



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
COLLECTIVE BARGAINING AGREEMENT NO. E006 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF COMMERCIAL, FOODS AND ALLIED WORKERS.....UNION

VERSUS

NATIONAL SOCIAL SECURITY FUND.....EMPLOYER

AND

SALARIES AND REMUNERATION COMMISSION.....OBJECTOR

RULING

The Collective Bargaining Agreement between Kenya Union of Commercial, Food and Allied Workers, the Union, and the National Social Security Fund, the Employer, was presented to this court for registration by letter dated 8th October 2020. The same was fixed for consideration for registration on 19th October 2020.

On 19th October 2020 when the matter came up it was fixed for mention on 2nd November 2020.

On 2nd November 2020, Ms. Wafula who appeared on behalf of Salaries and Remuneration Commission (SRC) informed the court that the CBA was not brought to the attention of SRC and a such has no advice from SRC. She objected to the registration of the CBA.

Mr. Benson Okwango who appeared for the Central Planning and Monitoring Unit of the Ministry of Labour informed the Court that upon receipt of the CBA for analysis for purposes of forwarding to this court for registration, the Unit contacted SRC who sought a copy thereof for advice. That the Union informed the Unit that the CBA had been exempted from SRC advice through a court order, a copy of which the Union availed to the Unit.

Mr. Nyumba for the Union informed the court that the employer had not objected to the registration of the CBA. Further that SRC had not filed a formal objection notice and that the objection was coming too late.

After considering submissions by the parties, the Court directed the employer to forward a copy of the CBA to SRC for advise within 10 days and in default the Union to do so within 14 days. Further, the Court directed that in default of the SRC to file a report in court within 14 days, the Court will proceed to register the CBA by SRC.

When the parties again appeared before the Court on 26th November 2020, Ms. Wafula informed the Court that although SRC had received a copy of the CBA, the employer had not responded to SRC's letter seeking additional documents. That SRC was therefore unable to prepare the report.

The Court directed SRC to file a formal objection. SRC instead filed an Objector's replying affidavit sworn by Ann R. Gitau, MBS, the Chief Executive Officer and Commission Secretary on 15th January 2021. There is therefore no formal objection to the registration of the CBA by SRC.

Section 60(7)(b) of the Labour Relations Act provides that the Court may refuse to register a CBA until all parties to the agreement have had an opportunity to make oral representations to the court.

Objector's Submissions

In the Objector's Replying Affidavit, the deponent sets out the guidelines for approval of CBAs.

The affiant states that the employer did not adhere to the guidelines which it was still waiting to facilitate an analysis and advice.

In the submissions filed by SRC, it sets out the following issue for determination: -

- i. Whether the Union's members are public officers;
- ii. Whether the Objector's advice is required;
- iii. Whether the decision in **Nairobi Petition No 30 of 2014 Kenya Union of Commercial, Food and Allied Workers v SRC, NSSF and the AG** is binding on this court;
- iv. Whether there is an Appeal against the above judgment.

It is submitted that there is an appeal against the decision of this court in the Court of Appeal being Appeal No. E489 of 2020.

The SRC relies on **Kenya Union of Domestic Hotels Educational Institution and Allied Workers (KUDHEIHA Workers) v Salaries and Remuneration Commission (2014) eKLR** where the court held as follows: -

“To my mind, it is clear that the drafters of the Constitution intended that the values and principles of public service should govern not just employees of state organs but also those of state corporations. The reason for that finding is not far-fetched. Under Section 3 of the State Corporations Act (Cap 446) the President establishes corporations as body corporates to perform certain specified functions. The State has a controlling stake in state corporations and as such they are public entities performing a public function. They therefore cannot be removed from the ambit of the Constitutional provisions with regard to the values and principles governing public service. Indeed, the provisions of the Public Officer Ethics Act of 2003 confirms that position. Section 2 defines a public officer to mean...”

The SRC further relied on the decision in **National Union of Water and Sewerage Employees v Mathira Water and Sanitation Company Ltd and Others, 1st Interested Party - The Hon. Attorney General, 2nd Interested Party - Salaries and Remuneration Commission** the Court held that;

“A Body may thus be deemed to be a public sector employer, if the general government [central, local, county, state corporation], exercises control over its general policy. Control may be direct or indirect, and may include the following: -

- a. Ability to appoint CEO and Directors who determine the policy of the organization;
- b. Right to be consulted over appointments, or veto appointments;
- c. Provision of funding, accompanied by the right to determine how the funds are expended;
- d. Government's ownership of majority shares, or special powers for government in the organization's constitution;
- e. Right to demand certain reports or information, to set or constrain policy,
- i. outcomes, or determine the way profits should be utilized; and,
- f. A general but wide-ranging right to control the day to day running of the organization.

