



**Kenya National Union of Nurses v Moi Teaching and Referral Hospital;
Salaries and Remuneration Commission (Interested Party) (Miscellaneous
Application E191 of 2022) [2023] KEELRC 1631 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1631 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E191 OF 2022**

**B ONGAYA, J
JULY 7, 2023**

BETWEEN

KENYA NATIONAL UNION OF NURSES APPLICANT

AND

MOI TEACHING AND REFERRAL HOSPITAL RESPONDENT

AND

SALARIES AND REMUNERATION COMMISSION INTERESTED PARTY

RULING

1. The applicant union filed the application by the notice of motion dated November 11, 2022 signed by Eudius Nyambura, Industrial Relations Officer for the applicant. The application was under section 60(3) of the Labour Relations Act, 2007. The applicant prayed for an *ex-parte* order to be issued summoning the respondent to appear in Court for registration of the Collective Bargaining Agreement; any other order the Court deems just and fit in the circumstances; and, costs of the application be provided.
2. The application was based on the affidavit of Eudius Nyambura and upon the following grounds:
 - a. The parties signed a collective bargaining agreement (CBA) on 27.09.2022 and which is duly exhibited as KNUN-1. It was the 3rd CBA negotiated between the two parties. Upon expiry of the 2nd CBA, the respondent and the applicant undertook the 3rd cycle negotiations and had the same signed on September 27, 2022.
 - b. The respondent as employer failed to submit the signed 3rd CBA to the Court for registration per section 60 (3) of the Labour Relations Act. Section 60 (3) of the Act provides that if an employer or employers' organisation fails to submit the collective agreement to the Court as



specified in subsection (1), the trade union may submit it. The said subsection (1) states that every collective agreement shall be submitted to the Court for registration within fourteen days of its conclusion.

- c. The Court should therefore allow the application as prayed.
3. The respondent responded to the application by filing the replying affidavit of Felx Kosgei, the Principal Human Resource Officer of the Respondent drawn by Josephat Mutuma Kirima Advocate. The affidavit confirmed that indeed the parties had signed the CBA on September 27, 2022. On September 27, 2022 the respondent forwarded the CBA to the Salaries and Remuneration Commission (SRC) with a cover letter requesting for a letter of no objection as duly exhibited as F.K-1. The SRC replied by the letter dated October 5, 2022 stating that SRC had reviewed the CBA for 2021-2025 and observed that the rates for leave allowance payable to grades MTRH 5 & 6; Nursing service allowance and uniform allowance are not within the SRC's advice provided by the letter Ref No SRC/TS/MRTH/3/17/11/2 VOL III(5) dated August 23, 2021. The Commission advised that the CBA be reviewed to be in line with its advice. Once the CBA was revised in line with the parameters of the advised, the respondent to submit the same to SRC for a no objection letter to facilitate the registration at the Court
4. The respondent's further replying affidavit by Felix Kosgei was sworn on March 3, 2023. It stated and urged as follows:
 - a. There are three issues in dispute namely leave allowance payable to job group M6 and M5, uniform allowance and nursing service allowance payable to nurses employed by the respondent. The SRC has since approved the current rates of leave allowance being paid to claimant's members in respondent's employment. That was after a compromise meeting convened by SRC as per Court's directions that parties seek to compromise. By the letter dated February 3, 2023 SRC conveyed that the leave allowance payable to claimant's members in employment of the respondent were per rates recommended by the State Corporations Advisory Committee and thus it be retained at the current rates. By that letter SRC resolved further as follows: the nursing service allowance be retained at Kshs 20,000.00 per month as advised in SRC letter dated June 9, 2017; and, uniform allowance be retained at Kshs 10,000.00 per year as advised by SRC letter dated June 5, 2017. The SRC further noted that the rates currently paid by the respondent for nursing service allowance and uniform allowance had not been approved by SRC and further, if approved, would necessitate similar treatment for other health workers in the country and with a significant impact on the public wage bill.
 - b. Under the current (out-going) CBA, nursing service allowance is paid at Kshs 30,000.00 per month and uniform allowance at Kshs 25,000.00 per annum. Impact of SRC's advisory is that each allowance reduces by Kshs 10,000 and Kshs 15,000.00 respectively.
 - c. The current nursing service allowance and uniform allowance were arrived at after protracted labour dispute dating back to 1997 some lasting over 200 days with a great economic loss as well as loss of too many human lives in Kenya which no one which citizens should not be allowed to experience again.
 - d. The current uniform allowance of Kshs 25,000.00 and nursing service allowance Kshs 30,000.00 have been paid to claimant's members being in the respondent's employment for at least 6 years effective July 1, 2017 to date. The rates have not been appealed or reviewed by any Court of law.



