



Kenya Medical Practitioners Pharmacists and Dentists Union & another v Salaries and Remuneration Commission & 4 others; 47 County Government Public Service Boards & 56 others (Interested Parties) (Employment and Labour Relations Petition E006 of 2023 & Petition 048 of 2023 (Consolidated)) [2023] KEELRC 2964 (KLR) (17 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2964 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

**EMPLOYMENT AND LABOUR RELATIONS PETITION
E006 OF 2023 & PETITION 048 OF 2023 (CONSOLIDATED)**

SC RUTTO, J

NOVEMBER 17, 2023

BETWEEN

**KENYA MEDICAL PRACTITIONERS PHARMACISTS AND DENTISTS
UNION 1ST PETITIONER
KAHURA MUNDIA 2ND PETITIONER**

AND

**SALARIES AND REMUNERATION COMMISSION 1ST RESPONDENT
CABINET SECRETARY FOR HEALTH 2ND RESPONDENT
CABINET SECRETARY FOR LABOUR 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT
PUBLIC SERVICE COMMISSION 5TH RESPONDENT**

AND

**47 COUNTY GOVERNMENT PUBLIC SERVICE BOARDS INTERESTED
PARTY
COUNCIL OF GOVERNORS INTERESTED PARTY
KENYATTA NATIONAL HOSPITAL INTERESTED PARTY
MOI TEACHING & REFERRAL HOSPITAL INTERESTED PARTY
KENYATTA UNIVERSITY HOSPITAL INTERESTED PARTY
KENYATTA UNIVERSITY INTERESTED PARTY
UNIVERSITY OF NAIROBI INTERESTED PARTY**



MOI UNIVERSITY INTERESTED PARTY
 JOMO KENYATTA UNIVERSITY OF AGRICULTURE &
 TECHNOLOGY INTERESTED PARTY
 LAW SOCIETY OF KENYA & 47 OTHERS & 47
 OTHERS INTERESTED PARTY

The circular by the Salaries and Remuneration Commission seeking to review non practicing allowance is a violation of the right to fair labour practices.

The SRC sought stakeholder views with regards to review, setting and advice on a number of allowances including Non-practice allowance in the public service. It was contended that the SRC in purporting to exercise the powers bestowed upon it, had acted ultra vires. The Employment and Labour Relations Court held that best labour practices demanded that any review of employee benefits should be incremental. As such, any emolument that had accrued to an employee should not be unfavorably, reduced or removed to the disadvantage of the employee. The SRC to taking away a benefit that had accrued to employees was detrimental and was a practice that should be discouraged. It was affront to the right to fair labour practices which was guaranteed under article 41 of the Constitution.

Reported by John Ribia

Administrative Law – judicial review – justiciability – question of whether a dispute was ripe for determination - whether a dispute that challenged a public body’s communication stating that intended to undertake an activity on grounds that the body was acting in excess of its mandate was justiciable.

Salaries and Remuneration Commission – mandate – mandate of the Salaries and Remuneration Commission vis-à-vis the mandate of the Public Service Commission - whether they had the mandate to review the non-practicing allowance of public servants - whether Salaries and Remuneration Commission was constitutionally mandated to set, review and advice on the non-practice allowance payable in the public service - whether the Salaries and Remuneration Commission overstepped its mandate in proposing to abolish payment of Non-practice allowance in the public service – Constitution of Kenya, 2010 article 234(2)(g); Salaries and Remuneration Commission Act (cap 412D) sections 11, and 26; Public Service Commission Act (CAP 185) section 53; Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations (Cap 412D Sub Leg) regulations 4, 5, and 12.

Constitutional Law – fundamental rights and freedoms – right to labour practices – remuneration – emoluments – proposal to unfavourably reduce emoluments of employees - whether emoluments that had accrued to an employee could be unfavorably, reduced or removed to the disadvantage of the employee – Constitution of Kenya, 2010 articles 10 and 234(2)(g).

Words and Phrases – justiciability – definition - quality or state of being appropriate or suitable for adjudication by a court - Black’s Law Dictionary 9th Edition.

Brief facts

The genesis of the instant dispute was a circular issued by the Salaries and Remuneration Commission (SRC) through which it sought stakeholder views with regards to review, setting and advice on a number of allowances including Non-practice allowance in the public service. It was contended that the SRC in purporting to exercise the powers bestowed upon it, had acted *ultra vires*.

The SRC contended that the circular was a call for view on its proposals. It argued that since the consolidated petitions challenged a proposed decision that was under public participation and parties to the suit had submitted their views on the proposals, the issues raised in the consolidated petitions were not justiciable at the instant stage. The SRC further contended that the issues raised by the petitioners may only concretise after it had taken into account all views submitted by participants and it had then advised the national and county



governments as was its mandate under article 230(4)(b) of the Constitution. The SRC contended that the petitions were premature and offended the principle of constitutional avoidance and ripeness.

Issues

- i. Whether a dispute challenging a public body's communication stating that they intended to undertake an activity on grounds that the body was acting in excess of its mandate was justiciable.
- ii. Whether Salaries and Remuneration Commission was constitutionally mandated to set, review and advice on the non-practice allowance payable in the public service.
- iii. Whether the Salaries and Remuneration Commission overstepped its mandate in proposing to abolish payment of Non-practice allowance in the public service.
- iv. Whether emoluments that had accrued to an employee could be unfavorably, reduced or removed to the disadvantage of the employee.
- v. Whether the circular by the Salaries and Remuneration Commission that sought to set aside/review non practicing allowance was a violation of the right to fair labour practices.

Held

1. Justiciability meant the quality or state of being appropriate or suitable for adjudication by a court. A justiciable issue was one that is capable of being determined by a court of law. Justiciability referred to a matter that a court could adjudicate. Therefore, if a case was non-justiciable, the court could not hear and determine it.
2. A dispute on whether the Salaries and Remuneration Commission (SRC) had the power to propose to abolish payment of Non-practice allowance in the public service was justiciable in so far as the court was being called to determine whether the SRC acted *ultra vires* and overstepped its mandate in proposing to abolish payment of Non-practice allowance in the public service. The dispute had crystalized and was justiciable.
3. Pursuant to Article 230 of the Constitution, the SRC as mandated to set and regularly review the remuneration and benefits of all state officers. With respect to public officers, the SRC was mandated to advise the national and county governments on the remuneration and benefits payable. In performing its functions, SRC is required to take into account the principles set out in article 230(5) of the Constitution.
4. In the conventional sense and in terms of the Industrial Relations Charter, there existed a tripartite system recognizing three players being the employer, the trade unions representing the employees and the Government, interacting in good faith. That was the position under ILO Convention 144. However, with the establishment of the SRC, there was a new player in the collective bargaining process when it comes to public officers.
5. One of the primary rights enjoyed by employers and duly recognized trade unions was the right to engage in collective bargaining. The right was guaranteed under article 41(5) of the Constitution and was recognized under ILO Convention 98.
6. The parties responsible for the formulation of collective bargaining agreements and setting of the terms and conditions of service were the employers and duly recognized trade unions. It was through the collective bargaining process that employers and trade unions freely engaged and agreed on the terms and conditions of employment.
7. One of the key terms of employment negotiated and agreed upon during the collective bargaining process was remuneration and benefits. non-practice allowance was a form of financial compensation paid by the Government to certain categories of professionals who could not practice due to their engagement in the public service. Ideally, it was a compensation for their sacrifice of private practice after joining the government service.
8. Non-practice allowance fell among the remunerative allowances payable and adds up to the total compensation due to an employee. As such, it constitutes part of an employee's remuneration and was



