



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

C.B.A NO. E007 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF COMMERCIAL,

FOODS AND ALLIED WORKERS.....UNION

VERSUS

NATIONAL HOSPITAL INSURANCE FUND.....EMPLOYER

AND

SALARIES AND REMUNERATION

COMMISSION.....APPLICANT/INTENDED INTERESTED PARTY

RULING

The dispute herein arose following the objection to the registration of the CBA between the Kenya Union of Commercial Food and Allied Workers, a trade union registered under the Labour Relations Act, and National Hospital Insurance Fund, the Employer who is a state corporation charged with providing mandatory health insurance as set out under the National Health Insurance Act. The CBA is for the period 1st July 2017 to 30th June 2021.

This is the second time that this particular CBA is before this court for adjudication.

The first time was through **Cause No. 1389 of 2018 between National Hospital Insurance Fund v Kenya Union of Commercial Food and Allied Worker's (KUCFAW)**. The suit was filed by NHIF following strike notice by the Union (KUCFAW) due to disagreement over the decision of NHIF to engage the Salaries and Remuneration Commission to undertake a job evaluation for the NHIF.

In the judgment delivered on 6th March 2020, I ordered as follows:-

“It is for these reasons that I find that the claimant having negotiated and concluded the CBA with the respondent, it cannot renege on the same by seeking advice of SRC after the fact.

It is on this basis that I find the claim herein without merit and order that the CBA be signed and registered as agreed between the claimant and the respondent with wage increase as per draft CBA being 8% with effect from 1st July 2017, 8% with effect from 1st July 2018, 10% with effect from 1st July 2019 and 12% with effect from 1st July 2020.

I note that the wage increases for the claimant's non-unionisable employees was paid as per circular dated 11th February 2019 referred to above.

The parties are directed to immediately sign the CBA and process the same for registration by the court to avoid any further delay in implementation of the same.”

The resultant CBA is the one before this court for registration.

When the CBA came up of registration on 19th October 2020, Mr. Nyumba representing the Union and Mr. Johnson Mwanzia representing

the Employer had no objection to the registration. Ms. Wafula representing the Salaries and Remuneration Commission (SRC) however raised objection to the registration on grounds that SRC appealed against the decision in **Cause No. 1389 of 2018**.

The SRC was directed to file a formal objection to the registration of the CBA which it did though the application dated 19th November 2020. In the application, the SRC seeks the following orders: -

- a) *The applicant herein be joined as an interested party.*
- b) *There be a stay in the implementation of the 2017 – 2019 CBA registered in court on 20th September, 2018.*
- c) *There be a review and setting aside in the CBA 006 to pave way for due compliance with Article 230(4) of the Constitution 2010 the SRC Act.*
- d) *The court declines the registration of the 2017 – 2021 CBA and declares it irregular for want of compliance with statutory provisions.*
- e) *Stay of the Courts judgment issued on 14th March, 2020.*

Vide the replying affidavit of Andrew Kinyua for the KUCFAW sworn on 8th December 2020, the Union states that the role of SRC in CBA negotiations of NHIF was questioned in Petition No. 40 of 2015 between NHIF and KUCFAW with the SRC as the 2nd Respondent and the Attorney General as the 3rd Respondent. In the decision of the court delivered on 18th March 2016, the court made a determination as follows –

"In conclusion the Court allows the following prayers only in the Petition.

- (a) *A declaration that the Petitioners constituted under the Act does not fall under the mandate of the 2nd Respondent.*
- (b) *A declaration that the Salaries and Remuneration Commission*
- (c) *Act and Salaries and remuneration Commission regulations 2012 in so far as they purport to confer on 2nd Respondent jurisdiction to set or restrict remuneration and benefits for public officers other than state officers are inconsistent with the Constitution hence null and void to that extent.*
- (d) *The insistence by the 2nd respondent that its advice to the petitioner is binding is counter to the principal of Collective Bargaining as envisaged under ILO Convention on the Right to Organize and Collective Bargaining, 1949 (No. 98) and by virtue of Article 2(6) of the Constitution, unconstitutional.*
- (e) *A declaration that the Petitioner be at liberty to conclude the Collective Bargaining Agreement reached in July, 2013 with the 1st respondent.*
- (f) *There will be no orders as to costs.*

It is so ordered."

That the appeal filed against the judgment is pending before the **Court of Appeal in Civil Appeal No. 156 of 2016**. It is the Union's position that there is no stay of execution of the judgment. That the CBA which was for the period 1st July 2013 to 30th June 2018 that was the subject of the said judgment has been implemented in full and the CBA now before the court is the successor to the said CBA.