- e. It is unfair labour practice to reduce an employees pay to their detriment especially after such a long time of six years in the instant case.
5. By consent of the parties SRC was enjoined in the suit as an interested party. The SRC filed the replying affidavit by Dr Hilary Patroba, the Director of Remuneration Services at SRC and sworn on December 8, 2022 as drawn by James Sitienei Advocate. It was urged as follows:
- a. SRC's functions per Article 230(4) of the Constitution are setting and regularly reviewing remuneration and benefits of all state officers and, to advise the national and county governments on the remuneration and benefits of all other public officers. (such as the respondent's employees).
- b. Article 230(5) of the Constitution and section 12(1) of the SRC Act requires SRC to take into account the following principles thus, the need to ensure that the total public compensation bill is fiscally sustainable; the need to ensure that the public services are able to attract and retain the skills required to execute their functions; the need to recognise productivity and performance; transparency and fairness; and, equal remuneration to persons for work of equal value.
- c. By circular dated September 14, 2015, the SRC advised uniform allowance be paid at Kshs 10, 000.00 per annum to all nurses serving at national and county government.
- d. On December 14, 2016 national government, county governments and the applicant negotiated a return to work formula following an industrial unrest and they agreed, without SRC advisory per Article 259(11) to introduce a nursing service allowance of Kshs 15,000.00 to be paid to nurses in job group G to L and Kshs 20, 000.00 for the nurses in job groups M and above. By letter dated January 30, 2017 SRC by ratification approved the rates as per that return to work formula. The respondent wrote to SRC the letter dated February 15, 2017 to adopt the rates of the two allowances per SRC letter of January 30, 2017 and SRC advised as much by the letter dated May 8, 2017.
- e. The respondent sought SRC Advisory on CBA for 2017/2018 to 2020/2021 with the applicant and by letter dated June 5, 2017 SRC advised the rates to prevail being uniform allowance Kshs 10,000.00 per annum; and, nursing service allowance Kshs 15, 000.00 per month for job group G to L and Kshs 20, 000.00 for job groups M and above. Leave allowance was fixed at Kshs 25,000.00 per annum for grade M5 and Kshs 20,000.00 for grade M6.
- f. The respondent resubmitted by letter dated June 8, 2017 the CBA for 2017/18 – 2020/21 proposing uniform allowance Kshs 20,000.00 per annum and, nursing services allowance M11 -17 Kshs 20,000.00 and M6 and above Kshs15, 000. SRC respondent by letter dated June 9, 2017 and advised nursing service allowance be at flat rate of Kshs 20,000 per month and uniform and commuter allowances be retained at current rates as earlier advised by SRC.
- g. Thereafter the respondent never resubmitted the CBA for 2017/18 – 2020/21. The last advisory was that uniform allowance be at Kshs 10, 000.00 per annum and nursing service allowance at Kshs 20,000.00 per month. The respondent has never advised the respondent to pay uniform allowance at Kshs 25,000.00 per year and nursing allowance at Kshs 30,000.00 per month. Leave allowance for M5 was last advised at Kshs 25,000.00 for grades M5 and Kshs 20,000.00 for grade M6.



6. The SRC states that the respondent concluded to pay Kshs 25,000.00 uniform allowance and Kshs 30,000.00 nursing services allowance without obtaining SRC advisory per Articles 230 (4) (b) and 259 (11).
7. The SRC is aware that on November 2, 2017 the national government, county governments and the applicant entered an agreement to ending of a nurses strike and for years 2018/19, 2019/20, and 2020/21 it was agreed uniform allowance to graduate thus Kshs 15,000.00 to 20,000.00 to 25, 000.00 and nursing allowance Kshs 23,000, to26, 500, to 30, 000.00. SRC's case is that that agreement of November 2, 2017 was not legally binding because its advisory was not obtained per the cited Articles of the Constitution and was not signed per section 68 of the Labour Relations Act by the conciliator and the parties was not lodged with the Cabinet Secretary. The two levels of government have not therefore implemented the the agreement of November 2, 2017. the applicant filed ELRC Petition E114 of 2022 for SRC's refusal to approve that agreement and for two levels of government to implement the same and on December 8, 2022 the Court returned that the agreement dated November 2, 2017 had no force of law. Issue of validity of agreement of November 2, 2017 should therefore be found res judicata.
8. For 3rd cycle CBA 2021/22 to 2024/25 SRC by letter dated August 23, 2021 SRC advised the respondent to pay leave allowance Kshs 25,000 for M5 and Kshs 20,000.00 for M6; nursing allowance be retained at Kshs 20,000.00 per month; and, uniform allowance be retained at Kshs 10,000.00. Across the public service uniform allowance is Kshs 10,000.00 and nursing service allowance is Kshs 20,000.00. The respondent and KUDHEIHAW have agreed upon the same rates for the CBA for 2021/22 to 2024/25 with leave allowance at Kshs 25,000 for M5 and Kshs 10,000.00 for M6.
9. If CBA were to be registered as proposed the wage bill across the public service for nurses would increase to additional annual cost of Kshs 3, 325, 050, 000.00 for the in post 24, 630 nurses and the registration would be devoid of the SRC approval or advisory per cited constitutional provisions.
10. The further affidavit of Felix Kosgei sworn March 3, 2023 has exhibited certificate of registration of the CBA between the applicant and the respondent signed on February 23, 2018 registered as RCA No 98 of 2018 and the certificate is dated April 26, 2018. Nursing Services Allowance for all grades is Kshs 30,000.00. and last agreed uniform allowance is Kshs 25,000.00.
11. The further affidavit by David Omulama dated April 27, 2023 has explained in paragraphs 9, 10, 11, 12, 13, 14, 15, and 16 how the allowances in dispute were subject of return to work agreements culminating in their inclusion in the 2nd cycle CBA for 2017 to 2021 as was duly registered in Court.
12. Parties filed final submissions on the application. The Court has considered all the material on record. The Court returns as follows.
13. To answer the 1st issue for determination, whereas the agreement dated November 2, 2017 was found of no legal force as found by the Court and as urged for the interested party the SRC, the applicants and respondents do not rely on that agreement to advance their case. They only rely on it to show circumstances leading to the conclusion, execution and registration of the 2nd cycle CBA between the applicant and the respondent. It is not in dispute that there had been circumstances culminating in the inclusion of the allowances in the 2017 to 2021 CBA. The applicants do not seek to re-litigate the validity of the agreement of November 2, 2017 and the plea of res judicata for the interested party is found unjustified.
14. To answer the 2nd issue, the Court returns that the interested party has not rebutted the applicant's and respondent's evidence that the CBA for 2017 to 2021 was duly registered and therefore became incorporated in the individual contracts of the members of the applicant being the employees of the



