



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO E085 OF 2021

CONSOLIDATED WITH CAUSES NO E66 OF 2021 AND E101 OF 2021

KENYA NATIONAL UNION OF NURSES.....1ST CLAIMANT

KENYA NATIONAL UNION OF CLINICAL OFFICERS.....2ND CLAIMANT

-VERSUS-

CABINET SECRETARY, MINISTRY OF HEALTH.....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF PUBLIC SERVICE

YOUTH AND GENDER.....2ND RESPONDENT

COUNCIL OF GOVERNORS.....3RD RESPONDENT

KENYATTA NATIONAL HOSPITAL BOARD.....4TH RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA.....5TH RESPONDENT

THE COUNTY GOVERNMENT OF KWALE.....6TH RESPONDENT

THE COUNTY GOVERNMENT OF TAITA TAVETA.....7TH RESPONDENT

THE COUNTY GOVERNMENT OF KILIFI.....8TH RESPONDENT

THE COUNTY GOVERNMENT OF LAMU.....9TH RESPONDENT

THE COUNTY GOVERNMENT OF GARISSA.....10TH RESPONDENT

THE COUNTY GOVERNMENT OF WAJIR.....11TH RESPONDENT

THE COUNTY GOVERNMENT OF MANDERA.....12TH RESPONDENT

THE COUNTY GOVERNMENT OF MARSABIT.....13TH RESPONDENT

THE COUNTY GOVERNMENT OF ISIOLO.....14TH RESPONDENT

THE COUNTY GOVERNMENT OF MERU.....15TH RESPONDENT

THE COUNTY GOVERNMENT OF THARAKA NITHI.....16TH RESPONDENT

THE COUNTY GOVERNMENT OF EMBU.....17TH RESPONDENT

THE COUNTY GOVERNMENT OF KITUI.....	18 TH RESPONDENT
THE COUNTY GOVERNMENT OF MACHAKOS.....	19 TH RESPONDENT
THE COUNTY GOVERNMENT OF MAKUENI.....	20 TH RESPONDENT
THE COUNTY GOVERNMENT OF NYANDARUA.....	21 ST RESPONDENT
THE COUNTY GOVERNMENT OF NYERI.....	22 ND RESPONDENT
THE COUNTY GOVERNMENT OF KIRINYAGA.....	23 RD RESPONDENT
THE COUNTY GOVERNMENT OF MURANG'A.....	24 TH RESPONDENT
THE COUNTY GOVERNMENT OF KIAMBU.....	25 TH RESPONDENT
THE COUNTY GOVERNMENT OF TURKANA.....	26 TH RESPONDENT
THE COUNTY GOVERNMENT OF WEST POKOT.....	27 TH RESPONDENT
THE COUNTY GOVERNMENT OF SAMBURU.....	28 TH RESPONDENT
THE COUNTY GOVERNMENT OF TRANS NZOIA.....	29 TH RESPONDENT
THE COUNTY GOVERNMENT OF UASIN GISHU.....	30 TH RESPONDENT
THE COUNTY GOVERNMENT OF ELGEYO MARAKWET.....	31 ST RESPONDENT
THE COUNTY GOVERNMENT OF NANDI.....	32 ND RESPONDENT
THE COUNTY GOVERNMENT OF BARINGO.....	33 RD RESPONDENT
THE COUNTY GOVERNMENT OF LAIKIPIA.....	34 TH RESPONDENT
THE COUNTY GOVERNMENT OF NAKURU.....	35 TH RESPONDENT
THE COUNTY GOVERNMENT OF NAROK.....	36 TH RESPONDENT
THE COUNTY GOVERNMENT OF KAJIADO.....	37 TH RESPONDENT
THE COUNTY GOVERNMENT OF KERICHO.....	38 TH RESPONDENT
THE COUNTY GOVERNMENT OF BOMET.....	39 TH RESPONDENT
THE COUNTY GOVERNMENT OF KAKAMEGA.....	40 TH RESPONDENT
THE COUNTY GOVERNMENT OF VIHIGA.....	41 ST RESPONDENT
THE COUNTY GOVERNMENT OF BUNGOMA.....	42 ND RESPONDENT
THE COUNTY GOVERNMENT OF BUSIA.....	43 RD RESPONDENT
THE COUNTY GOVERNMENT OF SIAYA.....	44 TH RESPONDENT
THE COUNTY GOVERNMENT OF KISUMU.....	45 TH RESPONDENT
THE COUNTY GOVERNMENT OF HOMABAY.....	46 TH RESPONDENT
THE COUNTY GOVERNMENT OF KISIL.....	47 TH RESPONDENT

