REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 352 OF 2019

KENYA UNION OF COMMERCIAL, FOOD &

ALLIED WORKERS UNION (KUCFAW)...................................CLAIMANT

VERSUS

AGRICULTURE AND FOOD AUTHORITY

(COFFEE DIRECTORATE) LIMITED..............................1ST RESPONDENT

SALARIES AND REMUNERATION COMMISSION.......2ND RESPONDENT

JUDGMENT

1. The Claimant through its suit seeks for determination of the issue it framed as the 1st Respondent's refusal to review the Collective Bargaining Agreement (CBA) for the period 1st July 2015 to 30th June 2019. Suit was filed on 30th May 2019. In the claim, the Union averred that there had been a dispute between the parties being Cause No. 1130 of 2015 which was settled by consent of parties on 18th December 2015 for the CBA for the period 1st January 2011 to 30th June 2014. The Claimant while negotiating with the Respondent for the CBA under review in this suit, the Respondent sought the interposition of the 2nd Respondent, the body mandated to set and regularly review the remuneration and benefits of all State officers. The 2nd Respondent sought some additional information from the 1st Respondent and the Claimant avers it is not aware whether the 1st Respondent actually complied with the SRC request. What it is sure of is that the 1st Respondent declined, refused and ignored to engage it in negotiations. The matter was reported as a trade dispute to the Cabinet Secretary on 18th April 2018 and a conciliator appointed on 22nd May 2018. Proposals were forwarded by the Claimant on 5th June 2018 and on 6th July the 1st Respondent forwarded their proposals. The Conciliator gave a determination that on operalisation of the Agricultural, Fisheries and Foods Authority under the Crops Act, No. 16 of 2013, the former Coffee Board of Kenya is no longer a legal entity and the relationship that subsisted with KUCFAW has since lapsed. He also held that the dispute remains unresolved and issued a certificate of unresolved trade dispute under Part VIII of the Labour Relations Act, 2007. The Claimant disagreed with the aforementioned findings hence the dispute before the Court.

2. The Claimant averred that the mandate of the 2nd Respondent 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. The Claimant asserts that the role of the 2nd Respondent therefore is only advisory and that the drafters of the Constitution did not intend for the 2nd Respondent to go beyond the mandate set under Article 230(4) of the Constitution on the role of the SRC. The Claimant averred that the 1st Respondent having been established to succeed the Coffee Board of Kenya and to take over its activities has done nothing to conclude and implement collective bargaining agreement and are the biggest frustration to employees purporting to revoke a Recognition Agreement on grounds they know to be false. The Claimant further averred that equally, the National Treasury has made it almost impossible to negotiate with State organs through their circulars where collective bargaining agreements have been concluded and registered. The Claimant averred that the 2nd Respondent cannot set terms and conditions of service for the Respondent's employees and that their role ends at advisory level. The Claimant finally averred that the National Treasury has no role in collective bargaining and they have a duty to provide funding for the implementation of Collective Bargaining Agreements. The Claimant sought costs of the suit.

3. The 1st Respondent responded by filing a defence on 22nd November 2019 while the 2nd Respondent filed a report which it craves the Court to consider. The 1st Respondent denied that the provision of law cited by the Claimant in respect to the case applies to the instant dispute and puts the Claimant to strict proof of any allegations to the contrary. The 1st Respondent admitted to having recorded a consent with the Claimant but not within the relationship context alleged and sought to be advanced by the Claimant. It further averred that save that several of the conciliation meetings failed to take off as averred in paragraph 18 of the Memorandum of Claim the 1st Respondent denies that it contributed to the same in any way at all. It averred that save that the 2nd Respondent has issued circulars as averred in the Memorandum

