Articles 223** and **208** has made provisions for Supplementary Appropriation or Contingencies Fund that can be invoked for immediate payment of the award.

184. **Sections 35 to 45** of the **Public Finance Management Act** outline in detail the National Government Budget Process. The High Court **In The Matter of An Application by The Speakers of The 47 County Assemblies of The Republic of Kenya -v- Commission on Revenue Allocation & 3 Others, Nairobi HC Petition No. 368 Of 2014**, had the occasion to consider the constitutional budget making process and stated as follows:

**“...In order to determine the dispute before me, it is important to analyze and confirm the budget making process as outlined in the Constitution and in the Public Finance Management Act. It is important to state from the outset that the budgetary process in Kenya is undertaken ....at the National Level .... At the National level, the process is managed by the National Treasury... The National budgetary process starts with the preparation of a Budget Policy Statement by the National Treasury as is provided for in Section 25(1) of the Public Finance Management Act. Section 25(5)(a) of the same Act enjoins the National Treasury in its preparation of the Budget Policy Statement to seek and take into account the views of *inter alia* the Controller of Budget...the public and any other interested persons or groups. Section 25(7) of the Act then provides that Parliament, within fourteen days of submission to it of the Budget Policy Statement, shall table and discuss its recommendations and pass a resolution to adopt it with or without amendments. Thereafter, under the provision of Section 25(8) of the Act, the Cabinet Secretary for Finance shall take into account the resolutions passed by Parliament and finalize the budget for that financial year. Lastly, under Section 25(9) of the Act, the National Treasury shall publish and publicize the Budget Policy Statement not later than fifteen days after submission of the said Statement to Parliament.”**

185. It is now my duty to determine the constitutionality and statutory legality of the statement by the trial court that “TSC needs only prepare a budget for allocation of funds by the National Treasury and approval by the National Assembly.” Having analysed the provisions of **Articles 201, 206, 208, 220, 221, 222, 223**, and **228** of the Constitution, it is my finding that the trial court erred in the statement that “TSC needs only prepare a budget for allocation of funds by the National Treasury.” The statement is not in conformity to the constitutional and statutory procedures on national budget making process or in compliance with constitutional provisions on withdrawal of money from the Consolidated Fund or consistent with constitutional procedures on expenditure by way of Supplementary Appropriation or expenditure from the Contingencies Fund. The trial court disregarded the constitutional procedures on the national budget process outlined in **Sections 35 to 45** of the **Public Finance Management Act**.

The court ignored the constitutional role of the Controller of Budget in **Article 228 (4)** of the Constitution pursuant to which the Controller of Budget must authorize withdrawal of public funds under **Article 206 (2) (a)** (Consolidated Fund), **Article 222** (Expenditure before annual budget is passed) or **Article 223 (Supplementary Appropriation)**. Even if Supplementary Appropriation or Contingencies Fund is to be utilized to pay the salary increment awarded by the trial court, the Controller of Budget must authorize withdrawal and expenditure therefrom.

186. In the instant case, it is not disputed that the constitutional procedures in **Articles 208** and **223 (1)** on expenditure from Contingencies Fund and Supplementary Appropriations have neither been invoked nor activated for payment of the basic salary increment of 50% to 60% awarded by the trial court. The fact that the Constitution contains provisions on Contingencies Fund and Supplementary Appropriations is not *per se* an automatic authorization for expenditure of monies neither budgeted for nor appropriated by

Parliament through an Appropriation Act. The contention by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the national government can pay the basic salary increment award of 50% to 60% from the Contingencies Fund or by way of Supplementary Appropriation is not tenable so long as the mandatory constitutional and statutory procedures for expenditure vide the Contingencies Fund or Supplementary Appropriation have not been followed. By ordering immediate payment of the 50%-60% basic salary increment, the trial court did not comprehensively direct its mind to **Article 237 (3)** of the Constitution to note that whereas TSCs budget must be approved by Parliament, there was no Appropriation Act incorporating the award.

187. The respondent Unions strenuously submitted that it is not the duty of a trial court to inquire into the source of funds to be used to satisfy a judgment or decretal sum. I concur. However, in the instant case, the trial court did not direct its mind to the fact that the issue at hand involved expenditure of public not private funds. The trial court disregarded the role of National Treasury, Parliament and Controller of Budget in budgeting for, appropriating and authorizing public funds to be expended out of monies appropriated by Parliament to TSC.

### **Constitutionality of the Criteria adopted by the trial court in awarding the 50% - 60% basic salary increment**

188. The trial court adopted the criteria for its determination of the 50% to 60% basic salary increment award from the book by Justice Saeed R. Cockar titled **“The Kenya Industrial Court: Origin, Development, and Practice”, Addison-Wesley Longman, Limited (1981)**. (Hereinafter referred to as the “Cockar criteria”). The Cockar criteria adopted by the court is expressed at paragraphs 273,274, 275 and 276 of the judgment to be the following:

a) The level of economic benefits enjoyed by workers can never be static and the court determines their level from time to time taking into consideration all the economic factors plus social and to some extent political considerations;

b) The principal economic criteria are: the basic needs of the workers on the family budget, movement in the cost of living, wage comparisons i.e. wages paid in other industries and places; i.e. the financial position of the employer and the ability or inability to pay and productivity increase, if any, i.e. the workers efforts in productivity of an enterprise. Other factors are the effect of a wage award on employment situation in the country and on the price of products of the undertaking, i.e. its effect upon consumer purchasing power and employment....The court’s main concerns has been in the first place to ensure that the workers standards of living do not go down. This is done by restoring the loss of purchasing power that the workers may have suffered....this is done by granting the workers some percentage of wage increase over and above the compensation for increase in the cost of living.

c) Citing the **Industrial Cause No. 89 of 1966 Kenya Union of Commercial Food and Allied Workers and Twentieth Century Fox Organization**, the trial court found that an increase in the cost of living is only one of the factors to be considered in wage increase; another factor that cannot be overlooked is that the worker should be able to get something more that compensates for the loss of money value in order to move towards the ultimate objective of enjoying a higher standard of living....This has further got to be consistent with the growth of the economic in the country and its development plan.”

189. The constitutionality of “Cockar criteria” adopted by the trial court is determinable by comparison to the 2010 Constitutional criteria for remuneration and benefits in public service. If the trial court’s criteria are in conformity to the 2010 Constitution, then the trial court did not err; if not in conformity, then the court erred and the criteria adopted by the trial court is unconstitutional. The constitutional criteria for determination of remuneration and benefits in the public service binds the trial court pursuant to **Articles 3 (1)** and **Article 10 (1) (a) (b) (c)** and **2 (d)** of the Constitution.

190. The constitutional criteria for the determination of remuneration and benefits in the public service are in the following Articles:

- a) Article 230 (5) (a) – total public compensation bill is to be fiscally sustainable;
- b) Article 230 (5) (c) – need to recognize productivity and performance;
- c) Article 230 (4) (b) – prior advice to be given by SRC
- d) Article 10 (2) (d) – national value and principle of sustainable development;
- e) Article 201 (c) – the burdens and benefits of the use of resources ...shall be shared equitably between present and future generations;
- f) Article 201 (d) – public money shall be used in a prudent and responsible way;
- g) Article 225 (1) of the Constitution as read with Sections 11, 12, 13 and 15 of the Public Finance Management Act No. 18 of 2012 providing for establishment and functions of the National Treasury.
- h) Article 228 (4) and (5) – role of Controller of Budget.