THE COUNTY GOVERNMENT OF NYAMIRA.....	48 TH RESPONDENT
THE COUNTY GOVERNMENT OF NAIROBI.....	49 TH RESPONDENT
THE COUNTY GOVERNMENT OF TANA RIVER.....	50 TH RESPONDENT
THE COUNTY GOVERNMENT OF MIGORI.....	51 ST RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF MOMBASA.....	52 ND RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF KWALE.....	53 RD RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF TAITA TAVETA.....	54 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF KILIFI.....	55 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF LAMU.....	56 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF GARISSA.....	57 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF WAJIR.....	58 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF MANDERA.....	59 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF MARSABIT.....	60 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF ISIOLO.....	61 ST RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF MERU.....	62 ND RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF THARAKA NITHI.....	63 RD RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF EMBU.....	64 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF KITUI.....	65 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF MACHAKOS.....	66 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF MAKUENI.....	67 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF NYANDARUA.....	68 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF NYERI.....	69 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF KIRINYAGA.....	70 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF MURANG'A.....	71 ST RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF KIAMBU.....	72 ND RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF TURKANA.....	73 RD RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF WEST POKOT.....	74 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF SAMBURU.....	75 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF TRANS NZOIA.....	76 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF UASIN GISHU.....	77 TH RESPONDENT

THE COUNTY PUBLIC SERVICE BOARD OF

ELGEYO MARAKWET.....	78 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF NANDI.....	79 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF BARINGO.....	80 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF LAIKIPIA.....	81 ST RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF NAROK.....	82 ND RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF NAKURU.....	83 RD RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF KAJIADO.....	84 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF KERICHO.....	85 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF BOMET.....	86 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF KAKAMEGA.....	87 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF VIHIGA.....	88 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF BUNGOMA.....	89 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF BUSIA.....	90 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF SIAYA.....	91 ST RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF KISUMU.....	92 ND RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF HOMABAY.....	93 RD RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF KISII.....	94 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF NYAMIRA.....	95 TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD OF NAIROBI.....	96 TH RESPONDENT

AND

THE HONOURABLE ATTORNEY GENERAL.....	INTERESTED PARTY
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JUDGMENT

Introduction

1. This consolidated judgment relates to three claims being; *Cause No. E66 of 2021* and *Cause No. E085 of 2021* instituted by *Kenya National Union of Nurses* and *Cause No. E101 of 2021* instituted by *Kenya National Union of Clinical Officers*.
2. By an order of the Court issued on 25th February 2021, the three claims were consolidated and *Cause No. E085 of 2021* selected as the lead file.
3. The subject of these claims is communication dated 22nd December 2020 from the Cabinet Secretary, Ministry of Health to the Cabinet Secretary Ministry of Public Service and Gender, indicating that the Ministry and the County Governments would “*not play the agency role of remitting union dues to the Unions in the Health Sector.*”

The 1st Claimant’s Case

4. In *Cause No E066 of 2021*, the 1st Claimant accuses the 1st Respondent

of issuing an illegal Circular dated 22nd December 2020 directing the 2nd Respondent not to deduct and remit the union dues as the Ministry of Health and the County Governments would not play the agency role of remitting union dues to Trade Unions in the Health sector.

5. The 1st Claimant asserts that based on the said Circular, the 2nd Respondent failed to deduct the union dues from the wages of Nurses who are members of the 1st Claimant and hence no remittance was made to the Union.

6. The 1st Claimant seeks the following remedies:

- a) An order quashing Circular Ref; *MOH/HRM&D/IPPD/SM/(30)* dated 22nd December 2020 issued by the Cabinet Secretary, Ministry of Health;
- b) An order stopping the implementation of the said Circular Ref; *MOH/HRM&D/IPPD/SM/(30)* dated 22nd December 2020;
- c) A declaration that the 1st and 2nd Respondents either by themselves or through their servants, representatives, agents or assigns have no legal capacity to issue directives to County Public Service Boards interfering with employment, membership, remittance and or deduction of trade union dues from the 1st Claimant's members;
- d) An order directing the 2nd Respondent to pay from its own funds any money lost by the 1st Claimant in any County Government as a result of implementation of the Circular Ref; *MOH/HRM&D/IPPD/SM/(30)* dated 22nd December 2020;
- e) General damages.

7. The 1st Claimant's case is that the impugned circular flies in the face of Section 48 of the Labour Relations Act and contravenes Legal Notice No. 160 of 2018 directing employers of its members to deduct and remit union dues.

8. The 1st Claimant avers that the 2nd Respondent's failure to deduct and remit union dues is aimed at crippling union activities and interferes with the right of the members to participate in those activities.

9. In *Cause No E085 of 2021*, the 1st Claimant seeks the following reliefs:

- a) A declaration that the Cabinet Secretary and or any other person either by themselves or through their servants, representatives, agents or assigns, have no legal capacity to suspend or revoke a Legal Notice for Trade Union dues as issued by the Cabinet Secretary for Labour;
- b) An order quashing Circular Ref; *MOH/HRM&D/IPPD/SM/(30)* dated 22nd December 2020 issued by the Cabinet Secretary, Ministry of Health;
- c) An order directing the 1st and 2nd Respondents to pay all uncollected union dues from their own funds;
- d) General damages.