- a key term of service. Remuneration being a key term of service, was the preserve of an employer and a product of a collective bargaining process in cases where there was a duly recognized trade union.
9. The proposal by SRC to abolish the non-practice allowance paid to certain categories of public officers was tantamount to setting the terms and conditions of service in the public service. SRC could only play its advisory role, where a term of service, such as remuneration, had been set by the employer or negotiated and agreed upon between an employer and a trade union in the process of collective bargaining.
 10. Terms and conditions of service were serious matters that were negotiated between employers and recognized trade unions hence SRC could not be an active player to the extent of proposing to abolish payment of non-practice allowance. SRC could not dictate to employers how to negotiate with trade unions in the process of collective bargaining, as it proposed to do in the instant case. Therefore, the proposal by SRC to the effect that payment of the non-practicing allowance ceased to be payable upon lapse of existing CBAs, was contrary to the spirit of the collective bargaining process as envisaged under article 41(5) of the Constitution.
 11. SRC only performed its advisory role once parties (employers and trade unions) had negotiated and agreed on the terms and conditions of service of the employment. That could not happen before such terms were set by the key players in the employment relationship.
 12. Fundamentally, SRC could not propose to abolish a key term of service that had already been negotiated and agreed upon between an employer and an employee (or through a recognized trade union through a collective bargaining process). By so doing, SRC was essentially setting and determining a key term of service in the employment relationship hence overstepping its constitutional mandate which was limited to an advisory role.
 13. Inasmuch as the SRC had the duty to advise the employers (public institutions), on the terms of service, it must allow them latitude to set the key terms of service and to negotiate freely with recognized trade unions and ILO Convention 98 was germane in that respect.
 14. Whereas Article 230(4)(b) integrated SRC in the determination of matters relating to remuneration and benefits of public officers, the said provision must be read alongside other provisions of the Constitution which conferred power to some of the chapter 15 Commissions to review and make recommendations on the conditions of service of public officers under them.
 15. The power to review and make recommendations to the National Government in respect of conditions of service of public officers rest with the Public Service Commission (PSC). By proposing to abolish payment of non-practice allowance to public officers, the SRC was essentially setting and recommending a term and condition of service for public officers. The SRC acted outside its mandate under article 230(4) of the Constitution and in so doing, took over the role of PSC under article 234(2) (g) of the Constitution. SRC overstepped its mandate and acted *ultra vires* in proposing to abolish payment of Non-practice allowance in the public service.
 16. Best labour practices demanded that any review of employee benefits should be incremental. As such, any emolument that had accrued to an employee should not be unfavorably, reduced or removed the disadvantage of the employee. The SRC taking away a benefit that had accrued to employees was detrimental and was a practice that should be discouraged. It was affront to the right to fair labour practices which was guaranteed under article 41 of the Constitution.

Petition allowed.

Orders

- i. *Order of certiorari was issued quashing the 1st respondent's (SRC) circular No. SRC/TS/15 Vol. II (1), dated November 25, 2022, to the extent of its reference to non-practice allowance.*
- ii. *Order of prohibition was issued that prohibited the 1st respondent (SRC) from enforcing the said circular No. SRC/TS/15 Vol. II (1), dated November 25, 2022, to the extent of its reference to non-practice allowance.*



- iii. *Order issued declaring the circular No. SRC/TS/15 Vol. II (1), dated November 25, 2022, by the 1st respondent (SRC) on the proposal to abolish non-practice allowance to be conflict with articles 41 and 234(2)(g) of the Constitution and thus unconstitutional.*
- iv. *Each party was to bear their own costs.*

Citations

Cases

Kenya

1. *County Government of Kakamega & 2 others v Salaries and Remuneration Commission; County Government of Mombasa(Interested Party) Petition 9 of 2018; [2018] KEHC 9880 (KLR) - (Mentioned)*
2. *Gikonyo, Wanjiru & 2 others v National Assembly of Kenya & 4 others Petition 178 of 2016; [2016] KEHC 4450 (KLR) - (Applied)*
3. *Kenya National Union of Nurses v Chairperson Salaries & Remuneration Commission & 4 others Petition 51 of 2015; [2016] KEELRC 1614 (KLR) - (Mentioned)*
4. *Kenya Union of Domestic, Hotels, Education And Allied Workers (Kudhebia Workers) v Salaries and Remuneration Commission Constitutional Application 294 of 2013; [2014] KEHC 8148 (KLR) - (Mentioned)*
5. *Kiriwa wa Ngugi & 19 others v Attorney General & 2 Others Petition 254 of 2019; [2020] KEHC 8819 (KLR) - (Mentioned)*
6. *Mbae v Speaker, County Assembly of Nakuru & another; others (Interested Party) Constitutional Petition E004 of 2022; [2022] KEHC 3313 (KLR) - (Mentioned)*
7. *Muthuuri & 4 others v Attorney General & 2 others Petition (Application) 15 (E022) of 2021; [2022] KESC 74 (KLR) - (Applied)*
8. *National Union of Water and Sewerage Employees v Mathira Water and Sanitation Company Limited & 2 others Cause 1664 of 2012; [2013] KEELRC 283 (KLR) - (Mentioned)*
9. *Republic v Director of Public Prosecutions & 2 others Public Prosecutions; Ex-parte Applicants & 4 others Civil Miscellaneous Application 68 of 2019; [2019] KEHC 336 (KLR) - (Mentioned)*
10. *Teachers Service Commission v Kenya National Union of Teachers (KNUT) & 3 others Petition 3 of 2015; [2015] KEELRC 863 (KLR) - (Mentioned)*

Texts

Garner, BA., (Ed) (2009) *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn

Statutes

Kenya

1. Constitution of Kenya articles 2(6); 10; 19; 25; 27; 28; 29; 30; 40; 41; 43; 47; 50 (1) ; 230; 232; 234(1) (2)(4) (5); 260; Chapter 15 — (Interpreted)
2. Employment Act (cap 226) section 10 — (Interpreted)
3. Fair Administrative Action Act (cap 7L) In general — (Cited)
4. Judicial Service Act (cap 8A) In general — (Cited)
5. Labour Institutions Act (cap 234) In general — (Cited)
6. Public Service Commission Act (cap 185) section 53 — (Interpreted)
7. Public Service Commission Act Regulations (cap 185 Sub Leg) In general — (Cited)
8. Salaries and Remuneration Commission Act (cap 412D) sections 11, 26 —(Interpreted)
9. Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations (cap 412D Sub Leg) regulations 4, 5, 12 — (Interpreted)