191. The relevant statutory criteria for determination of remuneration and benefits in the public service are in different statutes as follows:

- a. Teachers Service Commission Act – Section 37 (3) that requires consultation with the SRC.
- b. Public Finance Management Act, Cap 412 C – Section 15 (2) – the national government's expenditure on wages and benefits for its public officers shall not exceed a percentage of the national government revenue as prescribed by the regulations.
- c. Offences under Sections 196 (1), (3), (4) and (5) of the Public Finance Management Act and liability under Article 226 (5) of the Constitution: **Section 196:** (1) A public officer shall not spend public money otherwise than authorized by the Constitution or an Act of Parliament. (2) A public officer shall not raise revenues other than in accordance with the Constitution or an Act of Parliament. (3) A public officer shall not enter into any obligation that has financial implications for the national government budget...unless the obligation is authorized by the Constitution or an Act of Parliament. (5) A public officer shall not direct another public officer to do an act that constitutes a contravention of, or failure to comply with this Act, the Constitution or any other written law. (6) A public officer who contravenes this Section commits an offence and on conviction is liable to a term of imprisonment not exceeding two years or to a fine not exceeding one million shillings or both. (7) Where a national government entity fails to comply with the Act, a public officer who assisted or facilitated the act...commits an offence in addition to the provisions under Article 226 (5) of the Constitution.
- d. 2 Section 15 (5) of the Industrial Court Act No. 20 of 2011 – the court may be bound by the national wage guidelines on minimum wages and other terms and conditions of employment issued by the Cabinet Secretary Finance. The National Treasury issued a guideline dated 23<sup>rd</sup> November 2005 which at paragraph 5 it is stated that productivity gains and the ability of the economy and employers to sustain increased labour costs is a factor to be considered in the determination of wages. Guideline No. 1 emphasizes productivity increases; Guideline No. 6 states that all parties should be made aware that Treasury would honour wage awards so long as there is prior budgetary provision, in this respect, wage awards should be integrated within the budget framework; Guideline No. 3 states that salary/wage demands based on wage trends or awards in other occupations or sectors per se, is not to be allowed. (See TSC List of Authorities dated 21<sup>st</sup> September 2015 Folio 19 for the Treasury Revised Guidelines).
- e. 3 Section 15 (6) of the Industrial Court Act No. 20 of 2011 – the court may make reference to guidelines as may be published by SRC.

f. Section 11 of the SRC Act stipulates that SRC is to inquire into and determine the salaries and remuneration to be paid out of public funds to state officers and other public officers.

192. I have analyzed the criteria adopted by the trial court and evaluated the same against the constitutional and statutory criteria for the determination of remuneration and benefits in the public service. By taking into account the “Cockar criteria” and ignoring the constitutional criteria, the trial court subordinated the constitutional criteria to the “Cockar criteria”. Constitutional criteria are superior to and stand above any other criteria. (See **Chelashaw -v-Attorney General & Another 2005** EA 33 at 35).

193. The trial court erred in not considering the constitutional advice given by SRC on fiscal sustainability of the total public compensation bill; the court erred in not taking into account the constitutional value and principle of sustainable development; the court erred and ignored that use of resources shall be shared equitably between present and future generations; that public money shall be used in a prudent and responsible way. The trial court erred in not appreciating the statutory requirement that the national government’s expenditure on wages and benefits for its public officers shall not exceed a percentage of the national government revenue as prescribed by the regulations; the court ignored the statutory offence that a public officer shall not spend public money otherwise than as authorized by the Constitution or by an Act of Parliament; the court did not direct its mind to **Section 196 (6) and (7) and Section 202 (1) (b)** of the **Public Finance Management Act** whereby it is an offence for a public officer to enter into any obligation that has financial implications for the national government budget unless the obligation is authorized by the Constitution or an Act of Parliament; the trial court ignored the Guideline that Treasury would honour wage awards so long as there is prior budgetary provision; that salary/wage demands based on wage trends or awards in other occupations or sectors *per se*, is not to be allowed.

194. In arriving at the 50% to 60% basic salary increment award, the trial court adopted the “Cockar criteria”. The book by Justice Cockar was published in 1981 prior to the promulgation of the **2010 Constitution**. The criteria identified by Justice Cockar were applicable prior to the 2010 Constitution. The 2010 Constitution introduced additional criteria and values to be taken into account in the determination of remuneration and benefits of public officers. The additional constitutional criteria include: fiscal sustainability, sustainable development, role of Controller of Budget, consideration of productivity and performance, advice by SRC, national values and principles of public finance. These constitutional criteria were inapplicable in 1981 when Justice Cockar authored his book.

195. In the determination of remuneration and benefits in the public service, the criteria that have constitutional underpinning are mandatory and take precedence over any other criteria that the Industrial Court used to apply prior to the effective date. Whenever the Employment and Labour Relations Court deals with remuneration and benefits in the public service, the criteria identified by Justice Cockar cannot supersede the constitutional criteria. The trial judge by wholesome adoption of the Cockar criteria misdirected himself and ignored the mandatory constitutional criteria for determination of remuneration and benefits in public service.

### **Fiscal Sustainability of the 50%-60% basic salary increment award**

196. Fiscal sustainability is a guiding constitutional criterion in the determination of remuneration and benefits in the public service (See **Article 230 (5) (a)** of the Constitution). Fiscal sustainability is a component of **Article 10 (2) (d)** on sustainable development and **Article 201 (c)** on equity between present and future generations. Did not consider fiscal sustainability in awarding the 50% to 60% basic salary increment?

197. The 1<sup>st</sup> and 2<sup>nd</sup> respondents in their Joint Memorandum of Appeal at Item 5.3 addressed the issue of fiscal sustainability by posing the question whether the government could afford increment in basic salary for teachers. The Unions submitted that the government can afford the increment because it loses about 30% of its revenue through corruption; that it is wrong for the government to say it has no money to pay teachers yet it has embarked on financially massive infrastructural projects such as the standard gauge railway, LAPPSET and Thika Super highway among others.

198. The respondents' analysis of fiscal sustainability of the basic salary increment award is premised on corruption and massive infrastructural projects in government. The respondent Unions urged this Court to take judicial notice of corruption in government asserting that this is a matter of general or local notoriety under Section 60 (o) of the Evidence Act. In **Commonwealth Shipping Representative v. P. & O. Branch Service (1923) AC 191**, it was stated that "judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer". In Stephen's Digest of the Law of Evidence (12<sup>th</sup> Edn.) art.62 as adopted in Kenya in the case of **Kimani -v- Gikanga (1965) EA 735 at 742**, it was stated as follows:

**"No evidence of any fact of which the court will take judicial notice need be given by the party alleging its existence; but the judge, upon being called upon to take judicial notice thereof may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference."**

199. As urged by the respondent Unions, I hereby take judicial notice of the endemic corruption plaguing this country that is escalation towards cataclysmic proportions. Corruption is permeating and dissecting the moral fabric of the Kenyan society; it is slowly eroding the individual and collectively dignity of the Kenyan people; it must be condemned and stopped at all costs. Pertaining to the respondent Unions submission that corruption erodes 30% of government revenue, I decline to take judicial notice of the percentage because the record does not contain any analytical study, report, and document, book of reference or source of information that can guide me in taking judicial notice. The fiscal sustainability analysis urged by the respondent Unions is thus not tenable for want of proof. Sheer allegations that corruption constitutes 30% loss of government revenue without empirical data, analysis and sources thereof are no proof. Fiscal sustainability is determined *inter alia* through evaluation of the growth rate of GDP to total government revenue compared with total public compensation bill. There is no analysis on record to show how infrastructural projects undertaken by the government affects fiscal sustainability of the total public compensation bill. The Unions assertion was countered by the expert testimony of RW3 who opined that the government infrastructural projects are responsible for the GDP growth rate in the economy. Faced with bare allegations and contradicting expert testimony, I am unable to take judicial notice of the facts as urged by the respondent Unions. Further, there is no determination on judicial notice by the trial court.