of Claim, the 1st Respondent denies that the intention of the 2nd Respondent was and is to frustrate negotiations with State Corporations. The 1st Respondent averred that the Salaries and Remuneration Commission, the 2nd Respondent herein, was and is in exercise of its constitutional mandate by issuing the said circulars and this cannot be impugned through the backdoor as sought to be done by the Claimant. It averred that a proper constitutional challenge to the above-mentioned mandate of the 2nd Respondent ought to be made. The 1st Respondent averred that there are no prayers being sought by the Claimant in the instant claim and therefore there is nothing to refer to this Honourable Court for determination. The 1st Respondent averred that without prejudice to the foregoing, it is not clear what the Claimant intends to achieve by its claim as the prayers sought are incorrigible and incapable of enforcement by this Honourable Court. The 1st Respondent averred that a collective bargaining agreement is a negotiated contract made voluntarily between an employer and a recognized trade union. It averred that this right is founded on the concept of social dialogue, freedom of contract and autonomy of parties in collective bargaining. The 1st Respondent averred that it would thus be injudicious for the Honourable Court to force parties to enter into a non-negotiated, non-dialogued and forced contract as is being sought by the Claimant herein. The 1st Respondent further averred that this suit should be stayed pending the determination of the application seeking revocation and/or termination of the Recognition Agreement between the Claimant and the now defunct Coffee Board of Kenya. It was averred that the claim as filed is an abuse of the process of court, is frivolous, vexatious and ought to be summarily dismissed as it is not a dispute contemplated by the Labour Relations Act and as defined by Section 2 of the said Act. The 1st Respondent denied that this Court has jurisdiction to entertain the claim as drawn asserting that the same was in addition fatally and irredeemably defective.

4. The 2nd Respondent averred that it is an Independent Commission established under Article 230 of the Constitution of Kenya 2010 and that Article 230(4) of the Constitution provides that 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. The 2nd Respondent averred that the Constitution further provides that in performing its functions, the 2nd Respondent shall take the following principles into account: a) the need to ensure that the total public compensation bill is fiscally sustainable; b) the need to ensure that the public services are able to attract and retain the skills required to execute their functions; c) the need to recognize productivity and performance; and d) transparency and fairness.

5. The 2nd Respondent averred that the Salaries and Remuneration Commission Act (SRC Act) vests additional powers and functions on the 2nd Respondent in Section 11 to: 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. It averred that the advice it gives is binding under Article 259(11) which states that: (11) If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation with the approval or consent or on consultation with/another person/the function may be performed or the power exercised only on that advice/recommendation/ with that approval or consent or after that consultation except to the extent that this Constitution provides otherwise. The 2nd Respondent averred that the Claimant vide letter dated 23rd March 2017 wrote to the 1st Respondent forwarding proposals for the Collective Bargaining Agreement (CBA) which covered the period 1st July 2015-30th June 2019 for its (1st Respondent's) study and counter proposals. The 2nd Respondent averred that the 1st Respondent vide letter dated 28th April 2017 then wrote to the 2nd Respondent informing the 2nd Respondent that it was in receipt of the CBA from the Claimant, and was seeking guidance and advice on how to proceed with the engagement with the Claimant. The 2nd Respondent averred that vide letter dated 11th May 2019 acknowledged receipt of the request for guidance and advice from the 1st Respondent and advised that it was looking into the issue and would communicate in due course. The 2nd Respondent averred that vide letter dated 23rd May 2017 and in reference to the 1st Respondent's request for advice and guidelines, responded to the said letter and requested for information that would enable it (2nd Respondent) analyse the submitted CBA, noting that the CBA as had been submitted did not comply with the provisions of the 2nd Respondent's circular Ref No. SRC/ADM/CIR/1/13(118) dated 21st March 2014. The 2nd Respondent averred that the information it needed to enable it render guidance and advice on the CBA included the copy of the running CBA being implemented for the unionized employees represented by the Kenya Union of Commercial Food and Allied Workers (KUCFAW); the 1st Respondent's counter offer and justification for each recommendation in the CBA on items that had financial implications based on affordability, fairness and parity; the existing salary structure for unionized staff and numbers in post in every grade; the 1st Respondent's Audited Financial Statements for the last three years and approved budget for the year 2016/17; and a copy of the recognition agreement signed between the 1st Respondent and the Claimant. The 2nd Respondent averred that despite the letter seeking the documents and reminders that were subsequently sent, the 1st Respondent had not responded and the matter was still pending as the required information was yet to be submitted. The 2nd Respondent averred that it therefore could not give any additional input. The 2nd Respondent took issue with facts set out in the Claim and specifically denies that its circulars are meant to frustrate negotiations with State Corporations. The 2nd Respondent further averred that that the Claimant had not demonstrated or even indicated how it (2nd Respondent) has frustrated or in any issued circulars that curtail negotiations of CBAs. The 2nd Respondent averred that it has been unnecessarily joined in this Claim and in light of the foregoing, the 2nd Respondent averred that it would at the opportune time apply that it be struck out of the Claim as it is joined prematurely as it has not refused to give its advice.