International Instruments

1. ILO Convention 144 Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)



2. ILO Convention No. 158-Termination of Employment Convention, 1982
3. ILO Convention No 98
4. ILO Convention Protection of Wages Convention, 1949 (No. 95) — article 9

Advocates

Mr. Juma for the 1st petitioner

Mr. Sitienei for the 1st respondent

Mr. Koome h/b for Ms. Wangechi for the 5th respondent

Ms. Odhiambo h/b for Mr. Bake for the 47th interested party

Mr. Thuo for the 52nd interested party

JUDGMENT

Introduction

1. This judgment disposes two consolidated Petitions, namely, Petition number E006 of 2023 (hereinafter referred to as the first Petition) and Petition Number E048 of 2023 (hereinafter referred to as the second Petition). By consent of the parties herein, the two Petitions were Consolidated on June 27, 2023.
2. The common thread in the two Petitions as far as I can discern it, is that they seek to challenge the mandate of the 1st respondent, the Salaries and Remuneration Commission (SRC) to review, set and advice on Non-Practice Allowance in the public service.
3. Through a circular Ref No SRC/TS/15/15 Vol. II (1) dated November 25, 2022, SRC addressed the County Executive Committee Members in charge of Public Service, County Secretaries, Chairperson County Public Service Boards and Secretaries of all County Public Service Boards, requesting them to provide written submissions on the allowances for review, setting and advice in the public service. Annexed to the circular, was a proposal titled;

“Proposed Review, Setting and Advice on Retreat, Taskforce, Non-Practice, Meal, Extraneous, Entertainment Allowances and Sitting Allowances for Institutional Internal Committees in the Public Service.”
4. Of relevance to this dispute is the proposal by the SRC to abolish payment of Non-Practice Allowance in the public service. This did not augur well with the Petitioners hence the instant dispute. Suffice to say, it is that proposal that provoked the instant dispute.

The KMPDU’s Case

5. The KMPDU which is the petitioner in the first Petition, is a trade union that represents the interests of the Medical Practitioners, Pharmacists and Dentists its members within the Republic of Kenya. Its Petition which is dated January 17, 2023, is supported by the affidavit of its Secretary General, Dr Davji Atela, sworn on even date.
6. The KMPDU avers that since time immemorial, its members in the public sector have been earning Non-Practice Allowance as part of their remuneration. That the purpose of this allowance is to compensate them for what they would have earned had they opted to remain in private practice.



7. It further avers that it currently has in place a Collective Bargaining Agreement (CBA) signed on June 30, 2017 between itself and the Republic of Kenya. Under article 5 of the CBA, one of the allowances that constitute the petitioner's members' remuneration is the Non-Practice Allowance.
8. According to the KMPDU, SRC published the letter dated November 25, 2022, in a bid to short circuit the next phase of its CBA negotiations and deny them a right to freely bargain with their members' employers. That this action was setting the stage for a gridlock during the next phase of CBA negotiations by denying them a right to freely engage in collective bargaining.
9. The KMPDU has further termed the advisory discriminatory for targeting employees in the service of County Governments as their counterparts in the National Government and agencies will continue to draw the said allowance.
10. The KMPDU further contends that even though its members were the majority of the public servants targeted by the advisory, SRC neither sought their comment on the same nor shared the advisory with them.
11. It further asserts that by taking away the allowance in the manner SRC is proposing, its members will not only be prejudiced through reduction in remuneration but they will also be arbitrarily deprived of property contrary to article 40(2)(a) of the *Constitution*.
12. In KMPDU's view, the impugned decision should not have been made without public participation given its impact. It further contends that SRC did not conduct a market study before the said proposal was made yet such a study is a pre-requisite for review as provided for by its own regulations.
13. It further states that considering the manifestly harsh economic times, it will be prejudicial for its members to lose any part of their remuneration. That in any event, it has been the legitimate expectation that any discussions on review of salaries and remuneration should be intended to improve rather than worsen the financial abilities of its members. As such, the advisory is a breach of this expectation.
14. The KMPDU further contends that the advisory threatens to infringe on the rights of its members as guaranteed under articles 10,19, 40, 41 and 47 of the *Constitution*.
15. Against this background, the KMPDU has asked the court to grant the following orders:
 - a. A declaration that the impugned letter by the Salaries & Remuneration Commission Reference No SRC/TS/15 Vol I (1) and dated November 25, 2022 to the extent of its reference to Non-practice Allowance, infringes and/or threatens to infringe the rights of the petitioner and those of its members guaranteed under articles 10, 19,40,41 and 47 of the *Constitution of Kenya* and is therefore null and void.
 - b. An order of prohibitory injunction barring the respondents and interested parties herein from implementing, with respect to the petitioner's members, the impugned letter by the Salaries & Remuneration Commission Reference No SRC/TS/15 Vol I(1) and dated November 25, 2022 to the extent of its reference to Non-practice Allowance.
 - c. An order of *certiorari* to bring in this Court for the purpose of its being quashed the impugned letter by the Salaries & Remuneration Commission Reference No. SRC/TS/15 Vol I(1) and dated November 25, 2022 to the extent of its reference to Non-practice Allowance.
 - d. Costs of the proceedings.



Dr. Mundia's Case

16. Dr. Kahura Mundia, who is the petitioner in the second Petition, describes himself as a facial surgeon, a lawyer, a public servant and a member of the KMPDU. Dr Mundia's Petition which is dated March 6, 2023, is supported by his affidavit of even date.
17. Dr Mundia avers that the circular, directive or guideline issued by the SRC was done with repugnant prejudice, with a predetermined course and without public participation from key stakeholders. He contends that the actions of SRC seek to limit the right to human dignity, right against slavery, servitude and force labour, right to collective bargaining, fair labour relations and rights to property.
18. He further avers that the Public Service Commission (PSC) has not given any interested party and stakeholders an opportunity to make representations before reviewing or making any recommendation to the national government on conditions of service in the public service.
19. Dr Mundia contends that SRC and PSC appear to be working at cross-purposes, with the SRC acting *ultra vires* by usurping functions and mandates assigned to the PSC as regards conditions of service in the public service as stipulated in the Constitution.
20. That the PSC has come out vide a letter dated March 6, 2023 and decried the conduct of the SRC as having usurped its powers in purporting to conduct public participation.
21. He further avers that SRC has occasioned untold suffering and psychological torture to public servants who are burdened and struggling with high rates of economic inflation when they consider they have to dedicate their careers to excessive levels of servitude when SRC fails to apply salary market adjustment to public servants' emoluments as it has been applied on other state officers' emoluments.
22. Dr Mundia further states that in seeking to implement the directive, circular and guideline, and undertake a review to reduce and remove Non-Practice Allowance, SRC failed to make viable alternatives to ensure that the rights, earnings and livelihoods of persons who will be affected are not infringed or disrupted.
23. He contends that persons have committed themselves in financial obligations which cannot be considered away arbitrarily and unreasonably. The operationalization of this directive, circular and guideline however legitimized, would occasion more social and economic harm than good to the affected public servants.
24. According to Dr Mundia, the directive, circular and guideline and proposal to review, advice, reduce and remove emolument components is arbitrary, lacks informed economic sense and is arrived at without the consideration of proximate and related factors. That it fails to take into account the harsh economic realities of an already struggling and disillusioned workforce trying to adjust to the increasing levels of inflation as evidenced by current consumer price indexes.
25. He further avers that contrary to the concerns raised by SRC on the directive, circular and guideline, and proposal for review and advisory, the mere reduction and removal of the emolument component would not in any way guarantee the balance and achievement of sustainability of the public wage bill as claimed. According to Dr Mundia, substantive economic development, measures, remedies and savings lie elsewhere than in the consideration to disenfranchise the public service.
26. Dr. Mundia further states that the impugned circular, directive or guideline and actions by the SRC and omissions by the PSC violate the fundamental right protected in the Constitution under article 41(5) on the right to collective bargaining and fair labour relations and article 2(6) of the Constitution which adopts the ILO Convention No. 98 into domestic law