### **Backdating the trial court award to 1<sup>st</sup> July 2013**

200. The 1<sup>st</sup> and 2<sup>nd</sup> respondents in their Joint Memorandum of Claim at item 5.1 pray that the effective date of the award should be backdated to 1st July 2013. The respondent Unions support backdating on the premise that the Salaries and Remuneration Commission by circular dated 4<sup>th</sup> July 2012 directed all employers in the public sector to negotiate and register collective bargaining agreements for four (4) year cycles beginning 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2017; that backdating is essential to enable teachers enjoy the full term of the current 4 year CBA cycle as to determine otherwise would be a grave injustice that would allow TSC to get away with its delaying tactics to the detriment of the teachers. The trial court in its judgment at paragraph 281 (b) and (e) adopted the contents of the SRC circular and backdated the 50% to 60% award to 1<sup>st</sup> July 2013.

201. It is the appellants contention that the trial court erred in backdating the award to 1<sup>st</sup> July 2013; that **Section 59 (5) of the Labour Relations Act (Cap 233 of the Laws of Kenya)** stipulates that a collective bargaining agreement shall be effective from the date agreed to by the parties; that **Section 59 (2)** stipulates that a collective bargaining agreement binds an employer as at the time of its commencement.

202. Presently, there is no collective bargaining agreement between TSC and the respondent Unions. Even if the SRC circular is to be applied, the circular can only be applied to an existing CBA - it cannot be applied in vacuum on a CBA that does not exist. The SRC circular clearly stated it was prospective

and applicable to CBAs concluded before 30<sup>th</sup> June 2013. In the instant case, no CBA had been concluded by the parties before 30<sup>th</sup> June 2013 and the circular is inapplicable. In the absence of an existing collective bargaining agreement, the trial court erred in retrospectively fixing an effective date for a CBA that does not exist in fact and in law. A CBA is a contract between the employer and the Unions. In contract law, the terms and conditions of a contract can only be negotiated and concluded by the parties to the contract. This is the essence of autonomy of parties in collective bargaining, freedom of contract and privity of contract.

203. In **National Bank of Kenya Ltd. -v- Pipeplastic Samkolit (k) Ltd. & Another (2001) KLR 112,** this Court held that “a court of law cannot re-write a contract between the parties.” The trial court in its judgment at paragraph 281 (e) provides terms to be inserted in a yet to be concluded collective bargaining agreement and gives an effective date when the parties themselves have not done so. At paragraph 281 (d), the court provides other terms to be reflected in a yet to be concluded CBA. The trial court erred in writing and providing terms for a future contract yet to be concluded by the parties.

204. The legality of backdating the basic salary increment award can also be evaluated in the context of the rule of law and constitutionalism by probing the nature of the Unions claim that the court backdated. The claim by the Unions was for increment in basic salary and other allowances. The claim arose well back before the Consultative Committee meeting held on 9<sup>th</sup> September 2014. Between 9<sup>th</sup> September 2014 and 30<sup>th</sup> June 2015 when the trial court delivered its judgment and award, the teachers’ claim was for increment in basic salary and other allowances. Between these two dates, the teachers did not have any vested and crystallized contractual right or entitlement to increment in basic salary and allowances; all that the teachers had was an inchoate claim for increment in basic salary and other allowances. In law, an inchoate claim is a right or entitlement that is in progress and is neither ripe nor vested nor crystallized – it is a future claim which is in preliminary stage and is yet to develop into a full right.

205. Inchoate rights are unenforceable since they have neither crystallized nor vested. It is only vested rights, acquired rights or rights under legitimate expectation that are enforceable. The trial court by backdating the 50% to 60% basic salary award was enforcing an inchoate right for a period when the rights had neither crystallized nor vested. If the award by the trial court is to stand, the same can only be prospective from the date of judgment because it is from this date that the inchoate claim by the teachers crystallized, vested and became enforceable.

206. Before the judgment date of 30<sup>th</sup> June 2015, the vested rights between TSC and the teachers was to pay the existing salary and allowances. In backdating the award, the trial court impaired and affected existing contractual rights between TSC and teachers and created not only a debt on TSC, but also made the debt retrospective and applied it to an existing contract.

207. There is a general presumption against retroactivity and the law frowns on retrospectivity in contract unless it is by consent of the parties. In the instant case, there is no consent of parties but an order of the trial court. In the case of **Samuel Kamau Macharia & Another -v- Kenya Commercial Bank Limited & 2 Others, Supreme Court App. No. 2 of 2011 (2012) eKLR,** the Supreme Court at para. 61 expressed itself as follows on retrospectivity *albeit* in statute law:

**“A retroactive law is not unconstitutional unless it:**

- i. is in the nature of a bill of attainder;**
- ii. impairs the obligation under contracts;**
- iii. divests vested rights; or**
- iv. is constitutionally forbidden.”**

208. Using the analogy of statute law, what is in issue is whether the backdating of the award by the trial

court impaired TSCs contractual obligations or if backdating divested TSC any of its vested rights. Prior to the judgment of the trial court, the contractual and vested right of TSC was to pay teachers existing salaries and allowances. In backdating the basic salary increment award, the trial court not only created a debt for TSC, it altered and impaired TSCs existing contractual obligations to the teachers. The backdating is a nullification and impairment of TSC's contractual rights. The trial court created a debt where none existed in contract or in law. Prior to the judgment of the trial court, TSC and the teachers derived their rights and obligations from their existing contracts. By backdating the award, the trial court re-opened and inserted terms to an existing contract. One cannot re-open a contract that has been performed, insert a term in it, create a debt therein, backdate the debt, enter judgment and execute for the debt – this is not the law. Guided by the dicta in **Samuel Kamau Macharia & Another -v- Kenya Commercial Bank Limited & 2 Others, Supreme Court App. No. 2 of 2011 (2012) eKLR**, the backdating order of the trial court is unconstitutional as it impairs the obligations of the parties under contract and divests TSC its vested contractual rights and creates a retroactive debt where none existed.

### **Binding Nature of SRC Advice**

209. Under **Article 230 (4) (b)** of the Constitution, SRC has the constitutional function to advise the national government on the remuneration and benefits of all public officers. Under **Section 37 (3)** of the TSC Act, TSC has a statutory obligation to consult SRC before determining the terms and conditions of service for teachers. Is the advice given by SRC binding on TSC which is an independent commission that is not subject to direction or control by any person or authority pursuant to **Article 249 (2) (b)** of the Constitution?