6. The Claimant and the 1st Respondent filed submissions. The 2nd Respondent did not consider it necessary to file submissions and relied on its response and report filed in the matter. The Claimant submitted that the enactment of the Crops Act 2013 meant that the former institution including the Coffee Board of Kenya were merged and managed under the Crops Act. The Crops Act paved way for the establishment of the Agriculture Fisheries and Food Authority now Agriculture & Food Authority after Fisheries management was returned to the Ministry of Agriculture & Livestock Development. The Claimant submitted the transitional clauses in the First Schedule of the Agriculture, Fisheries and Food Authority Act, 2013, and specifically Section 7 of the made provision that every agreement, deed, bond or other instrument to which a former institution was party to or which affected the former institution and whether or not of such nature that the rights, liabilities and obligations thereunder could be assigned, shall have effect as if the Authority or the successor company were a party thereto or affected thereby instead of the former institution as if for every reference (whether express or implied) therein to the former

institution there were substituted in respect of anything to be done on or after the appointed day. The Claimant submitted that this is the reason why the 1st Respondent was sued in the suit. The Claimant submitted that the 1st Respondent had refused to review the employees' terms of service and that is why it triggered the dispute resolution mechanism by reporting a trade dispute to the Minister on 18th April 2018. The Claimant submitted that the Conciliator Mr. Mokaa issued a report and a certificate of unresolved trade dispute which was now before the Court. The Claimant submitted that the 2nd Respondent has a mandate to advise or instruct the Inspectorate of State Corporations and the State Corporations Advisory Committee on the remuneration and benefits of statutory bodies, some of the employees including the employees of the 1st Respondent were not state officers within the definition of Article 260 of the Constitution. That is to say, the 1st Respondent is not a Commission, Office, Agency or other body established under the Constitution of Kenya. It submitted that the 1st Respondent derives its existence from the Crops Act, 2013 and from the Agriculture, Fisheries and Food Authority Act, 2013 and to some extent the State Corporations Act. It submitted that the 1st Respondent is not a creation of the Constitution. The Claimant submitted that arising from the foregoing, the mandate of the 2nd Respondent in respect of the 1st Respondent's employees right to bargain collectively with their employer is in question and that this undermines Article 41(5) of the Constitution of Kenya and ILO Conventions No. 87 and 98. The Claimant submitted that it had demonstrated beyond doubt that the 1st Respondent has a duty to review the terms of service for the employees of the Coffee Directorate and that the involvement of the 2nd Respondent in the review of the 1st Respondent's employees only amounts to gross interference and urge that they be advised to stick to their mandate. The Claimant submitted that it is not right, just or lawful to discriminate against employees for reasons of their trade union membership. The Claimant submitted that the Claimant's proposals having not been challenged be awarded by the Court with costs. The Claimant submitted that the existence of a Recognition Agreement between the Claimant and the Coffee Board of Kenya and the fact that the Claimant and the Coffee Board of Kenya had negotiated several Collective Bargaining Agreements is not denied, the Claimant urged the grant of the claim.