Courts have examined the status of the Water Companies in various decisions, and appear to agree that although these are limited liability companies, they are registered as agents and instrumentalities of the Local Governments. They are private companies, rendering public services, and controlled by Public Authorities. In **Eldoret High Court Miscellaneous Civil Application Number 97 of 2003, Republic v Eldoret Water and Sanitation Company ex parte Booker Onyango [2008 eKLR]**, Justice Mohammed Ibrahim concluded the Eldowas is an agent and instrumental of the Government.”

It is submitted that the negotiations and intended registration of the instant CBA is tainted with illegality as it was done in contravention of Article 230(4) of the Constitution, Section 11 of SRC Act and Regulations 18 of the SRC (Remuneration and Benefits of State and Public Officers) Regulations 2013. That this position was upheld in **Nairobi City County Government v Kenya County Government Workers Union; Salaries and Remuneration Commission (Interested Party/Applicant) [2019] eKLR**, and in the **Teachers Service Commission (TSC) v Kenya National Union of Teachers (KNUT) & 3 Others [2015] eKLR**. That the position was further upheld in **KUDHEIHA Workers v Salaries and Remuneration Commission (2014) eKLR**.

SRC submits that an appeal against the decision of this court is pending in **Nairobi Civil Appeal No. 489 of 2020 Salaries and Remuneration Commission v National Social Security Fund**.

The SRC drew the Court's attention to the High Court's decision in **Nairobi High Court Constitutional Petitions No 208 of 2019**

consolidated with Petition Nos. 185 of 2019 and 339 of 2019, Salaries and Remuneration Commission Okiya Omtatah, Okoiti v Parliamentary Service Commission and others where a three Judge bench addressed the question of whether a decision by a court of concurrent jurisdiction was binding on the court. It held that a decision rendered by a court of co-ordinate jurisdiction is not binding though persuasive. Further the court held: -

“that in any event we were informed during the hearing of this case that the decision is subject to a pending appeal hence great caution must be employed as we consider its persuasive value.”

SRC submits that there are appeals pending against both judgments in Cause 40 of 2015 and Cause 1389 of 2018 which would be rendered nugatory should the CBA be registered.

Union’s Submissions

For the Union it is submitted that it has a recognition agreement with the employer herein and has negotiated several CBAs. That following the establishment of the SRC, it issued a circular dated 4th July 2012 which forced the employer herein to decline to sign the CBA for the period 1st July 2013 to 30th June 2015 which had been negotiated and concluded. That vide **Petition No. 30 of 2014** the Union challenged the application of the circular to the employer herein. This is because the Union was convinced that employees of the National Social Security Fund do not qualify as public officers whose remuneration and benefits are subject to regulation by the Salaries and Remuneration Commission in the plain reading of Article 230(4) of the Constitution of Kenya, 2010.

This petition succeeded in favour of the Union and at paragraph 34, the court stated

"Therefore, the circular dated 4th July, 2012 is not applicable whatsoever to collective bargaining and determination of terms and conditions of employment between the petitioner and the Interested Party, National Social Security Fund. All the parties are so directed by the court."

That following the success in **Petition No. 30 of 2014**, the Collective Bargaining Agreement dated 23rd March, 2015 for the period 1st July, 2013 to 30th June, 2015 was registered as RCA No. 205 of 2015 and has been fully implemented. That the Collective Bargaining Agreement for the period 2015/2017 and 2017/2019 which followed were equally negotiated, concluded, signed, registered and implemented without the involvement of the Salaries and Remuneration Commission.

That the right of employees and their employer to Bargain Collectively is anchored under Article 41(5) of the Constitution of Kenya 2010 which find strong endorsement in ILO Convention No. 98 which is a universal right. Article 41(5) of the Constitution of Kenya is reproduced here below: -

Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

The Union submits that State Corporations are classified into three major groups: -

- i. Commercial Corporations
- ii. Independent Regulatory agencies and;
- iii. Research Institutions including Public Universities, Tertiary Education and Training Institutions.

The Union submits that the Employer herein falls under the category of Commercial State Corporations which generate their own income through members’ contributions, investments and assets, funds which are used to manage their activities and to pay salaries and benefits. That it is the ultimate intention of the Government that Commercial State Corporations be self-sustaining with minimum financial intervention from the National Treasury.

That the two positions were buttressed in the Ruling in **Cause No. 1882 of 2014** delivered and dated 27th November, 2014 involving **Chemilil Sugar Company Ltd, Muhoroni Sugar Company Ltd and South Nyanza Sugar Company Ltd v Kenya Union Sugar Plantation & Allied Workers**.

That the remuneration and benefits of employees of the National Social Security Fund are not payable directly from the consolidated fund or from money provided by parliament as parliament does not appropriate funds for the payment of employees of the National Social Security Fund. The remuneration and benefits of employees of the National Social Security Fund are generated from their operations and from their investments which lie beyond the mandate of the Salaries and Remuneration Commission.