respondent. The allowances have therefore become accrued benefits in favour of the members and cannot be varied to their disadvantage without due process or fair cause. While the interested party urges that the allowances per the CBA were without its advisory and which it appears to interpret as approval, there is no case before the Court to nullify the CBA for 2017 to 2021 between the applicant and the respondent. The CBA is found binding as already registered.

15. To answer the 3rd issue, the Court returns that the alleged increase in wage bill across the public service if the allowances in dispute are paid, and as advanced for the interested party, is not established at all. Of particular evidence is that the allowances have been paid for six years without such wage bill increase being in issue as suggested and urged for the interested party.
16. To answer the 4th issue, the Court has considered the principles governing the interested party's decision making in setting, reviewing and advising on remuneration and other benefits. It is not said that the respondent as a state corporation and within its enterprise shall be unable to sustain the payment of the allowances so that the same are not fiscally unsustainable. The payment appears to be consistent with attraction and retention of nursing skills required for the respondent to discharge its mandate. Owing to the circumstances of the industrial unrest that was diluted with the introduction of the allowances, the same appears to be consistent with recognition of the nurses' productivity and performance as within the respondent's employment. The applicant's members in the respondent's employment appear to be in a unique circumstance and the payment has not been shown to be against the principle of equal remuneration to persons for work of equal value. The Court finds that the members in issue having enjoyed the payment for six (6) years without the interested party or respondent raising an objection and the same being contractual per the 2nd cycle CBA duly registered by the Court, it would amount to unfair labour practice in violation of Article 41 of the Constitution to withdraw the accrued rates of payment.
17. The Court finds that the interested party in discharging its mandate is bound by its guiding principles and the exercise of discretion is also fettered by the constitutional rights and fundamental freedoms, as well as, other constitutional values and principles. Article 10 provides for the national principle of sustainable development. The Court considers that sustainable development demands balancing of present and future exploitation of the limited available resources. Further, human sustainability requires the development of skills and human capacity to support the functions and sustainability of the enterprise and to promote the wellbeing of individuals, families, communities and society. The applicant and respondent have shown and the interested party has confirmed that the allowances in the 2nd cycle CBA as proposed to be retained in the 3rd cycle CBA were comprehensively and vigorously negotiated and arrived at in the best interest of industrial peace as well as wellness of the respondent's enterprise and affected applicant's members. The Court finds that it would be unreasonable as contravening Article 47 of the Constitution on fair administrative action for the interested party to pay a blind eye to that undisputed historical reality as manifested in the outgoing 2nd cycle CBA that was duly registered by the Court. Further, it appears to the Court that cutting the accrued contractual allowances in issue in such unreasonable and unfair manner is inconsistent with the constitutional principle of sustainable development as it would result into unjustified immediate deteriorating living standards for the affected nurses, and which would as well, constitute bad and not good governance in that respect.
18. In conclusion, the Court considers that the applicant and the respondent are entitled to submit to the Court for registration, and, in accordance with the law, the CBA signed on September 27, 2022. The respondent appears not to have opposed but supported the application and each party to bear own costs of the proceedings.

In conclusion the application dated November 11, 2022 is hereby determined with orders:



1. The applicant and the respondent are entitled and at liberty to submit to the Court the CBA they signed on September 27, 2022 for purposes of its registration in accordance with the provisions of law including section 60 of the *Labour Relations Act*, 2007 and Rule 36 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016.
2. Each party to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 7TH JULY, 2023.

BYRAM ONGAYA, PRINCIPAL JUDGE