210. **Article 249 (2) (a)** of the Constitution stipulates that all Independent Commissions are subject to the Constitution and the law. **Article 230 (4) (b)** is a constitutional procedural and substantive limitation on the powers of TSC in matters relating to determining of remuneration and benefits of public officers. The limitation is that prior advice from SRC should be obtained. Expressed differently, **Article 230 (4) (b)** tells TSC that it cannot determine remuneration and benefits of teachers without seeking prior advice from SRC. The constitutional procedural requirement to seek prior SRC advice is reinforced by Article 259 (11) of the Constitution which states:

#### **“Article 259 (11)**

**If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.”**

211. **Article 259 (11)** raise two interpretation issues: is the request for advice from SRC that is mandatory and binding or is the advice given by SRC that is binding or are both mandatory and binding? Seeking SRC's advice is a constitutional procedural step; the content of the advice given is substantive as it affects the remuneration rights and entitlements of public officers. **Article 230 (4) (b)** of the Constitution must be analyzed from both the procedural and substantive aspects. The issue is whether both the procedural and substantive aspects of SRC's advice are binding.

212. Senior Counsel Mr. Nowrojee appearing for SRC submitted that SRC's advice is not only a constitutional procedural mandatory requirement but the advice given is constitutionally binding and must be acted upon; that the constitutional mandate of SRC is binding on those who are required to seek its advice and they are obliged to follow the advice; that the SRC itself is obliged to achieve and carry out its constitutional objectives and functions; that the word “shall” used in **Article 230 (4)** in describing the functions of SRC is mandatory; that the use of “shall” means that the powers and functions of SRC to advice is mandatory; that it is not optional for SRC to say it will advise one Independent Commission and not the other; that TSC is under a mandatory obligation to play its prescribed role to enable SRC achieve its mandate and this is done by TSC following the advice mandatorily given by SRC; that the advice given is not optional but mandatory. It was submitted that **Article 41 (5) and 237 (2) (b) of the**

**Constitution** as read with **Sections 13 (5) and 37 (3) of the TSC Act** allows TSC to undertake basic salary or remuneration negotiations with advice from SRC; that without the advice, TSC cannot constitutionally and legally perform its function of determining the remuneration and benefits of teachers.

Counsel submitted that advice given under **Article 230 (4) (b)** as read with **Article 259 (11)** is not something that can be accepted or rejected, there is no discretion on TSC or any other Independent Commission or person or body – all are bound and must follow SRC advice.

213. For SRC it was submitted that advice given under **Articles 230 (4)** and **259 (11)** of the Constitution must be read in conjunction with **Article 230 (5)** of the Constitution and **Section 37 (3)** of the TSC Act and **Section 11** of the SRC Act. **Article 230 (5)** of the Constitution stipulates that SRC in performing its functions shall be guided by the need to ensure that total public compensation bill is fiscally sustainable. **Section 11** of the SRC Act provides additional functions of SRC as to:

- i. inquire into and determine the salaries and remuneration to be paid out of public funds to state officers and other public officers.
- ii. keep under review all matters relating to salaries and remuneration of public officers;
- iii. ....
- iv. ....
- v. determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation.

214. Counsel for SRC urged this Court to take judicial notice of the background leading to the establishment of SRC; that SRC was established as a centralized Commission that would deal with salary structure across the entire public service to ensure parity of services, parity of remuneration, fairness, transparency and fiscal sustainability of the total public compensation bill; that there can be no two or more systems or structures for fixing remuneration for public officers; that there are no separate systems to fix salaries i.e. TSC cannot operate one system and other state organs or Independent Commissions that recruit public officers to operate other systems; that by establishing SRC, the Constitution established a single centralized public service remuneration system.

215. SRC submitted that the trial court erred by finding that TSC was not bound by the advice of SRC and holding that SRC had no role to play in the determination and fixing of salaries of teachers who are public officers. It was submitted that by making these findings, the trial court not only erred but made a major constitutional error and put aside the entire constitutional framework for the determination of remuneration and benefits in the public service; that under **Article 230 (4)** of the Constitution as read with **Section 11** of the SRC Act, SRC has a constitutional role to play in the collective bargaining process that leads to determination of remuneration and benefits of public officers.

216. The Attorney General in his submissions on the binding nature of the advice given by SRC cited the case of **Okiya Omutatah & 3 others -v- AG & 5 Others (2014) eKLR** where it was held that the National Assembly had no mandate to make resolutions nullifying Gazette Notices issued by SRC in relation to remuneration and benefits of members of the 11<sup>th</sup> Parliament. The AG urged this Court to find that the decision in **Okiya Omutatah** re-affirms the position that SRC in the constitutional matrix is the mandatory consultant on matters concerning remuneration and benefits of public officers.

217. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that what is binding and mandatory upon TSC is the constitutional procedure for seeking advice from SRC; that TSC is bound to seek advice from SRC in terms of **Article 230 (4) (b)** of the Constitution and **Section 37 (3)** of the TSC Act but TSC is not bound by the advice given.

218. The trial court in addressing the binding nature of SRC's advice expressed itself as follows at

paragraph 270 of the judgment.

**“...The court further restates that TSC is not bound by the advice of SRC in setting and reviewing remuneration of teachers. A plain and holistic interpretation of Articles 230 (4) as read with Article 259 (11) of the Constitution supports this view.....TSC must take into consideration the advice by SRC without necessarily being bound by it.”**

219. Pursuant to **Article 230 (4) (b)**, it is a constitutional mandatory procedure for TSC to seek SRC advice on matters relating to remuneration and benefits of teachers. The binding nature of the advice given by SRC is a matter of involving interpretation of the following provisions of law: **Article 230 (4) (b)** and **(5) (a)**; **Article 237 (2) (b)** and **Article 259 (11)** of the Constitution and **Sections 37 (3)** of the TSC Act and **Section 11** of the SRC Act.

220. The binding nature of SRC advice is a constitutional matter dependent on the governance structure established by the Constitution whose essence is separation of powers and sharing of functions among different organs of government and the Independent Commissions. The Supreme Court **In the Matter of Interim Independent Electoral Commission Constitutional Application (2011) eKLR, at paragraph 54** observed that “the totality of governance powers is share out among different organs. These organs play mutually-countervailing roles. In this set up, it is to be recognized that none of the several government organs functions in splendid isolation.”

221. TSC and SRC are both governmental organs and independent commissions. They cannot function in seclusion but must function in reciprocally complementary roles while respecting separation of powers and functions. In the **Matter of the Principle of Gender Representation in the National Assembly and Senate, SC Application No. 2 of 2012 at paragraph 83**, the Supreme Court emphasized that the Constitution must be interpreted holistically to ensure that other organs bearing primary responsibility for effecting operations that crystallize enforceable rights are enabled to discharge their obligations, as a basis for sustaining the design and purpose of the constitution.

222. In support of the submission that the SRC’s advice is not binding upon TSC, the 1<sup>st</sup> and 2<sup>nd</sup> respondents cited a persuasive Indian Supreme Court case of **A.N.D’Silva -v- Union of India 1962 AIR 1130; (1962) Suppl; 1SCR 968**.

The case involved interpretation of **Article 320** of the Constitution of India which stipulates as follows:

**“...It shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or as the case may be, the Governor of the State, may refer to them.”**

223. The Indian Supreme Court in interpreting **Article 320** held that “The President is by **Article 320** of the Constitution required to consult the Public Service Commission but the President is not bound by the advice of the Commission.”