Further, that NSSF is not a commission, office, agency or any other body created under the Constitution of Kenya 2010. It derives its existence from the NSSF Act, 2013 and the State Corporations Act. It is therefore not a state organ under Article 260 of the Constitution of Kenya 2010.

The Union submits that the Government is a trustee or investor in Commercial State Corporations which does not convert such corporations into state organs.

It is the Union’s submissions that Cause 30 of 2014 has not been subjected to an appeal.

The Union submits that it does not have an economic dispute with the employer in this matter as the employer has in all appearances not objected to the registration of the CBA.

That the Cabinet Secretary of the Ministry of Labour has also not raised any objection to the registration of the CBA herein. That Rule 37(1) and (2) of the Employment and Labour Relations Court (Procedure) Rules do not cover the instant CBA.

It is submitted that all the issues raised by the Objector have been answered in the judgment in Petition No. 30 of 2014. That the CBA that was the subject of the petition was signed, registered and implemented. The Union submits that the decisions in **Petition No. 40 of 2015**, in **Petition No. 30 of 2014**, in **Cause No. 1882 of 2014** and in **Cause No. 1389 of 2018** are relevant to the present issue before this court concerning the interference of the Salaries and Remuneration Commission.

The Union prays that the objection be dismissed, and the CBA be registered. Further that SRC be condemned to pay costs.

The Employer did not file any affidavit or submissions.

Determination

I have considered the pleadings and submissions filed herein. The issues for determination are as set out in the submissions of SRC being: -

- i. Whether the Union's members are public officers;
- ii. Whether the Objector's advice is required;
- iii. Whether the decision in **Nairobi Petition No 30 of 2014 Kenya Union of Commercial, Food and Allied Workers v SRC, NSSF and the AG** is binding on this court;
- iv. Whether there is an Appeal against the above judgment.

The issue in dispute herein has been litigated and re-litigated severally. In all the cases, the Objector herein has always lost on its argument that CBAs of state corporations which do not receive funding from the exchequer or from funds provided by Parliament are subject to SRC advice/approval. The cases are the following:-

1. Cause No. 1882 of 2014 – Chemelil Sugar Company Limited & 2 Others v Kenya Union of Sugar Plantation and Allied Workers Union.
2. Petition No. 40 of 2015 – National Hospital Insurance Fund Management Board v Kenya Union of Commercial Food and Allied Workers & 2 Others (2016) eKLR
3. Cause no. 1389 of 2018 – National Hospital Insurance Fund v Kenya Union of Commercial Food and Allied Workers & 2 Others (2018) eKLR.
4. Petition No. 30 of 2014 – Kenya Union of Commercial, Food and Allied Workers v Salaries and Remuneration Commission & 2 others [2015] eKLR
5. CBA No. E007 of 2020 – Kenya Union of Commercial Fund and Allied Workers v National Hospital Insurance Fund & Another (2021) eKLR

The High Court has also recently added its voice to this debate in a judgment delivered on 4th December 2020 when in a 3 Judge Bench decision in **High Court at Nairobi Constitutional Petition No 331 Of 2016 Katiba Institute & another v Attorney General & Another [2020] eKLR**, the court held as follows: -

“51. Going by the above definitions, determination of whether an office is a public office will depend on two tests; first, whether it is an office in the national government, county government or public service; and second, if the remuneration thereof is from the consolidated fund or money directly provided by Parliament.

52. On the first test, we are of the considered view, that state corporations and parastatals are not offices in the public service, because they are neither offices in the national government nor county government as defined by the Constitution. The Constitution is also clear that to be a public service, there must be the collectively of individuals who are performing a function within a commission, office, agency or other body established under the Constitution, except state officers. More importantly, state corporations and parastatals are not offices established under the Constitution.

53. The next test is that, even if state corporations and parastatals were to be deemed to be offices in the public service, they would still not pass the test, if remuneration and benefits thereof are not payable directly from the Consolidated Fund or out of money provided by Parliament. To resolve the issue, we have to determine whether remuneration and benefits payable to state corporations and parastatals is drawn from the Consolidated Fund or money directly provided by Parliament.

62. From our reading of this section, and that on definition of public money, state corporations are funded using public funds by the

Treasury through line ministries though this funding is not exclusive, since they also generate their own money from other sources. This is borne by the fact that according to the section, they submit estimates of their revenue and expenditure for the following financial year, accompanied by proposals for funding of the projects to be undertaken.

63. We have found that state corporations and parastatals are not offices in public service, State organs or bodies established under the Constitution. We have also found that remuneration and benefits of chairpersons and members of boards of those bodies are not drawn from the Consolidated Fund. However, they are funded by public money from the Treasury through line ministries. That funding notwithstanding, and not being state organs or bodies established under the Constitution, they do not qualify as offices in the public service.