7. The 1st Respondent on its part submitted that the claim should fail as there is no advise from the 2nd Respondent on the CBA. The 1st Respondent cited Section 57(1) of the Labour Relations Act provides for CBAs and that in the case of **Teachers Service Commission *v* Kenya National Union of Teachers (KNUT) & Others [2015] eKLR** the Court of Appeal held that the advise of the SRC is mandatory and binding. The 1st Respondent submitted that in the case of **Kenya National Union of Nurses *v* Moi Teaching and Referral Hospital & 2 Others [2015] eKLR** the Court reiterated the decision of the Court of Appeal in the case of **Teachers Service Commission *v* Kenya National Union of Teachers (KNUT) & Others** *(supra)*. The 1st Respondent cited the case of **Banking Insurance & Finance Union (Kenya) *v* Kenya Post Office Savings Bank Ltd [2017] eKLR** where the Court held:

> *"To this extent I agree with the holding by Rika J. in National Union of Water Sewerage Employees v Mathira Water and Sanitation Company Limited 2 Others [2013] eKLR that the mandate of SRC under Article 230(4)(b) must extend to cover all manner of public servants, including employees of state corporations…That said, I have reached the conclusion that the Respondent, being a state corporation, falls within the mandate of SRC and no CBA ought to have been negotiated without the input of SRC...Additionally, following the decision of the Court of Appeal in Teachers Service Commission v Kenya National Union of Teachers [2015] eKLR the advice of SRC under Article 230(4)(b) on remuneration and benefits of all public officers is binding and any exercise of power that ignores this advice is invalid." (emphasis theirs)*

8. The Respondent submitted that the Court in **National Union of Water Sewerage Employees *v* Mathira Water and Sanitation Company Limited & 2 Others [2013] eKLR** adopted the definition of public officers as per Article 260 of the Constitution and Section 2 of the Public Officers Ethics Act, which definition applies to the instant category of public officers being the 1st Respondent's employees. The Respondent submitted that the said Court stated:

> *"In the view of this Court, the Commission must be left to meet its mandate as given under Article 230 of the Constitution. This mandate is two-fold; (a) setting and reviewing of the salaries and remuneration of State Officers; and (b) Advising National and County Government on the Remuneration of all other Public Officers. 'All other Public Officers must include all shades of public servants, including employees of the State Corporations, which like the Water Companies are agents and instrumentalities of the Government. The involvement of the Commission with regard to 'all other Public Officers' must however, be limited to advising the Government and its Agencies in the collective bargaining process, not defining and running the process." (emphasis theirs)*

The 1st Respondent submitted that it is not in dispute that it sought the advice of the 2nd Respondent with regard to the matter under dispute and which advice is yet to be rendered. That the 1st Respondent could therefore not proceed with the negotiations until such advice was rendered as the advice is mandatory. The 1st Respondent submitted that this Honourable Court cannot grant the prayers in the Claim because doing so would amount to subverting the place of the 2nd Respondent in the negotiation process and lead to an illegal CBA. Further, that a decision granting the prayers as sought in the Claim would be akin to irregularly and by judicial craft setting aside the binding decision of the Court of Appeal in the case of the **Teachers Service Commission *v* Kenya National Union of Teachers** *(supra)* on the place of the 2nd Respondent in issuing binding advice before conclusion of any CBA. That it is for this reason that this Honourable Court should down its tools until such advice on the CBA is given by the SRC as is by law required. The 1st Respondent submitted that the suit should fail as it is premature since there is no recognition agreement between the Claimant and the 1st Respondent and/or any recognition agreement under challenge and further, the dispute as to the challenge of the recognition agreement has also not been resolved. The 1st Respondent submitted that as per Section 54 (5) of the Labour Relations Act, it has the right to apply to have a recognition agreement terminated or revoked by applying to the National Labour Board (the Board). That it is trite that where the recognition agreement is in peril of termination or revocation, there can be no collective bargaining until the said issue of termination and/or revocation of the recognition agreement is concluded. The 1st Respondent cited Section 54(7) of the Labour Relations Act and submitted that whereas the Claimant referred a trade dispute for conciliation, the dispute was purely and strictly on alleged failure to conclude the negotiations or review of a CBA and not on the application by the 1st Respondent to the Board challenging the recognition agreement. That during conciliation of the said dispute, the 1st Respondent stated it had applied for revocation of the recognition agreement with the Claimant and could not therefore conclude the negotiations. That the Claimants confirmed in his Statement of Claim of being aware of the 1st Respondent's intention to terminate the recognition agreement and which issue is also captured in the findings of the Conciliator. It is the 1st Respondent's submission that Section 54(7) of the Labour Relations Act thus placed the duty on the Claimant to refer the trade dispute on the cancellation and/or revocation of the recognition agreement for conciliation before approaching this Court. It cited the case of **Civicon Limited *v* Amalgamated Union of Kenya**