It is the Union's position that the CBA between it and NHIF is not subject to advice from SRC as was decided in Petition No. 40 of 2015. It is further the Union's position that RC has no mandate in CBA negotiations between the NHIF and KUCFAW.

NHIF, the Employer herein, did not file any reply to the application filed by SRC. It further did not file any submissions.

Determination

There are only two issues for determination herein. The first is whether SRC has a mandate in the CBA negotiations between NHIF and KUCFAW, and two, whether SRC is entitled to the prayers sought.

Mandate of Salaries and Remuneration Commission (SRC)

The mandate of SRC is provided for under Article 230(4) of the Constitution and Section 11 of the SRC Act as follows: -

(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 recognise productivity and performance;

and

d. transparency and fairness.

Section 11 of SRC Act

11. Functions of the Commission

In addition to the powers and functions of the Commission under Article 230 (4), the Commission shall—

(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 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;

(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.

Public Officer is defined by Constitution to mean: -

“public officer” means—

(a) any State officer; or

(b) any person, other than a State Officer, who holds a public office;

“public office” means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;

“public service” means the collectivity of all individuals, other than State officers, performing a function within a State organ;

“State officer” means a person holding a State office;

“State organ” means a commission, office, agency or other body established under this Constitution;

From the definitions under the Constitution, as submitted by the Unions, the employees of NHIF do not fall under the category of public officers or state officers under the mandate of the SRC. They are not covered under any of the definitions above. They are neither public officers nor state officers. NHIF itself also does not fit under the definition of state organ.

Again as submitted by the Union, state corporations are categorised in three groups being: -

- (i) Commercial corporations
- (ii) Independent regulatory agencies, and
- (iii) Research institutions including public universities, tertiary education and training institutions.

NHIF falls under the 1st category of commercial state corporations with its own income through member contributions, investments and assets. It is from these funds that the NHIF pays for its operations, including staff salaries and benefits.

In a ruling delivered by Abuodha J. on 27th November 2014 in **Cause No. 1882 of 2014 Chemelil Sugar Company Limited & 2 Others v Kenya Union of Sugar Plantation and Allied Workers (2014) eKLR**, which I agree with, and which I will quote in *extenso*, the Judge had this to say –

39. From the foregoing provisions of the Constitution and relevant statutes the following is deducible as concerns the applicant and its workers (the Respondents in this application); first, the applicants are not state organs within the meaning of article 260 of the Constitution. That is to say they are not commissions, offices, agency or other body established under the Constitution. The applicants derive their existence from the State Corporations Act as stated earlier in this ruling and not the Constitution.

40. Second, the applicants’ employees are not public officers within the meaning of article 260 of the Constitution. That is to say, their remuneration and benefits are not payable directly (emphasis mine) from consolidated fund or directly from money provided by parliament. Neither the National Treasury nor Parliament in the government Budget Cycle appropriate public funds for the direct payment of salaries and remuneration of the applicants’ workers.

41. The applicants are entirely responsible for their wage bill payable from income and revenue generated from their operations or borrowing from financial institutions and or

National Government.

42. Whereas it may be true that the initial set up of commercial state corporation could be entirely from resources made available by the national treasury, it does not necessarily mean that salaries and remuneration will continuously be payable directly from these funds. The corporations once set up become bodies corporate capable of borrowing and carrying out commercial activities for profit like any other private company.

43. It therefore follows that commercial state corporations such as the applicants in which the government is mere investor lie beyond the mandate of the Salaries Remuneration Commission.

44. Consequently, the letter dated 13th October, 2014 from Salaries Remuneration Committee requiring the 1st applicant and by extension the 2nd applicant to renegotiate the Collective Bargaining Agreement registered by this Court on 17th October, 2013 was issued without jurisdiction and of no legal consequence on the Collective Bargaining Agreement voluntarily negotiated and signed between the applicants and their employees’ union.

45. Statutory bodies derive their powers and jurisdiction from the constitutive statute. They have no inherent powers hence no amount of operational creativity or innovation can confer jurisdiction where none exists.

46. It is erroneous for Salaries and Remuneration Commission to assume that it was the intention of the Constitution and indeed Parliament to give it omnibus jurisdiction over any body or agency where public funds may have been invested even where such funds are repayable or not clearly discernible from other income or revenue generated by the operations of the body or agency concerned.

47. As stated earlier commercial state corporations although are usually formed to address specific social-economic needs are actually investments by the government solely or jointly with other investors in return for profits. Monies appropriated by the government to these corporations are usually loans which are repayable to the National Treasury.

48. Whereas the state of law may currently appear cloudy on the scope and breadth of Salaries and Remuneration Commission’s jurisdiction over state corporations generally, this absence of clarity until addressed by Parliament cannot be construed to admit of Salaries and Remuneration Commission’s jurisdiction over commercial state corporations especially when the Constitution as currently crafted provides that the mandate of Salaries and Remuneration Commission extends only to cover state officers and

public officers whose remuneration is payable directly from the consolidated fund or directly out of money provided by parliament.