27. On the basis of the foregoing, Dr Mundia seeks the following reliefs:
- a. A declaration be and is hereby issued that through its circular issued in December 2022 as well as the further public participation notice issued on February 20, 2023, the 1st respondent (SRC) acted *ultra vires* by usurping the powers of the 2nd respondent, (PSC).
 - b. That as consequence thereof, an order of *certiorari* do issue removing into this honourable court for purposes of being quashed the circulars, directives and guidelines on the decision to review, reduce and remove the non-practice allowance.
 - c. An order of Prohibition prohibiting the respondents herein by themselves, their servants, agents or employees from enforcing the said circulars, directives and guidelines on the decision to review, reduce and remove the non-practice allowance.
 - d. The honourable court be pleased to hold and declare the circulars, directives and guidelines by the 1st respondent on the decision to review, reduce and remove the non-practice allowance conflicts with article 1(3), 2(6), 10, 230, 232 and 234(1)(2)(4)(5) of the [Constitution of Kenya, 2010](#) thus unconstitutional, void and of no effect.
 - e. The honourable court be pleased to hold and declare section 11 of the [Salaries and Remuneration Commission](#) unconstitutional to the extent that it conflicts with article 230, 232 and 234(1)(2)(4)(5) of the [Constitution of Kenya, 2010](#).
 - f. The honourable court be pleased to hold and declare as a consequence of declaration of the unconstitutionality of section 11 of the [Salaries and Remuneration Commission](#), the regulations under section 26 of the [Salaries and Remuneration Act](#) are repealed to the extent that they sought to misapply, usurp and vary the functions and mandates of the public service commission as set out in article 234 and PSC operationalizing statute.
 - g. A declaration that to the extent that the 1st respondent by issuing circulars, directives and guidelines to review, reduce and remove the non-practice allowance payable to public servants, rights to equal protection and equal benefit of the law as guaranteed by article 25, 27, 28, 29, 30, 40, 41, 43 and article 47 of the [Constitution](#) have been violated and continues to be threatened.
 - h. A conservatory order be issued restraining the 1st and 2nd respondents by themselves, their servants, agents and/ or representatives or anyone appointed by them by law from undertaking public participation, collection and analysis of views on the question of legality, legitimacy and decision to publish a notice to review, reduce and remove the non-practice allowance.
 - i. A conservatory order be issued restraining the 1st and 2nd respondents by themselves, their servants, agents and/ or representatives or anyone appointed by them by law from implementing circulars, directives and guidelines on the decision to review, reduce and remove the non-practice allowance.
 - j. A declaration that the 1st respondent herein has infringed and/or threatened to violate the [ILO Convention 98](#) as ratified by Kenya in 1964.
 - k. A declaration that the 1st respondent herein has infringed and/or threatened to violate section 26 of the Employment and section 53 of the [Public Service Commission Act](#).
 - l. A declaration that negotiated and protected emoluments cannot be unfavourably, irrationally and unreasonably reduced and removed to occasion disadvantage to a person in any employment engagement.



- m. A declaration that negotiated and protected emoluments paid as allowances cannot be termed as double compensation with the aim of occasioning disadvantage to a person in any employment engagement.
- n. A declaration that salary market rate adjustments shall be applicable to all persons in any employment engagement to balance interests of achieving a competitive, efficient and effectively skilled public workforce.
- o. A declaration that reduction of emoluments shall not be considered without taking notice of effects of the current consumer price indexes in any given period of salary evaluation review or collective bargaining cycle.
- p. A declaration that the 1st and 2nd respondents herein have infringed on and violated the petitioner's right to access to justice and fair hearing decreed and protected under article 48 and 50(1) of the Constitution of Kenya ,2010;
- q. Costs of this suit
- r. Any other order(s) as this honourable court shall deem fit.

The Response by the Salaries and Remuneration Commission

- 28. The SRC opposed the petitions through grounds of opposition dated February 6, 2023 and a replying affidavit sworn on February 20, 2023 by Anne R Gitau, in her capacity as its Chief Executive Officer.
- 29. In its grounds of opposition, SRC contends that the petitions reveal no cause of action, reasonable or otherwise as the document referred to is a draft and has not gone through public participation. SRC contends that the dispute presented is therefore speculative and does not meet the test of ripeness as the issues raised are premature and are anticipatory and do not warrant adjudication by the court.
- 30. Ms. Gitau deposes in her replying affidavit that pursuant to its powers and functions and in line with the principles set out under article 230(5) of the Constitution and section 11 of the SRC Act, SRC, following consultative stakeholder engagement and public participation, developed an administrative framework to guide the streamlining of allowances in the public service.
- 31. That the overarching objective of the administrative framework is to provide a structured approach for streamlining the management and administration of allowances in the public service so as to improve transparency, accountability, equity and fairness, thereby, ensuring that the total public compensation bill is affordable and fiscally sustainable. As such, it proposes to advise on the review of Retreat Allowance, Taskforce Allowance, Non-Practice Allowance, Meal Allowance and Sitting Allowance for Institutional Internal Committees.
- 32. That in accordance with article 10 of the Constitution, it first invited select key stakeholders vide various letters dated November 25, 2022, to provide written submissions on the five allowances proposed for review.
- 33. Ms. Gitau further avers that seeking the views of stakeholders is normally done in a phased manner and in the instant case, the national and county governments, being the employers were invited to give their views in the first place.
- 34. That further, and in line with the orders issued by this court on February 7, 2023, it invited views from additional stakeholders by writing directly to the KMPDU vide a letter on February 16, 2023 and inviting other stakeholders and members of the public to submit their memoranda on views on the proposed review of the Non-Practicing Allowance before March 7, 2023.



35. She maintains that the petitions are founded on a misinterpretation of its letter dated November 25, 2022. That for the avoidance of doubt, the impugned letter only serves to invite key stakeholders to submit their views on its proposals on review of Retreat Allowance, Taskforce Allowance, Non-Practice Allowance, Meal Allowance and Sitting Allowance for Institutional Internal Committees.
36. Ms Gitau further avers that SRC has not issued advice on Non-Practice Allowance as alleged by the petitioners. As such, the petitions are premature and speculative as its proposals on review of Non-Practice Allowance and other Allowances are subject to an ongoing public participation process to which the petitioner has been afforded an opportunity to submit its views on.
37. Ms Gitau further states that it has not issued an advisory to abolish the Non-Practicing Allowance but rather has only invited views from stakeholders on its intention to advise on a number of allowances including Non-Practicing Allowance in the public service. That the issue is still at the public participation stage and no conclusive decision has been issued.