Metal Workers [2016] eKLR where the Court of Appeal stated:

> *"...section 54(5) of the Labour Relations Act allows an employer, or group of employers or their association to apply to the National Labour Board established under Section 5 of the Labour Institutions Act to terminate or revoke a recognition agreement. Because of the intrigues around the whole question of simple majority, Section 54(6) requires any dispute regarding the right of a trade union to be recognised for the purposes of collective bargaining or the cancellation or revocation of a recognition agreement to be referred for conciliation. It is only when the conciliation fails that the dispute can be referred to the Employment and Labour Relations Court."(emphasis theirs)*

9. The 1st Respondent further submits that this Honourable Court would be remiss to make an order on a CBA before the question of recognition is determined as was the position in the case of **Kenya Union of Entertainment and Music Industry Employees *v* Bomas of Kenya Limited [2018] eKLR** where the Court held:

> *"It is obvious from the facts of this suit and the conciliation proceedings lodged by the Claimant to the Labour Cabinet Secretary on 9.10.2014 that the dispute was not about refusal to recognise the Claimant or cancellation of the recognition agreement…..it is clear that this suit was filed prematurely before first referring the recognition or cancellation of recognition for conciliation in accordance with Part VIII of the Labour Relation Act. The first Port of Call for a trade union to challenge cancellation of recognition under the said subsection (6) is the Conciliator and not this court. Consequently, I find that this suit is incompetent. In* ***Speaker of National Assembly - vs- James Njenga Karume [1992] eKLR****, the Court of Appeal held that:-*
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> *"In our view, there is merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."*
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> *The failure to challenge the apparent refusal by the respondent to continue recognizing the Claimant and further the failure by the Claimant to challenge the application by the respondent to the National Labour Board to revoke the recognition Agreement between the parties herein, meant that the Claimant has given up and therefore lost the right to continue representing the respondent's unionisable staff. Unfortunately for her, this suit was the wrong mechanism to preserve her right to continue enjoying recognition by the respondent under Section 54(1) of the Labour Relations Act."(emphasis theirs)*