224. The 1<sup>st</sup> and 2<sup>nd</sup> respondents’ further cited the Indian case of **Nagaraj Sivarao Karjagi -v- Syndicate Bank 1991 AIR 1507; 1991 SCC (3) 219** in which the Supreme Court of India held that “whenever an advice is given, it is not binding; it is not obligatory to accept the advice given because this would amount to blindly following the advice without independent consideration of the facts and circumstances of each case; that a binding advice takes away the discretion to make an independent determination having regard to the facts and circumstances of each case.”

Lenaola, J. **In The Matter of an Application by The Speakers of The 47 County Assemblies of The Republic of Kenya -v- Commission on Revenue Allocation & 3 Others, Nairobi HC Petition No. 368 of 2014**, while equating advice to recommendation held that the recommendation given to Senate by the Commission on Revenue Allocation pursuant to **Article 205 of the Constitution** is not binding on Senate.

225. I have considered the persuasive Indian decisions and the decision of Lenaola, J. **In The Matter of**

*an Application by The Speakers of The 47 County Assemblies of The Republic of Kenya (supra)*. All these decisions are distinguishable. The dispute in the Indian decisions relate to administrative exercise of disciplinary power against an individual, the cases neither related to constitutional values and governance structure as is in the instant case. The decision *In The Matter of an Application by the Speakers of The 47 County Assemblies of The Republic of Kenya (supra)* neither referred to nor considered **Article 259 (11)** of the Constitution and its interpretation. The decision was confined to interpretation of Article 205 of the Constitution whose wordings and phraseology are different from the context and wording in **Article 230 (4) (b)** of the Constitution.

226. The decisions in **Okiya Omutatah Okoiti & 3 Others vs Attorney General & 5 Others, Petition No.227 of 2013 (2014) e KLR** and the Supreme Court decision **In Re Matter of the Interim Independent Electoral Commission, Constitutional Application No.2 of 2011 (2011) eKLR**, evince a general principle that all constitutional organs are obliged to stick to their mandates. From a comparative perspective, the Uganda court in the case of **Foundation for Human Rights Initiatives vs. The Attorney General Constitutional Petition No. 20 of 2006** expressed that one of the cardinal principles in the interpretation of constitutional provisions is that the entire Constitution must be read as an integrated whole and no one particular provision should destroy the other but sustain the other. (See **Tinyefuza vs. Attorney General Constitutional Petition No.1 of 1996**). Another important principle is that all the provisions concerning an issue should be considered together to give effect to the purpose of the instrument. (See **South Dakota vs. North Carolina 192, US 268, 1940 PED 448**).

227. The Supreme Court **In the Matter of Advisory Opinion of the Court, Constitutional Application No. 2 of 2011** at paragraph 49 observed that it is an issue of principle regarding the doctrine of the *separation of powers* and the standing of Independent Commissions under the Constitution. At paragraphs 51 and 52, the Supreme Court citing and adopting the persuasive Namibian case, **S. v. Acheson, 1991 (2) S.A. 805** expressed itself thus:

**“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals and ...aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”**

228. **In the Matter of Advisory Opinion of the Court, Constitutional Application No. 2 of 2011 at paragraph 93**, the Supreme Court in the context of the binding nature of an advisory opinion expressed itself thus:

**“On this account, it is inappropriate that the Supreme Court’s Advisory Opinion should be sought as *mere advice*. Where a government or State organ makes a request for an Opinion, it is to be supposed that such organ would *abide* by that Opinion; the Opinion is sought to *clarify a doubt*, and to enable it to *act in accordance with the law*. If the applicant were not to be bound in this way, then it would be seeking an Opinion merely in the hope that the Court would endorse its position and, otherwise, the applicant would consider itself free to disregard the Opinion. This is not fair, and cannot be right....The Opinion must guide the conduct of not just the organ(s) that sought it, but all governmental or public action thereafter. To hold otherwise, would be to reduce Article 163(6) of the Constitution to an “idle provision”, of little juridical value. The binding nature of Advisory Opinions is consistent with the values of the Constitution, particularly the *rule of law*.”**

229. It is my considered view that if a constitutional advisory opinion is binding, then a constitutional advice is more binding. In **Kenya National Commission on Human Rights -v- AG & Another, Petition No. 132 of 2013; 2015 eKLR**, the High Court in a persuasive authority considered the legal consequences of failure to seek advice from SRC. In this case, Parliament had enacted the **Presidential Retirement Benefits (Amendment) Act** providing for pension and benefits for retired Presidents Hon. Mwai Kibaki and Hon. D.T arap Moi. The High Court (Lenaola, J.) stated that the law mandates that the

input of SRC is to be sought as it is the body mandated to review salaries and remuneration; that SRC's advice ought to have been obtained BEFORE Parliament embarked on its legislative mandate; that by failing to seek recommendation from SRC prior to legislation, Parliament violated the Constitutional Provisions of **Articles 10** and **Article 230 (4) (a)** and **(b)** and by so doing Parliament usurped the role of SRC; that **Section 11** of the SRC Act was violated and the fact that SRC was not consulted was unconstitutional. In declaring the **Presidential Retirement Benefits (Amendment) Act** unconstitutional, the learned judge expressed himself thus:

**“To my mind however, while I do not question the legislative power of the National Assembly, I am certain that the law mandated it to seek the input of the SRC as it is the body mandated in reviewing the salaries and remuneration of State officers including the pension of a retired President. It ought at the very least to have obtained its recommendation or consult it before embarking on its legislative mandate. I do not know why and I do not have the reasons as to why it failed to follow that simple and constitutionally important step....This Court does not therefore have any other option but to fault the Presidential Retirement Benefits (Amendment) Act for the failure of Parliament to involve the SRC... and it is therefore unconstitutional to bring into law, legislation concerning the benefits of State Officers without the involvement of the Salaries and Remuneration Commission and it follows that the Presidential Retirement Benefits (Amendment) Act to the extent of its inconsistency with the Constitution should be declared void. I so find.”**

230. Guided by the Supreme Court decision In **the Matter of Advisory Opinion of the Court, Constitutional Application No. 2 of 2011 at paragraph 93** and persuaded conclusions by the learned Justice Lenaola in **Kenya National Commission on Human Rights -v- AG & Another, Petition No. 132 of 2013; 2015 eKLR**, I hereby come to the conclusion and finding that the advice given by SRC is binding. The advice is binding because to hold otherwise would render the functions of SRC under **Article 230 (5)** idle; it would render SRC ineffective and irrelevant; it will introduce a discretionary concept of pick and choose in Kenya's governance structure. An interpretation that renders a constitutional Article idle and an Independent Commission ineffective does not pass the threshold of constitutionality. SRC is a constitutional organ and the trial judge erred in interpreting the Constitution in a manner that renders SRC's singular and exclusive mandate in **Article 230 (5) (a)** idle and ineffective. The trial court misapprehended the doctrine of separation of functions which is keystone in Kenya's governance structure. In holding that SRC has a non-binding advisory role in the determination remuneration and benefits of public officers, the trial court disregarded the central and exclusive juridical competence of SRC in the determination of fiscal sustainability of the total public compensation bill as per **Article 230 (5) (a)** of the Constitution.

231. I am fortified in my finding that the advice given by SRC is binding because a constitution does not contain mere advice; it does not contain provisions that would not have a binding force and obligation of law; everything in the constitution must have the force and binding obligation of law; nothing can be put in a constitutional instrument in the form of mere advice with no binding obligation and be placed in company of other binding Articles. A constitution cannot contain mere advice, incapable of being enforced and whose violation is attendant with no legal consequences. Unless expressly stated, the 2010 Constitution does not contain Articles or provisions that are without force of law and whose binding nature is discretionary. Except as otherwise stated in the Constitution, **Article 259 (11)** removes all discretionary power and by so doing, the Constitution contains binding provisions.