The Response by the 3rd Respondent.

38. The 3rd respondent responded to the Petitions through a replying affidavit sworn on February 22, 2023 by Mr Geoffrey E Kaituko, the Principal Secretary at the State Department for Labour & Skills in the Ministry of Labour and Social Protection.
39. Mr. Kaituko avers that the PSC as the employer of public officers in the National Government, enjoys independence while discharging its constitutional and statutory mandate. That it is therefore not bound by the advice given to it by the SRC in its final determination of the remuneration and benefits of public officers or civil servants borne out of an outcome of collective bargaining processes.
40. He maintains that courts must jealously safeguard and ensure that workers' standard of living improves and does not go down by among other things, restoring the loss of purchasing power that they might suffer by among other things, increasing their real income.
41. That further, the Ministry, in execution of her mandate consults from time to time, various Wage Councils which are internal economic advisory organs of the Ministry for specialised opinions on the terms and conditions of work in the respective economic sectors, in consultation with social partners as underpinned in the *Labour Institutions Act, 2007*.
42. He maintains that salary is a fundamental term of employment whose reduction and/or variance to the detriment of an employee would hurt the employee's economic livelihood and would inextricably expose an employee to pecuniary embarrassment and should not be done arbitrarily or unilaterally by an employer.
43. Mr Kaituko avers that there has been no upward salary review since 2017 or any tangible effort to improve the basic salaries of public officers in the public service and any increments have been arbitrary and discriminative. The bare minimum requirement on any salary increment is that it should sufficiently cushion all workers or employees against high rates of inflation.
44. In Mr Kaituko's view, the *Constitution* did not at any time contemplate a third-party interference in the contracts between an employer and an employee in the public service, thus the conscious wording in the *Constitution* in the use of the term "advise" in the case of public officers and conversely, in the use of the term "set and regularly review" in the instance of the salary of State officers.
45. He asserts that the PSC as the employer of public officers in the National Government enjoys independence while discharging its constitutional and statutory mandate of negotiating and determining the remuneration and benefits of its employees.



46. Mr Kaituko maintains that whereas it is generally accepted that the conduct of a comprehensive job evaluation exercise is the prerogative of the employer, it is now a well established practice, that the exercise must be done in consultation with the employees and where the employees are unionized, the exercise must be done in consultation with the Unions.
47. He states that Non-Practicing Allowance is a driver by skills demand in the market, relative to the number of available professionals against the general population and is a sector specific allowance negotiated for doctors, state counsels amongst other professionals to forestall high attrition in the public service and to ensure attraction and retention of critical professional skills in order to compensate them in comparison with their contemporaries in other institutions in the public service.
48. Mr Kaituko further states that the SRC ought to appreciate that while exercising its advisory role on salaries and remuneration of public officers, does not unduly ignore CBAs painfully crafted by trade unions and employers. That it should not be seen to be siding with employers and must always strike a balance, invoke fairness and ensure employees get paid for work done.
49. According to Mr Kaituko, civil servants in Kenya can hardly survive from month to month, as the cost of living far outstrips their pay as evidenced by the current high rate of inflation in Kenya. He further avers that many workers had their salaries reduced during the Covid-19 Pandemic which had a monumental effect on the global economy.

Response of the Public Service Commission

50. Opposing the petitions, the PSC filed grounds of opposition dated February 21, 2023 and subsequently, a replying affidavit sworn on May 22, 2023 by Dr Simon K Rotich, its Chief Executive Officer.
51. It is worth pointing out that the replying affidavitsworn by Dr Rotich is at variance with the Grounds of Opposition.
52. Dr Rotich avers that the Constitution makes a distinction between the mandate of the SRC with respect to state officers and with respect to public officers.
53. He further avers that in so far as public officers are concerned, the SRC cannot issue an advisory suo moto without a review being sought from it. That any such maneuvers will be tantamount to an affront on its constitutional and legal mandate, hence illegal and invalid.
54. He further states that to the extent of section 11(b),(d),(e) and (f) of the Salaries and Remuneration Commission Act, the provisions are unconstitutional as the SRC donated powers to itself through legislation, which it had not been given by the Constitution.
55. Dr Rotich contends that the SRC is overstepping its mandate and veering into the employment role of state organs with respect to public officers and encroaching on the mandate of other Constitutional bodies which are responsible for reviewing conditions of service for public officers under them.
56. He maintains that the parties to a CBA are three being the trade union, the employer's organization and the employer. That the SRC in the instant case is exceeding its mandate by trying to advise that the Non-Practicing Allowance be abolished and cease to be payable upon the lapse of the existing CBAs. Dr Rotich contends that SRC cannot be a third party in an employer-employee relationship to clear negotiated agreements and even to monitor implementation of the advice it has given.
57. Dr Rotich avers that the SRC can only give advice on the abolition and scrapping off of the Non-Practicing Allowance in a case where the employer has, in consultation with the employees, revised its



- terms of the employment contract and sought for advice from it. That in the instant case, the SRC has not provided evidence of any request from the PSC or County Public Service Boards to whom the advice they wish to give.
58. That by issuing the letter dated November 25, 2022 and the notice in the newspaper dated February 21, 2023, the SRC is not giving room to the employers to consult the employees whose wages may be affected as it seeks to proceed without the consent of the employee which goes against the principles set out under article 47 of the Constitution, the Fair Administrative Act and the Employment Act.
 59. Dr. Rotich further states that whereas it is generally accepted that the conduct of a comprehensive job evaluation exercise is the prerogative of the employer, it is now a well established practice, that the exercise must be done in consultation with the employees and where the employees are unionized, the exercise must be done in consultation with the Union (s). That the PSC which is the employer in the National Government has not conducted job evaluation to enable it review the terms and conditions of the employees under it and therefore ask the SRC to advise on the new terms and conditions.
 60. He further states that the SRC issued a Compendium of Remuneration and Benefits for Public Service in December, 2022 that protects the Remuneration and Benefits for other public officers serving in the civil service and set, reviewed and advised on health workers allowances including Non-Practice Allowance, payable to health personnel deployed in hospitals/health facilities excluding officers performing administrative functions, whose new rates were to apply to all public officers at National and County Governments and State Corporations from the scheduled date of implementation whose scope in application, requires employers in the public service to initiate CBAs with the relevant trade unions in the implementation.
 61. That further, the SRC, while reviewing the salaries of State Counsels in the Office of the Attorney General & Department of Justice, observed the high attrition of State Counsels to other institutions in the Public Service and noted that remuneration is one of the factors contributing to high attrition. Consequently, the PSC approved a review of remuneration for specific cadres of State Counsels by introducing labour market adjustment component to harmonize the remuneration structure for legal staff at the Office of the Attorney General & Department of Justice with those at the Office of the Director of Public Prosecutions (ODPP) whose gross pay is currently lower than those of comparable jobs at ODPP.
 62. He asserts that the payment of the Non-Practice Allowance is in line with the Conflict of Interest Bill, 2023 which, if passed into law, will bar a public officer serving on a full-term basis from participating in any other employment that amounts to privately practicing the same profession for which the official is engaged.
 63. According to Dr Rotich, courts must jealously safeguard and ensure that workers' standard of living improves and does not go down by among other things, restoring the loss of purchasing power that they might suffer by among other things, increasing their real income.