10. The 1st Respondent submits that until a decision is arrived at by the Board on the revocation and/or termination of the recognition agreement, it would be futile to direct and order that the parties hereto should conclude the CBA. It cites the case of **Olivado (Epz) Limited *v* Isaiah Bundi Kirigwa, Chairperson National Labour Board *&* Another [2019] eKLR** where the Court on noting there was a pending dispute on recognition before the National Labour Board, downed its tools and stayed the proceedings until the question of recognition (which had been filed as opposed to the instant suit) was determined. Further, that the Court in the case of **Banking, Insurance *&* Finance Union (Kenya) *v* Taifa Sacco Society Ltd [2014] eKLR** by parity of reasoning held that negotiations as to the terms of the CBA could not by law be properly embarked on prior to resolving the recognition dispute. In submitting that this Court should not issue orders in vain, the 1st Respondent relies on the case of **Kalya Soi Farmers' Co-operative Society *v* Paul Kirui *&* Another [2013] eKLR** where the Court stated that based on the maxim that "Equity, like nature will do nothing in vain", a court cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. It further submits that the Court cannot usurp the jurisdiction conferred on other bodies as to do so would be contrary to the doctrine of exhaustion. It relies on the case of **Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR** where the Court of Appeal held that where a dispute resolution mechanism exists outside Courts, the same ought to be exhausted before the jurisdiction of the Courts is invoked. The 1st Respondent submitted that without prejudice to the foregoing, the instant suit should be struck out as the Claimant has not adduced any evidence of existence of any recognition agreement it has with the 1st Respondent. That the provisions of Sections 107, 108 and 109 of the Evidence Act assert that he who alleges must prove and the Claimant has therefore failed to discharge its burden of proving there is in existence a valid recognition agreement so that this Honourable Court may entertain the claim for a CBA.

11. The Claimant's claim as captured in the pleadings above related to the issue of the negotiation of a CBA. Instructively, the Claimant sought the issuance of Court orders directing the 1st Respondent to enter into a CBA with it though the wording of the precise reliefs sought is inelegant. The Court distilled the above from the paragraphs preceding the final paragraph of the claim. The Respondents both assert the claim is not for grant while proffering different reasons for their positions. The 1st Respondent argues against the grant on the basis of two premise – first, it asserts that the entity that had entered into a recognition with the Claimant has since ceased to exist and that therefore there is no basis for the CBA to be negotiated. In the alternative it seeks this suit be stayed pending the determination of the recognition dispute before the National Labour Board. The second front is the fact that the Claimant and 1st Respondent are social partners and their engagement is on mutual trust and an understanding that they negotiate out of their own free will. The 1st Respondent is of the view that the Court will not force parties to negotiate. The 2nd Respondent on its part asserts it has a constitutional mandate which it has to exercise as its role is vital in the protection of the public purse as the exchequer cannot make payments for salaries to public bodies where there has been no consultation of the 2nd Respondent. The 2nd Respondent cites the Constitution as well as various Sections of the Salaries and Remuneration Commission Act. The matter had been referred to Conciliation in terms of the Labour Relations Act. The Conciliator appointed by the Minister received input in the dispute from the parties and gave a determination that on operationalisation of the Agricultural, Fisheries and Foods Authority (AFFA) under the Crops Act, No. 16 of 2013, the former Coffee Board of Kenya was no longer a legal entity and the relationship that subsisted with KUCFAW subsequently had lapsed. Upon the coming into effect of the AFFA, the framework under which the Claimant had a CBA was whittled away by the law and on the lapse of the CBA, the position taken by the 1st Respondent in respect of the Claimant's position vis-à-vis the 1st Respondent is one of strangers. There is no valid or binding agreement the parties can peg an agreement on. Though a dispute may be said to exist, such dispute can only crystalize once the parties before the Court formally engage upon either recruitment of membership or recognition of the Union as the proper Union to represent the unionisable members of the 1st Respondent.

12. Whereas the 2nd Respondent was accused of frustrating the negotiations of collective bargain agreements as result of its circulars, no

evidence was adduced to demonstrate this grave allegation. It is not doubted that the 2nd Respondent does at times make proposals that are unwelcome to many a Union or employer (as any advisory may well do), there was no demonstration of either bias, maladministration of the 2nd Respondent's mandate or any indication by way of evidence or preponderance of facts that the 2nd Respondent is a stumbling block in CBA negotiations. The Claimant's claim as can be gleaned from the foregoing is devoid of merit and granted that the Claimant and 1st Respondent are what may be classified as social partners and granted the limited scope of the claim, the Court orders each party to bear their own costs for the claim. Suit is dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2021

Nzioki wa Makau

JUDGE