49. *The Collective Bargaining Agreement in issue was voluntarily negotiated between the applicant's and the Respondents and agreement thereon reached. The Court presumes that the applicants must have exercised due diligence during such negotiations including consideration over its financial implication and were satisfied that it was fiscally sustainable hence signed it. They have so far no complaint about it except that Salaries and Remuneration Commission who is a third party is not happy with it.*

50. *Collective Bargaining Agreement is a fundamental right recognized both by the ILO Conventions and our Constitution. It concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment.*

51. *This right must be accorded equal protection as any other fundamental human rights. Its derogation must therefore be for good cause and deemed necessary in the context of an open and democratic society. In this respect Salaries and Remuneration Commission cannot by assumed jurisdiction purport to emasculate this right of the Respondents.*

52. *The Court therefore reaches the conclusion that the directive by Salaries and Remuneration Commission that the applicants re-open negotiations on the Collective Bargaining Agreement registered by this Court on 17th October, 2014 was made without jurisdiction with the consequence that the applicants' application dated 24th October, 2014 and indeed the entire claim is declared without merits and is hereby struck with no order as to costs."*

Again in **Petition No. 40 of 2015**, Abuodha J. had opportunity to determine a petition filed by NHIF against the KUCFAW, SRC and Attorney General in **National Hospital Insurance Fund Management Board v Kenya Union of Commercial Food and Allied Workers & 2 Others (2016) eKLR**, over the same issue. The Judge held as follows: -

18. *In order to fall within the mandate of Salaries and Remuneration Commission, the body or organization concerned must of essence be a public body employing or appointed to it, either state officers or public officers. Article 260 of the Constitution defines a public officer as any state officer or any person other than a state officer who holds a public office. A public office is defined under the same article to mean an office in the national government, a county government or public service if the remuneration and benefits of the office are payable directly from Consolidated Fund or directly out of money provided by Parliament.*

20. *Under section 15 of the NHIF Act any person who ordinarily resides in Kenya and has attained 18 years and whose total income whether salaried or self-employed is not less than the amount prescribed by the Board is liable to contribute to the Fund. That is to say contributions to the fund is mandatory to all salaried employees regardless of whether they are in public or private sector. The Fund is permitted under section 34 to invest moneys which are not immediately required to be applied for the purposes of the Act. The Fund therefore derives its income and funding from members' contributions and returns on investments made under section 34.*

21. *There is no provision in the Act for any allocation of moneys to it either from Consolidated Fund Services or Parliament. Further section 11 permits the Board of the Fund to appoint such officers, inspectors and servants as are necessary for the proper discharge of its functions upon such terms and conditions of service as the Board may determine.*

23. *As observed earlier in this judgment, the Petitioner derives its funds from member's contributions and returns on investments. There is no provision in the Act for funds to be appropriated to it by Parliament for payment of staff salaries and benefits. Since the mandate of Salaries and Remuneration Commission as provided under article 230 (4) is the setting and reviewing of salaries and benefits of state officers and further advising the county and national government on the remuneration and benefits of all other public officers, and since a public officer has been described as a person appointed to or employed in the public service of a county or national government and remunerated either from Consolidated Fund or money appropriated by Parliament, the Petitioner by reason of deriving their funding from members contributions or returns on investments do not fall under the mandate of Salaries and Remuneration Commission. It is not denied that the Petitioner receives a substantial portion of contributions from employees in Public Service but there are contributions from private sector as well. Member's contributions are their private property and do not constitute public funds.*

24. *The Petitioner is a contributory Health Insurance Fund started by the Government to ensure wide access to affordable medical insurance especially to majority of employees both in private and public sector. It is like any other insurance company where contributors pool their risk in return for protection from loss or expense arising from the risk assured. The only difference is that membership and contribution to the Petitioner is made mandatory by law to all persons in employment regardless of whether its public or private sector. The purpose of close legal and supervisory framework over the Petitioner is to ensure members of the public are protected from embezzlement of their contributions or any other mal-practice. The regulatory and supervisory framework is the same as in any other sector such as banks and other institutions offering these essential services to the public.*

25. *Another aspect of Salaries and Remuneration Commission mandate which needs to be clarified is its role over State Officers and other public officers. Under article 230 (4), Salaries and Remuneration Commission is mandated to "set and regularly review the remuneration and benefits of all state officers; and to advice national and county government on remuneration of all other state officers" what this implies is that Salaries and Remuneration Commission has the power to set and regularly review the remuneration and benefits of state officers only but when it comes to other public officers in national and county government, Salaries and Remuneration Commission's role is advisory.*

37. *The SRC's Act and regulations made thereunder derive their*

validity from the Constitution therefore no power or jurisdiction can be conferred by the Act or regulations made thereunder the exercise of which would conflict or contradict the powers donated or contemplated by the Constitution. Further the Act or regulations made thereunder cannot purport to enlarge the jurisdiction or mandate of the 2nd respondent where such enlargement does not have any Constitutional anchoring.