The Response by the 47th Interested Party

64. The Nairobi County Public Service Board, being the 47th interested party filed its grounds of opposition dated May 12, 2023 in response to the 1st Petition.
65. The 47th interested party contends that the Petition does not raise any constitutional issues as it is based on merely anticipated, future occurrences that lack basis and remain unsubstantiated. It contends that the Petition offends the doctrine of constitutional avoidance and ripeness and as such should be summarily dismissed with costs.



The Response by the 48th Interested Party

66. In response to the 1st Petition, the Council of Governors, the 48th interested party filed its grounds of opposition dated February 17, 2023.
67. The 48th interested party contends that the Petition is premature and speculative and thus unripe for adjudication. That this goes against the doctrine of ripeness which prevents parties from approaching court prematurely at a time when they have not been subject to prejudice. That there exists no justifiable controversy at the time the Petition was filed that is appropriate for Judicial determination and this court cannot be subjected to proceedings where the questions for determination are abstract and anticipatory.
68. It states further that the letter dated November 25, 2022 is merely a request for stakeholders meeting and does not amount to an advisory that can be implemented. That the documents annexed are draft in nature and are due for stakeholder engagement and therefore, are neither operational nor capable of being implemented.

The Response by the 52nd Interested Party

69. On its part, the 52nd interested party filed grounds of opposition through which it contends that it is not a necessary party to the determination of the issues in controversy between the parties and that it is wrongly joined to the 1st petition.

The Submissions

70. When the matter came up for directions on July 27, 2023, the court directed that the petitions be canvassed by way of written submissions and to that end issued timelines for purposes of compliance.

Submissions by the KMPDU

71. The KMPDU has submitted that issues touching on salaries, benefits and remuneration of state officers fall completely within the domain of SRC where it exercises sweeping and absolute power. That in exercising these powers, SRC sets and reviews state officers' salaries, remuneration and benefits independently. That however, the SRC has very limited power concerning the salaries and benefits of other public servants apart from state officers, as it can only advise the relevant employers within the public service, with said employers having the final say in the matter.
72. KMPDU has further argued that SRC does not have the power to set and/or review the salaries, benefits and remuneration of public officers other than state officers. It anchored this argument on the provisions of article 230(4) of the *Constitution* which lays down the mandate of the SRC and the determinations in the case of *Kenya National Union of Nurses v Chairperson Salaries & Remuneration Commission & 4 Others* [2016] eKLR and *Union of Domestic Hotels, Education and Allied Workers (Kudbeiba Workers) v Salaries Remuneration Commission* [2014] eKLR.
73. The KMPDU maintains that by purporting to decide through the impugned letter, its members who are employed by the interested parties herein would no longer earn the Non-Practicing Allowance, a decision it contends, proves that the SRC acted *ultra vires* its powers.
74. It is KMPDU's further submission that a decision to abolish/propose the abolishment of the Non-Practicing Allowance without complying with regulations 4,5, and 12 of the *Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations* is not only sporadic and haphazard but also injurious to its members and is therefore illegal and unfounded.



n support of this argument, it has sought to place reliance on the case of *County Government of Kakamega & 2 Others v Salaries and Remuneration Commission; County Government of Mombasa (Interested Party)* [2018] eKLR.

75. The KMPDU states in further submission that the arbitrary review of an employee's salary and remuneration by abolishing a component of the salary that the employee has been earning is an affront to sections 10(5) and 26(2) of the *Employment Act* and article 9 of the *ILO Convention No. C95 of 1949*.
76. Further, that by proposing an impugned review at a time when it was preparing to engage the Interested Parties in the next phase of collective bargaining would be unlawful as the SRC has no role in collective bargaining. In its view, such action would be unconstitutional. It referenced the case of *Teachers Service Commission v Kenya National Union of Teachers (KNUT) & 3 Others* [2015] eKLR, in support of this position.

Dr Mundia's Submissions

77. In his submissions, Dr Mundia states that it is clear that one of the functions of SRC is to advise the national and county governments on the remuneration and benefits of all other public officers. To this end, he has argued that the law is advisory and nothing more and the body empowered in law to set, review and determine the salaries and allowances payable to public servants is the PSC.
78. It is Dr Mundia's further submission that by usurping the roles of the PSC, SRC acted ultra vires and as such, its circular of December 2022 as well as the invitation for public participation and the resultant public participation programme is a nullity in law and cannot stand the test of constitutionality. He urged the court to adopt a constitutionality-compliant approach in interpreting section 11 of the *SRC Act*, a position expressed in the case of *Mbae v Speaker, County Assembly of Nakuru & another; others (interested Party)* 2022 KEHC 3313 (KLR).
79. Dr Mundia has further argued that this court ought to consider that the effect of the application of section 11 of the *SRC Act* is to usurp the powers granted to PSC on the subject and to thwart the demarcation set out between articles 230(4)(a) and 230(4)(b) of the *Constitution*. It is his submission that the architectural design of the *Constitution* was set out to limit the powers of SRC and let remuneration of public servants be determined by PSC and not SRC.
80. It has also been submitted by Dr Mundia that the said circular, directive or guideline and actions by SRC and omissions by the PSC, violate the fundamental right protected in the *Constitution* under Article 41(5) on the right of collective bargaining and fair labour relations.

Submissions by the SRC

81. On its part, the SRC submits that it is not in dispute that the consolidated Petitions herein challenge a proposed decision that is currently under the subject of stakeholder engagement and public participation and parties to the suit have tendered their views on the proposal to review Non-Practice Allowance, to it for consideration before making a decision. As such, the key question for this court to decide is whether the issues raised in the consolidated Petitions are justiciable.
82. The SRC further posits that it is the singular body, established by the *Constitution*, entrusted with the responsibility to address matters related to remuneration and benefits to both state officers and all public officers.
83. It is SRC's position that no other entity, including the PSC is vested with the authority to set and advise the national and county governments on matters concerning the remuneration and benefits of all other public officers.



84. Placing reliance on the determination in *TSC v KNUT & 3 Others* [2015] eKLR, the SRC further submits that the mandate to determine pay for all other public officers is not the sole preserve of respective employers, but rather a shared responsibility involving itself, the national and county governments and other stakeholders. It invited the court to find as such.
85. Referencing the decision in the case of *Muthuuri & 4 Others v National Police Service Commission & 2 Others (Petition 15 (E022) of 2021)* (2023) KESC 52 (KLR) (Civ) by the Supreme Court, the SRC submits that its advice is binding.