232. The seeking of advice does not violate the principle that Independent Commissions are not subject to direction or control by any person or authority. The binding advice given by SRC is mutually complementing the role of all state organs and Independent Commissions in ensuring sustainable development as a constitutional value embodied in **Article 10 (1) (d)** of the Constitution. The advice given by SRC is binding because the advice is not merely an opinion that is given by a friend, it is advice that has a constitutional underpinning; it is binding because it emanates from a constitutional organ with exclusive constitutional mandate to determine fiscal sustainability of the total public compensation bill; it is binding because the principle of effectiveness require that all provisions of the constitution must be given effect. SRC advice is not an advice *in personam*, it is an advice *in rem* as it limits and determines

remuneration rights and entitlements of public officers. Being an advice *in rem*, SRC advice binds all persons, state organs and independent commissions.

233. The Supreme Court in **Communications Commission of Kenya & 5 others –v– Royal Media Services Limited & 5 others, Petition Nos. 14, 14A, 14B and 14C of 2014 at paragraph 169** stated the independence clause is a shield against influence or interference from external force and the body in question must be seen to be carrying out its functions free of orders, instructions or any other intrusion from external forces. A literal reading of **Article 230 (4) (b)** of the Constitution shows that SRC is not one of the envisaged external forces against whom the shield of independence can be waved. The Constitution vides **Article 230 (4) (b)** and **(5)** has integrated SRC in the determination of all matters relating to remuneration and benefits of public officers. The practical consequence is that SRC has an integrated, over-arching centripetal force in the determination of remuneration and benefits payable to public officers which includes teachers. Using company law analogy, the advice given by SRC is like a floating charge hovering all over public service and when it descends, it attaches, crystallizes and binds anything and everything that it lands upon. I believe that the drafters of the Constitution never intended SRC to be a toothless bulldog that barks, barks and barks again without biting – SRC has teeth and can bite, must bite and shall bite. SRC is the forum for determining fiscal sustainability of the remuneration and benefits of all public officers. One ignores SRC at his/her own peril.

234. If the advice given by SRC limits the powers and functions of TSC or other Independent Commissions or any other state organ, such a limitation is permitted and authorized by **Article 249 (2) (a)** of the Constitution as a limitation imposed by the Constitution and the law. **Section 4 (a) and (b) of TSC Act** reinforces the limitation to the powers of TSC as an independent commission by requiring TSC to consult with State and non-state actors and to be guided by national values. Other constitutional limitations on the powers and functions of state organs, TSC or other Independent Commissions include limitations in **Article 230 (4) (b)** as read with **230 (5) (a)** of the Constitution; **Article 10 (1) (d)** of the Constitution on sustainable development and **Article 201 (d)** which requires public money shall be used in a prudent and responsible way. A further limitation is the doctrine of separation of powers and functions which is central to the governance structure established under the 2010 Constitution. I reiterate my finding that the advice given by SRC is binding on all state organs and independent commissions.

### **Legal consequences of failure by TSC to budget for salary increment**

235. TSC did not factor in its 2015/16 budget any monies towards payment of any basic salary increment for the teachers. The respondent Unions submitted that the obligation to prepare a budget that includes payment of teachers' salary and the basic salary increment award was upon the TSC. The respondent Unions further submitted that failure to factor the salary increment was either due to negligence, delay or intentional disregard of a contingent liability on the part of TSC; that the delay or negligence or intentional disregard cannot absolve TSC from its obligation to pay teachers the basic salary increment of 50% to 60% awarded by the trial court.

236. I concur with the respondent Unions that the obligation to prepare a budget that includes remuneration and benefits payable to teachers is upon TSC. The obligation is not delegable. Responsibility to prepare a budget is not a guarantee that funds will be appropriated by Parliament. Parliament in exercise of its functions may or may not appropriate funds as per the budget submitted by TSC. A relevant question is whether failure by TSC to budget establishes and accrues a right vested on teachers to receive remuneration and impose a liability on TSC to pay the increment. Rights and liabilities are established by law. Any increment in basic salary of teachers is an expenditure of public not private funds. In public service, there is no constitutional or statutory provision that failure to budget imposes a liability to pay. Failure to budget affects constitutional and legal capability to expend public funds; it does not create a liability to pay. Liability to pay is founded *inter alia* on breach of contract, breach of collective bargaining agreement, final judgment or breach of statutory obligation. The respondent Unions must demonstrate the legal foundation upon which TSC's liability to pay the basic salary increment award has arisen - this they have not done.

237. TSC's liability to pay cannot be founded on contract, collective bargaining agreement or statute.

Failure by TSC to *a priori* follow the constitutional and statutory procedures in **Article 230 (4) (b)** of the Constitution and **Section 37 (3)** of the TSC Act vitiates and voids the 50% to 60% offer that TSC tabled at the Consultative Committee meeting held on 9<sup>th</sup> September 2014. TSCs liability to pay cannot be founded on the trial court judgment as the judgment arose out of null and void conciliation proceedings and the trial court ignored peremptory constitutional criteria of fiscal sustainability in making its award.

238. There are constitutional and legal implications of failure by TSC to have in its 2015/16 budget a provision for payment of basic salary increment to teachers. The constitutional and legal consequences are in the following of Articles of the Constitution: **Articles 249 (3)** and **208 (2)** as read with **Sections 21** and **22 (1) and (2)** of the **Public Finance Management Act**; **Article 206 (2) (a) (b) (c), (3) and (4)** of the Constitution and **Sections 196 (1) and (3) (5) (6) (7) and 202 (1)** of the **Public Finance Management Act No. 18 of 2012** and **Article 226 (5) of the Constitution**.

**“Article 249 (3) of the Constitution:**

Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.

**Article 208 (2) of the Constitution:**

An Act of Parliament shall provide for advances from the Contingencies Fund if the Cabinet Secretary responsible for finance is satisfied that there is an urgent and unforeseen need for expenditure for which there is no other authority.

**Section 21 of the Public Finance Management Act No. 18 of 2012:**

Subject to Section 22, the Cabinet Secretary may make advances from the Contingencies Fund if, on the basis of the criteria and the process and operational guidelines of Article 208 (1) as prescribed by Parliament and the laws relating to disaster management, the Cabinet Secretary is satisfied that an urgent and unforeseen need for expenditure has arisen for which there is no specific legislative authority.

**Section 22 (1) of the Public Finance Management Act No 18 of 2012:**

Not later than two months after a payment from the Contingencies Fund in terms of Section 21, the Cabinet Secretary shall submit to Parliament a detailed report in respect of the payment....

**Article 206 (2) (a) (b) (c), (3) and (4) of the Constitution:**

**Article 206 (2) (a):**

Money may be withdrawn from the Consolidated Fund only in accordance with an appropriation by an Act of Parliament.

**Article 206 (b):**

Money may be withdrawn from the Consolidated Fund only in accordance with Article 222 or 223.

**Article 206 (3):**

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

**Article 206 (4):**

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

**Section 196 (1) and (3) of the Public Finance Management Act:**

**Section 196 (1):**

A public officer shall not spend public money otherwise than authorized by the Constitution or An Act of Parliament...