10. The 1st Claimant reiterates that the 1st Respondent had issued an illegal Circular dated 22nd December 2020 stopping deduction and remittance of union dues in favour of Trade Unions in the Health Sector.

11. The 1st Claimant further reiterates that there exists a Legal Notice issued by the Cabinet Secretary for Labour directing all employers of the members of the 1st Claimant Union to deduct and remit union dues and as such, the action by the 1st and 2nd Respondents was in contravention of the Legal Notice as well as Section 48 of the Labour Relations Act.

The 2nd Claimant's Case

12. Vide an amended Memorandum of Claim dated 3rd March 2021, the 2nd Claimant seeks the following reliefs:

- a) An order quashing Circular Ref; *MOH/HRM&D/IPPD/SM/ (30)* dated 22nd December 2020 issued by the 1st Respondent;
- b) An order stopping the implementation of the Circular Ref; *MOH/HRM&D/IPPD/SM/ (30)* dated 22nd December 2020;
- c) An order directing the 1st and 2nd Respondents to pay from their own funds any money lost by the 2nd Claimant in any County Government as a result of implementation of the Circular Ref; *MOH/HRM&D/IPPD/SM/ (30)* dated 22nd December 2020;
- d) General damages.

13. The 2nd Claimant pleads that the Recognition Agreement between itself and the 1st Respondent dated 18th February 2019, gives the 2nd Claimant the *locus Standi* to act on behalf of Clinical Officers who are in the service of the National Government, 47 County Governments,

Parastatals and State Corporations.

14. The 2nd Claimant argues that upon being served with check off forms, the 1st Respondent and the County Governments had a statutory obligation to deduct and remit union dues in favour of the 2nd Claimant.

15. The 2nd Claimant further argues that the 1st Respondent has no mandate to regulate the right to unionise, which is secured under Article 41 of the Constitution.

16. The 2nd Claimant adds that it is entitled to recruit, represent and receive monthly subscriptions from Clinical Officers who are employees of the 1st Respondent and the 47 County Governments.

The Respondents' Case

17. In their response to the claims, the 1st, 2nd and 3rd Respondents describe the consolidated claims as frivolous, scandalous, and mischievous and an abuse of the court process and urge the Court to dismiss them with costs.

18. These Respondents state that the Claimants' claims raise no triable and or reasonable cause of action as against the 1st, 2nd and 3rd Respondents as no evidence has been adduced regarding the existence of an employment relationship with the National Government so as to hold the 1st, 2nd and 3rd Respondents responsible for failure to remit union dues in line with Section 48 of the Labour Relations Act.

19. The 1st, 2nd and 3rd Respondents state that the impugned Circular was issued after a consultative meeting between the Ministry of Health and the County Governments and as such there was no violation of Legal Notice No. 160 of 2018 or Section 48 of the Labour Relations Act.

20. It was also averred that the Claimants had misunderstood the aforesaid legal provisions by including the National Government as their members' employer despite it being clear that the said members are employees of County Governments, save for those employed by Kenyatta National Hospital.

21. It was further averred that the County Governments are a distinct level of Government and it would be ridiculous for the Claimants to insist that the deduction of their union dues should be facilitated by the 2nd Respondent and or the National Government.

22. The 1st, 2nd and 3rd Respondents maintain that it was in order for the Cabinet Secretary in the Ministry of Health to communicate the decision arrived at after a consultative meeting with all the stake holders vide his Circular dated 22nd December 2020. They ask the Court to appreciate the role played by the Ministry of Health in providing policy direction towards strengthening devolution and efficient functioning of the Health Sector.

Findings and Determination

23. Based on the pleadings and submissions filed by the parties, the following are the issues for determination:

- a) Whether the consolidated claims offend the *res sub judice* rule;
- b) The effect of the Circular dated 22nd December 2020;
- c) Whether the Claimants are entitled to the prayers sought.

Res Sub Judice?

24. It was submitted on behalf of the 1st, 2nd and 3rd Respondents that the Claimants' claims are *res sub judice* on account **Republic v Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others [2013] eKLR** in which the Claimants were *Ex Parte* Applicants.

25. The doctrine of *res sub judice* was restated by the Supreme Court of Kenya in its decision in **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR** in the following terms:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

26. The 1st, 2nd and 3rd Respondents argue that the claims herein are *res sub judice* on the basis that a similar suit was filed in **Republic v Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others [2013] eKLR** where the 1st and Claimants had sought to have the transfer of health services from the National Government to the County Governments, quashed.