Submissions by the PSC

86. On its part, PSC has submitted that it is guided by the principles of fair labour practices under article 41 of the *Constitution* and the Principles of Fair Administrative Action under article 47 of the *Constitution* and enabling legislation. That the exercise of SRC's mandate under article 230(4)(b) of the *Constitution* must be read together with PSC's mandate under article 243(2)(g) of the *Constitution*. It contends that it is also only upon the review of its Regulations, 2020, that advice may be sought from the SRC on the issue at hand.
87. PSC further submits that in so far as public officers are concerned, SRC cannot issue an advisory *suo moto* without the same being sought from it and that any such manoeuvres will be tantamount to an affront on its constitutional and legal mandate, hence illegal and invalid.
88. According to PSC, it is clear that the mandate of the SRC with regard to review of allowances allocated to public officers is purely advisory and only when such advice has been sought can they give it. PSC contends that it is clear that the recommendations given by the SRC are not binding upon the entity which has been addressed unless where it has been specifically provided for by law, which is not the case in this matter.
89. PSC maintains that employers of respective public officers are the ones vested with the responsibility of setting their remuneration, and therefore, it is the body that is vested with the mandate of reviewing salaries and allowances for public officers as provided for under article 234(2)(g) as read with regulation 46 of the *PSC Regulations, 2020*.
90. In further submission, PSC states that the impugned letter and the subsequent notice in the newspaper by the SRC, did not give room for the employer to consult employees whose wages were to be affected. That this action goes against article 47 of the *Constitution*, the *Fair Administrative Actions Act* and the *Employment Act*.

Submissions by the 47th Interested Party

91. It has been submitted by the 47th interested party that the impugned letter by the SRC does not violate or threaten to violate the petitioners' rights under the *Constitution* as the same was a mere proposal. It argues that the petitioners are therefore seeking declaratory orders against proposals that are still underway and which have not in any manner, crystallized or excluded their input. In support of this argument, the 47th interested party invited the court to consider the determination in the case of *Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 Others* (2019) eKLR.
92. It has been further submitted that the petitions are premature and speculative, and that presently, there is no tangible threat to or violation of the petitioners' rights. That therefore, the doctrine of ripeness should be applied in determining the same. In support of this position, reliance was placed on the case of *Kiriwa wa Ngugi & 19 Others v Attorney General & 2 Others* [2020] eKLR.



Submissions by the 52nd Interested Party

93. The 52nd interested party has submitted that the Petitions raise no cause of action against it as it is not party to any CBA with either of the Petitioners. As such, it is not a necessary party to the determination of the issues in controversy.
94. It is further submitted that as per article 260 of the *Constitution*, the members of the KMPDU, as medical practitioners in the public sector, are public officers and therefore fall within the mandate of the SRC. As such, the SRC acted within its constitutional mandate in reviewing the allowances.
95. The 47th interested party further posits that there exists no cause of action that infringes or threatens to infringe the petitioners' rights under the *Constitution* and therefore the petitions are premature. According to the 47th interested party, the proposed reviews are still at their consultative stages and cannot be said therefore to infringe any rights under the *Constitution*.

Analysis and Determination

96. I have considered the pleadings and the evidentiary material on record as well as the opposing submissions and the following issues rise for consideration by the court: -
 - i. Justiciability of the issues raised in the consolidated Petitions; and
 - ii. Whether the SRC overstepped its mandate in proposing to abolish payment of Non-Practice Allowance in the public service.

The Question of Justiciability

97. According to the SRC, the letter dated November 25, 2022 is a call for view on its proposals. It argues that since the consolidated Petitions challenge a proposed decision that is currently under public participation and parties to the suit have submitted their views on the proposals, the issues raised in the consolidated petitions are not justiciable at this stage. The SRC further contends that the issues raised by the petitioners may only concretise after it has taken into account all views submitted by participants and it has then advised the national and county governments as is its mandate under article 230(4)(b) of the *Constitution*.
98. This position was supported by the 52nd interested party who has argued that the petitions are premature and offends the principle of constitutional avoidance and ripeness.
99. The 47th interested party has also adopted the position taken by the SRC and argues that the petitioners are seeking declaratory orders against proposals that are still underway and which have not in any manner crystallised.
100. The *Black's Law Dictionary* 9th Edition, defines justiciability to mean the quality or state of being appropriate or suitable for adjudication by a court.
101. Applying the doctrine of justiciability in the case of *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR, the court reckoned thus: -

“The citadel of the power to determine disputes through the exercise of judicial authority and the capacity to commence action for such determination is based however on the rather universal concept or principle of justiciability. This concept has found much favour in most jurisdictions. It also gathers much support from the engraved supplementary doctrines of ripeness, avoidance and mootness.



By justiciability it is meant a matter “proper to be examined in courts of justice” or “a question as may properly come before a tribunal for decision”: see *Black’s Law Dictionary* 9th Edn, pp 943-944. In other words, courts should only decide matters that require to be decided. Thus in *Ashwander v Tennessee Valley Authority* [1936] 297 US 288, the US Supreme Court stated that courts should only decide cases which invite “a real earnest and vital controversy”.

102. Fundamentally, a justiciable issue is one that is capable of being determined by a court of law. Put another way, justiciability refers to a matter that a court can adjudicate. Therefore, if a case is non-justiciable, the court cannot hear and determine it.
103. As stated herein, the genesis of the instant dispute is the circular dated November 25, 2022, issued by the SRC through which it has sought stakeholder views with regards to review, setting and advice on a number of allowances including Non-Practice Allowance in the public service. This being the case, can it then be said that the issue is capable of adjudication?
104. According to Dr Mundia and the PSC, the SRC in purporting to exercise the powers bestowed upon it, has acted ultra vires hence the invitation for stakeholder views is a nullity in law. Evidently, the court is being called to determine the role of SRC with regards to setting, reviewing and advising on the payment of Non-Practice Allowance in the public service.
105. In effect, the second Petition brings up a germane issue which is whether in the first place, SRC is constitutionally mandated to set, review and advice on the remuneration payable in the public service. In this context, is the SRC constitutionally mandated to review, set and advice on Non-Practice Allowance in the public service? Better still, does SRC have the power to propose to abolish payment of Non-Practice Allowance in the public service?
106. In light of the foregoing, it is evident that the issues in dispute herein are not limited to determining whether the circular dated November 25, 2022 by the SRC amounts to an advisory and the constitutionality of such an advisory.
107. Accordingly, it is my considered view that the dispute is justiciable in so far as the court is being called to determine whether the SRC acted ultra vires and overstepped its mandate in proposing to abolish payment of Non-Practice Allowance in the public service. To that extent, the dispute has crystallized and is justiciable.

Whether the SRC overstepped its mandate in proposing to abolish payment of Non-Practice Allowance in the public service.