**Section 196 (3):**

A public officer shall not enter into any obligation that has financial implications for the national government budget....unless the obligation is authorized by the Constitution or an Act of Parliament ...”

**Article 226 (5) of the Constitution:**

If the holder of a public office, including a political officer, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.

239. Taking into account that TSC did not factor into its 2015/16 budget any monies for payment of salary increment; noting that it is not disputed that there is no Appropriation Act by Parliament providing for and authorizing payment of basic salary increment to teachers and having examined Articles **249 (3)** and **Article 208 (2)** and **Article 226 (5)** of the Constitution as read with **Sections 21** and **22 (1) and (2)** of the **Public Finance Management Act; Article 206 (2) (a) (b) (c), (3) and (4)** of the Constitution as read with **Section 196 (1), (3) (5), (7) and Section 202** of the **Public Finance Management Act**, I hereby deduce and make the following conclusions being the constitutional and legal consequences of failure by TSC to make budgetary provisions for payment of basic salary increment to teachers and also the legal consequences for failure to have Parliamentary authority in the form of an Appropriation Act to pay teachers the basic salary increment:

- a. It is unconstitutional for TSC to make any payment of basic salary increment awarded to the teachers without approval of Parliament in accordance with Article 249 (3) of the Constitution as read with Section 196 (1) and (3) of the Public Finance Management Act as read with Article 206 (3 and (4) of the court
- b. Since there is no Appropriation Act enacted by Parliament to pay any basic salary increment to teachers, it is unconstitutional under Article 206 (3) and 206 (4) for TSC to make any payment of salary increment to teachers.
- c. In relation to the use of Contingencies Fund and or Supplementary Appropriation, it is unconstitutional for the government to make any payment of basic salary increment to the teachers without following the procedure and criteria laid down in Article 208 (1) of the Constitution as read with Section 21 (1) and (2) and Section 22 of the Public Finance Management Act as read with Article 206 (4) and Article 226 of the Constitution and Section 196 of the Public Finance Management Act.
- d. Article 226 (5) of the Constitution as read with Sections 196 (6) and (7) and Section 202 (1) (b) of the Public Finance Management Act creates offences by public officers and in this case, it would be an offence for TSC or any of its officers to spend public money otherwise than as authorized by the Constitution or an Act of Parliament.

240. I am fortified in the deductions and conclusions as stated above by the principle that there can be no estoppel against statute and there can be no estoppel to the implementation and enforcement of any

constitutional provision. (See Manchester Outfitters Suiting Division Limited & Another vs. Standard Chartered Financial Services Limited & Another Civil Appeal No. 88 of 2000 [2002] 2 KLR 590). The trial court in the judgment states that TSC cannot repudiate and get out of the offer it made on 9<sup>th</sup> September 2014. In other words, the trial court was applying the doctrine of estoppel against TSC. (See paragraph 22 of the judgment).

241. In Republic vs. Public Procurement Complaints, Review And Appeals Board & Another Ex Parte Kenya Airports Authority [2005] 1 KLR 628 it was held that:

**“It is now settled law that there can be no estoppel against a statute, for estoppel cannot supersede the law of the land...”**

242. Whereas the respondents Unions and the teachers in general have a legitimate right to expect increment in basic salary and other allowances, I cite the case of South African Veterinary Council -v- Szymanski, 2003(4) S.A. 42 (SCA) at [paragraph 28] where the Court held as follows:

**“The law does not protect every expectation but only those which are 'legitimate.’”**

243. A relevant excerpt from Republic -v- Nairobi City County & Another ex parte Wainaina Kigathi Mungai, High Court Judicial Review Misc. case No. 356 of 2013; [2014] eKLR thus reads [paragraph 33]:

**“...the legal position is that legitimate expectation cannot override the law.”**

244. There cannot be a legitimate expectation by the teachers for a basic salary increment without adherence to statutory or constitutional provisions. It has been held in several persuasive authorities such as R. v. Devon County Council, ex parte Baker & Another, [1995] 1 All. E.R. 73; R. v. Durham County Council, ex parte Curtis & Another, [1992] 158 LG Rev R 241 (CA) and R. v. DPP ex p. Kebilene [1993] 3 WLR 972, that no legitimate expectation can override clear statutory provisions.

245. The respondent Unions submitted that the failure by TSC to prepare a budget or make provision for contingent liability to pay the basic salary increment was due to negligence or delay on the part of the TSC. My response to this is to cite the decision in Republic vs. Kenya Revenue Authority, ex parte Aberdare Freight Services Limited, [2004] 2 eKLR 530 where it was held:

**“...a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.... Purported authorization, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims...”**

246. I cite the case of Said Bin Seif v. Shariff Mohammed Shatry, (1940)19 (1) KLR 9, and state that any action taken by the TSC without legal authority is a nullity; such an action, however technically correct, is a mere nullity and not only voidable but void with no effect, either as legitimate expectation, estoppel or otherwise. I have held that the offer made by TSC on 9<sup>th</sup> September 2014 was a nullity under contract law; it was *ultra vires* the TSC Act and *ultra vires* the Constitution. I have also held that TSC has no constitutional authority to make any payment without an Appropriation Act passed by Parliament.

247. Guided by the foregoing judicial decisions and my finding that the offer made by TSC was a nullity in law, it is my considered view that estoppel cannot be used as shield to protect violation of constitutional procedures requiring SRC to give its prior advice; neither can estoppel operate to authorize unconstitutional procedure for payment of any basic salary increment; estoppel cannot be used to enforce the unconstitutional offer made by TSC on 9<sup>th</sup> September 2014; estoppel cannot override express statutory procedures in **Section 37 (3)** of the TSC Act, **Section 11** of the SRC Act and Section 196 of the Public Finance Management Act. There can be no estoppel against the Constitution or statute. (See Tarmal Industries Ltd. -v- Commissioner of Customs & Excise, (1968) E.A. 471; see also Maritime

**Electric Co. Ltd. v General Dairies Ltd. (1937) 1 All ER 748).**

248. A judgment of a court cannot and should not direct any person to commit an offence. In the instant case, to the extent that the judgment by the trial court directs TSC to effect payment without following constitutional procedures and to the extent that the judgment requires TSC and or its officers to commit an offence under **Section 196** of the Public Finance Management Act; the trial court's judgment is unconstitutional, null and void. A court order that directs violation of the constitution or statute is null and void.

**Obiter Observations**

249. I have considered and determined the pertinent issues in this appeal. Learned counsel Mr. Kioko Kilukumi while beseeching this Court to dismiss the appeal remarked and posed the following question: what will Kenyans say if this Court were to allow the appeal and set aside the award of 50% to 60% basic salary increment to the teachers when three judges of this Court in a ruling delivered on 23<sup>rd</sup> July 2015 ordered that the 50% to 60% basic salary increment award to be effected from 1<sup>st</sup> August 2015? Learned counsel Mr. Kiragu Kimani stated that the remark and question posed by his learned colleague was very unfortunate. Be that as it may, I do not profess to know the minds of Kenyans to decipher what they will think or say. There are those who will claim to be prophets endowed with the vision of foretelling; there are others whose voices will grow hoarse as they shout from the rooftops and claim that allegations of executive interference was not farfetched; others of vile temperament will resort to character assassination in social media; others will seek to gain political mileage and relevance and some will pause, read and analyze the judgment of this Court and comment on its rationality and constitutionality; and yet some will be swayed by the opinion of those who shout loudest or be imbued with writings in social media. This is the occupational hazard of being a judicial officer in the Republic of Kenya.