27. I will say two things on this issue; first, the cited case has already been determined and second, the subject matter in the present claims, being the legality of a circular stopping deduction and remittance of union dues does not have even the remotest connection with the subject matter in the **Transition Authority Case** (supra). There is nothing more to say on this issue and I will therefore let it rest.

The Circular

28. On 22nd December 2020, the Cabinet Secretary, Ministry of Health wrote to his Counterpart in the Ministry of Public Service and Gender as follows:

“Dear Waziri,

RE: STOPPAGE OF REMITTANCE OF UNION DUES

Arising from the consultative meeting held between the Ministry of Health and Council of Governors on 21st December 2020, it was decided that with effect from the date of this letter, the Ministry and the County Governments will not play the agency role of remitting union dues to the Unions in the Health Sector.

Kindly facilitate.

Yours Sincerely

(signed)

SEN. MUTAHI KAGWE, EGH,

CABINET SECRETARY

Copy to: **H.E Hon. Wycliffe Oparanya, EGH,**

Council of Governors,

Delta House

NAIROBI

Principal Secretary

Ministry of Health.”

29. This letter is what is variously referred to as the ‘*the Circular*’ or ‘*impugned Circular*’ in this judgment and is the subject of the present claims.

30. In advancing their case, the Claimants relied heavily on Section 48 of the Labour Relations Act of 2007 which provides inter alia:

48 .(1)

(2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to-

(a) deduct trade union dues from the wages of its members; and

(b) pay monies so deducted –

(i) into a specified account of the trade union; or

(ii) in specified proportions into specified accounts of a trade union and a federation of trade unions.

(3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee’s wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.

(4) The Minister may vary an order issued under this section on application by the trade union.

31. In the instant cases, it is not in dispute that there exists a Ministerial Order contained in Legal Notice No. 160 of 2018, directing employers of the Claimants' members to deduct and remit union dues to the 1st and 2nd Claimants.

32. The only question to ask therefore is whether the impugned Circular could halt or even revoke the said Ministerial Order.

33. Section 50 of the Labour Relations Act, 2007 provides:

50. (1) Any amount deducted in accordance with the provisions of this Part shall be paid into the designated trade union, or employers' organisation account within ten days of the deduction being made.

(2) The Minister may revoke or suspend a notice issued in accordance with this Part if the Minister has reason to believe that?

(a) the order was obtained by misrepresentation or fraud;

(b) the money is not being paid into the designated account; or

(c) the money is being used for a purpose other than the lawful trade union or federation activities.

34. In *Kenya National Union of Nurses v Kilifi County Public Service Board & others [2019] eKLR Rika J* dealt with a similar matter and affirmed the law in the following terms:

“Governor Oparanya’s circular seeks to undo Legal Notice No. 160 of 2018. It is completely illegal. Once a Ministerial Order has issued under Section 48 of the Labour Relations Act, an Employer must [the word used in the law is shall] commence deductions.

The Legal Notice can only be revoked or suspended by the issuing Labour Cabinet Secretary under Section 50 [2] of the Labour Relations Act, if he is satisfied that:

a) The Order was obtained by misrepresentation or fraud;

b) Money is not being paid into the designated account; or

c) The money is being used for a purpose other than the lawful Trade Union or Federation activities.

There is no room for a Governor to vary, revoke or suspend an Order issued by the Cabinet Secretary for Labour under Section 48 of the Labour Relations Act.

Even the Cabinet Secretary for Labour is circumscribed in his power to suspend or revoke an Order, as shown at paragraph 20 above.”

35. I am completely persuaded and do not need to say more. The Circular dated 22nd December 2020 flew in the face of clear statute law and was therefore null and void and of no legal consequence. No amount of consultation could save it.

Remedies

36. Pursuant to the foregoing findings and conclusions, I make the following orders:

a) Circular Ref: MOH/HRM&D/IPPD/SM/ (30) dated 22nd December 2020 is hereby quashed;

b) Implementation of the said Circular Ref: MOH/HRM&D/IPPD/SM/(30) dated 22nd December 2020 is hereby stopped;

c) A declaration is hereby issued that the 1st and 2nd Respondents have no legal capacity to issue directives to County Public Service Boards regarding deduction and remittance of trade union dues on account of the Claimants' members.

d) The claim for payment of money lost as a result of Circular Ref: MOH/HRM&D/IPPD/SM/(30) dated 22nd December 2020 was not proved and therefore fails.

37. Each party will bear their own costs.

DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021

LINNET NDOLO

JUDGE

Appearance:

Miss Wangare for the 1st Claimant

Mr. Kumutai h/b Mr. Kataka for the 2nd Claimant

Miss Odhiambo h/b Miss Akuno for the 2nd - 4th Respondents and Interested Party

Mr. Wabuko h/b Miss Mbaka for the 40th Respondent