108. Pursuant to article 230 of the *Constitution*, the SRC is mandated to set and regularly review the remuneration and benefits of all state officers. With respect to public officers, the SRC is mandated to advise the national and county governments on the remuneration and benefits payable.
109. In performing its functions, SRC is required to take into account the principles set out in article 230(5) of the *Constitution*.
110. In the conventional sense and in terms of the Industrial Relations Charter, there exists a tripartite system recognizing three players being the employer, the trade unions representing the employees and the Government, interacting in good faith. Indeed, this is the position under *ILO Convention 144*. However, in the new dispensation and with the establishment of the SRC, there is a new player in the collective bargaining process when it comes to public officers. The question is to what extent can this new player participate in the process?



111. One of the primary rights enjoyed by employers and duly recognized trade unions such as the KMPDU, is the right to engage in collective bargaining. Indeed, this right is guaranteed under article 41(5) of the [Constitution](#) and is recognized under [ILO Convention 98](#).
112. Essentially, the parties responsible for the formulation of Collective Bargaining Agreements and setting of the terms and conditions of service are the employers and duly recognized trade unions. It is through the collective bargaining process that employers and trade unions freely engage and agree on the terms and conditions of employment.
113. One of the key terms of employment negotiated and agreed upon during the collective bargaining process is remuneration and benefits.
114. Non-practice Allowance is a form of financial compensation paid by the Government to certain categories of professionals who cannot practice due to their engagement in the public service. Ideally, it is a compensation for their sacrifice of private practice after joining the government service.
115. Therefore, Non-Practice Allowance falls among the remunerative allowances payable and adds up to the total compensation due to an employee. As such, it constitutes part of an employee's remuneration and is a key term of service.
116. It therefore follows that remuneration being a key term of service, is the preserve of an employer and a product of a collective bargaining process in cases where there is a duly recognized trade union.
117. In view of the foregoing, it is my view that the proposal by SRC to abolish the Non-Practice Allowance currently paid to certain categories of public officers is tantamount to setting the terms and conditions of service in the public service.
118. The way I see it, SRC can only play its advisory role, where a term of service, such as remuneration, has been set by the employer or negotiated and agreed upon between an employer and a trade union in the process of collective bargaining.
119. On this score, my thinking aligns with position taken by the court in the case of [Union of Water & Sewage Employees v Mathira Water & Sanitation Company Limited and others](#) [2013] eKLR thus:

“the [Constitution](#) recognizes that intrusion by the Commission into the entire area of public sector collective bargaining would have the effect of eroding the rights and freedoms given by article 41. This is why the Commission comes in as an advisor under article 230(4)(b) rather than an active player...”
120. As stated herein, terms and conditions of service are serious matters that are negotiated between employers and recognized trade unions hence SRC cannot be an active player to the extent of proposing to abolish payment of Non-Practice Allowance.
121. Even more, SRC cannot dictate to employers how to negotiate with trade unions in the process of collective bargaining, as it proposes to do in this case. Therefore, the proposal by SRC to the effect that payment of the Non-Practicing Allowance ceases to be payable upon lapse of existing CBAs, is contrary to the spirit of the collective bargaining process as envisaged under article 41(5) of the [Constitution](#).
122. I reiterate that SRC only performs its advisory role once parties (employers and trade unions) have negotiated and agreed on the terms and conditions of service of the employment. Certainly, this cannot happen before such terms are set by the key players in the employment relationship.



123. Fundamentally, SRC cannot propose to abolish a key term of service that has already been negotiated and agreed upon between an employer and an employee (or through a recognized trade union through a collective bargaining process). By so doing, SRC is essentially setting and determining a key term of service in the employment relationship hence overstepping its constitutional mandate which is limited to an advisory role.
124. Therefore, in as much as the SRC has the duty to advise the employers (public institutions), on the terms of service, it must allow them latitude to set the key terms of service and to negotiate freely with recognized trade unions and ILO Convention 98 is germane in this respect.
125. In addition to the foregoing, the Supreme Court in the case of *Muthuuri & 4 others v National Police Service Commission & 2 others (Petition 15 (E022) of 2021)* [2023] KESC 52 (KLR) determined that whereas article 230(4)(b) integrated SRC in the determination of matters relating to remuneration and benefits of public officers, the said provision must be read alongside other provisions of the *Constitution* which confer power to some of the chapter 15 Commissions to review and make recommendations on the conditions of service of public officers under them.
126. In this regard, the court underscored the powers of the PSC under article 234(2)(g) to “review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service” with the exception of state offices, an office of high commissioner, ambassador or other diplomatic or consular representative of the Republic.
127. The Apex court proceeded to hold that a reading of the *Public Service Commission Act* and the *Judicial Service Act* shows that, in reviewing and making recommendations on those conditions of service, consultation with SRC is not mandatory.
128. Applying the above determination by the Supreme Court and in view of the provisions of article 234(2)(g) of the *Constitution*, it is clear that the power to review and make recommendations to the National Government in respect of conditions of service of public officers rests with the PSC.
129. Accordingly, and as I have stated herein, by proposing to abolish payment of Non-Practice Allowance to public officers, the SRC is essentially setting and recommending a term and condition of service for public officers. To that extent, the SRC acted outside its mandate under article 230(4) of the *Constitution* and in so doing, took over the role of PSC under article 234(2)(g) of the *Constitution*.
130. In light of the foregoing reasons, it is my finding that SRC overstepped its mandate and acted ultra vires in proposing to abolish payment of Non-Practice Allowance in the public service.
131. In addition to the foregoing, best labour practices demand that any review of employee benefits should be incremental. As such, any emolument that has accrued to an employee should not be unfavorably, reduced or removed the disadvantage of the employee.
132. In this case, the proposal by the SRC to take away a benefit that has accrued to employees is no doubt detrimental and is a practice that should be discouraged. As it is, this is an affront to the right to fair labour practices which is guaranteed under article 41 of the *Constitution*.

Disposition

133. In total sum, I am satisfied that the consolidated Petitions are merited and the court therefore issues the following declarations and orders:



- a. An order of *certiorari* is hereby issued to bring into this court for purposes of quashing the 1st respondent's (SRC) circular No. SRC/TS/15 Vol II (1), dated November 25, 2022, to the extent of its reference to Non-practice Allowance.
- b. An order of prohibition is hereby issued prohibiting the 1st respondent (SRC) from enforcing the said circular No SRC/TS/15 Vol II (1), dated November 25, 2022, to the extent of its reference to Non-practice Allowance.
- c. An order is hereby issued declaring the circular No SRC/TS/15 Vol. II (1), dated November 25, 2022, by the 1st respondent (SRC) on the proposal to abolish Non-practice Allowance to be conflict with articles 41 and 234(2)(g) of the Constitution thus unconstitutional.

134. Considering the nature of the consolidated Petitions, I am of the view that the appropriate order to make with regards to the issue of costs is that each party bears their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2023.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Juma for the 1st Petitioner

No appearance for the 2nd Petitioner

Mr. Sitienei for the 1st Respondent

No appearance for the 2nd, 3rd and 4th Respondents

Mr. Koome instructed by Ms. Wangechi for the 5th Respondent

Ms. Odhiambo instructed by Mr. Bake for the 47th Interested Party

Mr. Thuo for the 52nd Interested Party

Abdimalik Hussein Court Assistant

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under article 48 of the Constitution and the provisions of section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