250. In *orbiter* and with due respect, the issue before the three judges of this Court related to arguability and nugatory aspects of the intended appeal in an application for stay of execution of the judgment of the trial court. The three judges did not have the benefit of considering the substantive merits of the appeal. It was not the duty of the three judges to determine the constitutionality and statutory validity of the offer made by TSC and the constitutionality or otherwise of the judgment of the trial court. There is no rule or principle of law that if stay is granted under rule 5 (2) (b) of the Rules of this Court, the appeal must succeed and conversely if stay is not granted the appeal must be dismissed. The present five judge bench is the Court vested with jurisdiction to hear and determine the substantive merits of the appeal.

251. In arriving at my determinations in this appeal, I have agonized whether to succumb to public opinion, feelings and expectations that are transient or to uphold the constitution and the rule of law which are the constant north in the governance of this country. At all times, a judge's fidelity and oath of office is to faithfully and impartially interpret and apply the Constitution and the Rule of Law based on nothing but proven facts and evidence on record. This appeal has evinced raw emotions, public interest and public anxiety to the extent that one can describe the appeal as a noxious appeal where character assassination, slanders, libel, veil threats and unethical utterances have been made or are bound to be made. Such slander and character assassination is the hall mark of a bad litigant. A bad litigant is one who believes he is always right and is entitled to win all cases in which he is a party or has interest. A bad litigant does not appreciate that in an adversarial system of justice, there is a winner and a loser. A bad litigant is one who justifies failure to win a case by defaming and engaging in character assassination. My fidelity to the constitution, judicial precedence and the rule of law is unwavering. Given the facts of this case, the 2010 Constitution provides direct access to the Supreme Court under **Article 163 (4) (a) and (b)** as a matter of right to any party dissatisfied and aggrieved by this judgment. No leave of this Court is required. Slander, innuendo, blackmail, character assassination and threats to a judicial officer in the exercise of duty are uncalled for and unbecoming to a ethically upright and law abiding citizen of this country. This judgment has been written without fear or favour and in defence of the Constitution and rule of law in spirit, word and action. It has been written in exercise of my decisional independence as a judge to make determination on the issues urged in the appeal.

252. I wish to comment *in obiter* about the procedure adopted by the trial court during the hearing of the

dispute between the parties. The trial judge started the proceedings as conciliator under the provisions of **Section 15** of the Industrial Court Act and then proceeded to sit as an adjudicator in the same dispute. I have held that the trial judge had no jurisdiction to sit as conciliator. It is advisable that a sitting judge or judicial officer should not be a conciliator or arbitrator in any dispute that may end up for adjudication in litigation before the courts. In the instant case, the trial court seamlessly moved from being a “facilitator” to a “conciliator” and then “adjudicator” in the same dispute. This should be avoided. Further, unless expressly authorized by statute or a general principle of law, *suo moto* orders should be avoided. To avoid trial courts conducting proceedings in the manner done in this case, I hereby recommend that the procedure for promoting alternative forms of dispute resolution under **Article 159 (2) (c)** of the Constitution should be clarified through a Practice Note to clearly state that a sitting judge or judicial officer cannot be facilitator, conciliator, mediator or arbitrator in any dispute. I note that the **Mediation (Pilot Project) Rules of 2015**, gazetted on 16<sup>th</sup> October 2015 vide **Legal Notice No. 197 of 2015** addresses the issue from mediation perspective on a pilot basis albeit temporarily.

### **Determination of the Appeal**

253. For the various reasons stated in this judgment, I hereby find that the judgment of the trial court dated 30<sup>th</sup> June 2015 awarding a 50% to 60% basic salary increment is unconstitutional for want of jurisdiction to conduct conciliation proceedings held on 14<sup>th</sup> January 2014; the proceedings of 14<sup>th</sup> January 2015 being a nullity in law, all consequential orders and proceedings arising therefrom are a nullity; the judgment and award is unconstitutional because the trial judge erred in not taking into account the constitutional and statutory criteria for determination of remuneration and benefits in the public service; the trial court erred in justifying its award of 50% to 60% basic salary increment on a constitutionally *ultra vires* offer by TSC; the award of 50% to 60% basic salary increment is statutorily illegal as it contravenes **Section 37 (3)** of the TSC Act and **Section 11** of the SRC Act because advice of SRC was not sought prior to TSC making the offer; the trial court erred in failing to find that the advice given by SRC is binding; the court misdirected itself by ignoring the expert opinion of RW3; the court in ordering TSC to make immediate payment of the award ignored the constitutional procedures in **Article 201 (c)** and **(d)**; **Article 206 (2)** and **(3)** of the Constitution; the award of 50% to 60% is illegal as it contravenes statutory provisions relating to the national budget process provided in **Sections 35 to 40** in the **Public Finance Management Act**. The award is illegal because implementation of the award directs the appellant to commit an offence under **Section 196 (1), (3), (5), (6)** and **(7)** and **Section 202** of the **Public Finance Management Act** as read with **Article 206 (3), (4)** and **Article 226(5)** of the Constitution.

254. All judgment takes effect immediately upon delivery. For clarity, I am not saying that the trial court erred in expressing that TSC should immediately pay the salary increment award; what I am saying is that the court misapprehended and ignored that the award made related to the use and expenditure of public funds; that expenditure of public funds is subject to constitutional procedures and appropriation by Parliament. The constitutional procedures on expenditure of public funds inculcates orderliness and predictability that is so essential to utilization and withdrawal of money from the Consolidated Fund; the procedures prevent damage to the fabric of national budget and legislative process and upholds the sanctity of constitutional controls in expenditure of public funds. The law has developed the concepts of interest from the date of judgment and payment in arrears as appropriate tools to deal with any delay in satisfaction of a judgment or decretal sum.

255. 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.

256. This appeal has merit and I hereby set aside in entirety the Judgment of the Employment and Labour Relations Court dated 30<sup>th</sup> June 2015 delivered in Petition No. 3 of 2015. I also set aside in entirety all consequential orders and decree ensuing therefrom.

**Determination on Costs**

257. Costs are at the discretion of the Court. The Supreme Court in **Mumo Matemu -v- Trusted Society of Human Rights Alliance & 5 Others, S.C., Civil Application No. 29 of 2014** expressed as follows at para. [86]:

**“In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed....[87] We hold that this case is one that raises constitutional issues which are public in nature. Therefore, in the public interest, each party should bear their own costs.”**

258. This appeal has advanced legitimate public interest and contributed to a proper understanding of law for example, the binding nature of advice given by SRC and the need to conform to constitutional budgetary procedures. Guided and persuaded by the dicta of the Supreme Court quoted above on costs, I propose that each party should bear their own costs in this appeal. Having found that Petition No. 3 of 2015 was not compromised and it has not been heard and determined on merits, I decline to grant the orders and relief sought in the Petition. The appeal having succeeded, the cross-appeal by the 1<sup>st</sup> and 2<sup>nd</sup> respondents be and is hereby dismissed.

**Final Judgment and Orders of the Court**

259. The final judgment and orders of this Court in relation to the three consolidated appeals is as contained in the Judgment and Orders of the Presiding Judge, Githinji, JA.

*Dated and delivered at Nairobi this 6<sup>th</sup> day of November, 2015*

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**