64. To buttress this view, we refer to the holding of the Supreme Court in **Fredrick Otiemo Outa v Jared Odoyo Okello & 4 others** (supra). In that case, one of the issues the Supreme Court dealt with was whether a person holding office in CDF was a public officer. The Court observed at paragraph 129, that in ascertaining who a public officer is, it had to take into account the plurality of laws emanating from the Constitution, statutory laws and regulations in relation to public service.

65. The court then considered the definitions ascribed to “public officer” by section 2 of the Public Officer Ethics Act, section 2 of the Political Parties Act, and section 2 of the Leadership and Integrity Act, which assign to public officer, the meaning given under Article 260 of the Constitution, and stated;

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“[148] Strictly speaking, the proper meaning of “public officer”, for purposes of the electoral law, is that embodied in Article 260 of the Constitution as read together with Section 2 of the Elections Act. The different definitions in other statutory provisions, such as those enumerated earlier on, ought not to take precedence over the said constitutional provision. And thus, the proper meaning of “public officer” – currently is;

- i. the person concerned is a State officer; or
- ii. any other person who holds “public office” – an office within the national government, county government, or public service;
- iii. a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.”

As the courts have consistently held, state corporations are not offices in the public sector. The mandate of SRC as set out in Article 230(4) of the Constitution is 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.**

Further, Section 11 of the Salaries and Remuneration Commission Act sets out the mandate of SRC as follows: -

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**
- e. and trends in remuneration to determine the monetary worth of the jobs of public offices;**
- f. determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;**
- g. make recommendations on matters relating to the salary and remuneration of a particular State or public officer;**
- h. make recommendations on the review of pensions payable to holders of public offices; and**

i. 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;

SRC has informed this court that it has appealed against the decisions or some of the decisions of this court in Civil Appeal No. 156 of 2016 and 489 of 2020. It is instructive that there is no mention of any stay having been granted by the Court of Appeal against the implementation of this court's decisions that are subject of the appeal. Further, SRC has not bothered to supply to this court copies of the pleadings it has filed in the Court of Appeal to enable this court assess whether or not the issues therein are similar to those in this matter and whether the appeals would be rendered nugatory should the Court of Appeal set aside the decisions of this court.

Be that as it may, the decisions of this court on the issue stretch over a long period. The decision in Cause 30 of 2014 was for example delivered on 28th August 2015 and that in Petition No. 40 of 2015 delivered on 18th March 2016. The decision in Cause No. 1882 of 2014 was delivered on 27th November 2014.

As I have observed before elsewhere, CBAs are time bound. A determination of a matter relating to a CBA must be made with haste. An appeal must therefore be fast-tracked to ensure the decision of the Court of Appeal is not rendered academic because it has come long after the period of the CBA it relates to has lapsed and parties have negotiated other intervening CBAs which have also lapsed.

In the instant matter, the Court made a determination between the parties in Petition 30 of 2014. The Court held as follows: -

"Therefore, the circular dated 4th July, 2012 is not applicable whatsoever to collective bargaining and determination of terms and conditions of employment between the petitioner and the Interested Party, National Social Security Fund. All the parties are so directed by the court."

That decision was clear and unequivocal. The decision was not stayed or overturned by any court of competent jurisdiction. The SRC cannot be heard to continue raising the same arguments over and over and expect this court to decide differently. This court can also not wait for SRC to pursue its appeal at its own pace and pleasure, while employees whose terms are due for review are turned away by this court on grounds that the Court is waiting for a determination in the appeal filed by SRC since 2014 when the first decision referred to above was made.

Before I conclude, I need to comment on the authorities cited by Counsel for SRC. These are:

1. Nairobi City County Government v County Government Workers Union (SRC – Interested Party) [2019] eKLR.
2. The Teachers Service Commission (TSC) v Kenya National Union of Teachers (KNUT) [2015] eKLR.
3. KUDHEIHA Workers v Salaries and Remuneration Commission (2015) eKLR.

All these cases are not relevant as the funds for operations of the TSC, Nairobi City County Government, Moi Teaching and Referral Hospital and Kenyatta National Hospital whom these decisions relate to, come directly from the consolidated funds or funds set aside by Parliament. They are therefore covered under Article 230(4) and Section 11 of SRC Act, unlike the NSSF which is not thus funded.

For the foregoing reason, I find no merit in the objection to the registration of the CBA dated 23rd July 2020 negotiated between Kenya Union of Commercial and Food Allied Workers and National Social Security Fund for the period 1st July 2019 to 30th June 2021 and I accordingly do proceed to register the said CBA.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF MARCH 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