38. As observed earlier in this judgment, the mandate of the 2nd respondent as clearly provided under Article 230(4) of the Constitution is to set and regularly review the remuneration and benefits of all state officers and advise the national and county governments on remuneration and benefits of all other public officers. In other words, the 2nd respondent is only mandated to set the salaries and remuneration of state officers but when it comes to other public officers, the 2nd respondent's role is advisory. It is therefore in excess of its jurisdiction to purport to fix or set salaries for public officers.

39. If it be the practice that the advice given by the 2nd respondent to national and county government is taken without any modification, it will remain as such-a practice without more. The 2nd respondent has no legal or constitutional ground to insist that its advice over remuneration of public officers to national or county government must be observed to the latter.

40. This conclusion may be unsettling to the 2nd respondent but unfortunately it is the interpretation yielded from the plain reading of article 230(4) of the Constitution. If it was the intention of the framers of the Constitution that the 2nd respondent be given the mandate to set and regularly review salaries and benefits of public officers other than state officers as well, then such intention was omitted when finalizing Article 230(4). If that be the case, only an amendment to Article 230(4) can remedy the situation. Until that is done, no amount of operational creativity can confer such jurisdiction on the 2nd respondent.

41. In conclusion, the Court allows the following prayers only in the petition.

- a. A declaration that the petitioner as constituted under the Act does not fall under the mandate of the 2nd respondent.
- b. A declaration that the Salaries and Remuneration Commission Act and Salaries Remuneration Commission regulations 2012 in so far as they purport to confer on 2nd respondent jurisdiction to set or restrict remuneration and benefits for public officers other than state officers are inconsistent with the Constitution hence null and void to that extent.
- c. The insistence by the 2nd respondent that its advice to the petitioner is binding is counter to the principle of collective bargaining as envisaged under ILO Convention on the Right to Organize and Collective Bargaining, 1949 (No. 98) and by virtue of article 2 (6) of the Constitution, unconstitutional.
- d. A declaration that the Petitioner be at liberty to conclude the Collective Bargaining Agreement reached in July, 2013 with the 1st respondent.
- e. There will be no order as to costs."

I have again quoted the judgment of my brother extensively because I agree with him entirely and need not re-invent the wheel.

I will now brief comment on the effect of the pending Appeal No. 156 of 2016 to this matter. It is instructive that in both instances the Court of Appeal did not find it necessary to grant orders of stay of the decisions of this court. Keeping in mind the two matters pending before the Court of Appeal and the likelihood of the Court overturning the decision of this court, I must consider whether the determination I make in this matter is likely to render the decision of the Court of Appeal nugatory or to conflict with the same. Together with this consideration, I must consider the impact of delaying the registration of the CBA herein, which is time bound and which covers the period of 4 years from 1st July 2017 to 30th June 2021. I must further consider the interests of the workers on whose behalf the CBA was negotiated. I must also consider the fact that during the hearing of the dispute in Cause no. 1389 of 2018, NHIF informed the court that it had already implemented salary increases for its employees who were not subject to the CBA agreement now pending for registration.

Having taken into account all these factors, it is my view that delaying the implementation of the CBA is discriminatory against the unionisable employees of the NHIF as their non-unionisable colleagues have already benefited from their wage increases for the period under review. The SRC did not mention any consideration of the wages of the non-unionisable cadre which begs the question whether its mandate is only over the unionisable cadre and not the non-unionisable cadre.

I have also taken into account that the SRC had the opportunity to be joined in the dispute in **Cause No. 1389 of 2018** but did not do so, thus causing the same matter to be re-litigated for a second time herein.

Thirdly, there have been previous decisions against SRC which it never appealed against such as the decision in **Cause No. 1882 of 2014 (supra)** and which is therefore binding upon it.

Lastly, it is my view that a decision by the Court of Appeal in the two matters pending before it referred to above would set a policy for posterity and that the implementation of the CBA now before me for registration would not render such decision nugatory.

For the foregoing reasons, I would be inclined to dismiss the application filed by SRC and accept the CBA between the NHIF and KUCFAW for registration, which I hereby do.

Each party shall bear its costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF FEBRUARY 2021

MAUREEN ONYANGO

JUDGE

ORDER

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

MAUREEN ONYANGO

JUDGE