REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 160 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

UNION OF NATIONAL RESEARCH INSTITUTES

STAFF OF KENYA.....CLAIMANT

VERSUS

KENYA AGRICULTURAL AND LIVESTOCK

RESEARCH ORGANIZATION.....RESPONDENT

JUDGMENT

The Claimant, Union of National Research Institutes Staff of Kenya, filed this suit vide a Memorandum of Claim dated 17th March 2020 against the Respondent, Kenya Agricultural & Livestock Research Organization for denying and/or failing to grant annual increment to staff members who are members of the Claimant union. The Claimant represents the interests and rights of the Respondent's unionisable employees who were previously employed by four defunct institutions being Kenya Sugar Research Foundation (KESREF), Coffee Research Foundation (CRF), Tea Research Foundation of Kenya (TRFK) and Kenya Agricultural Research Institute (KARI) which were merged with other research organisations to form Kenya Agricultural and Livestock Research Organisation (KALRO), the Respondent herein.

The Claimant avers that because employees of the defunct institutions were earning different salaries, the Respondent through a letter dated 2nd February 2016, informed its staff that it had received a harmonized salary structure from Salaries and Remuneration Commission (SRC) that eliminated the salary disparities among the staff. The Respondent thereafter effected the said structure for its staff. The Respondent also informed stakeholders that the Kenya Agricultural and Livestock Research Organization (KALRO) Board had approved the implementation of the harmonized terms of service which was to apply to all the employees of the former institutions who were in service on or after 1st July 2017 and superseded all the previous salary scales in force prior to the merger. That the incremental dates provided in the new salary scales were as follows:

> *i). Where the incremental date falls on 1st July 2017 officers will be granted their annual increments on the existing salary scales before their salaries are converted to the new salary points;*
>
> *ii). …...*
>
> *iii). Where two (2) or more salary notches are bracketed together and convert to a single point, those on the higher salary notches will retain their current incremental date, while those serving on the lower salary notch(es) will receive their next increment on 1st July 2018 and will adopt 1st July as their future incremental date;*

The Claimant avers that the Respondent did not implement annual increment in July 2018, October 2018 and January 2019. That it severally in writing requested the Respondent to effect the skipped annual increments together with the resultant arrears but the Respondent deliberately refused and declined to comply. That it thus reported a trade dispute to the Cabinet Secretary, Ministry of East African Community, Labour and Social Protection on 9th February 2019 as per **Section 62 of Labour Act, 2007**. That the Minister accepted the trade dispute and Mr. James Kiraguri was appointed as the Conciliator for the dispute. That the union filed its memorandum and submission to the Conciliator on 14th May 2019. The Claimant avers that the Respondent wrote a brief report through a letter dated 18th June 2019 stating that it was following up on the issue and was committed to ensure that staff get the annual increment upon provision of funding. That despite the Conciliator inviting the parties to a series of meetings so as to solve the trade dispute between the Claimant Union and Respondent, the dispute was not amicably resolved. The Conciliator thus issued a certificate of disagreement dated 7th August 2019.

The Claimant avers that its union members have a legitimate expectation to receive annual increment as per the terms of service. It urges this Court to find in favour of all the demands in the claim as fully justified and award accordingly. The Claimant prays for orders against the Respondent as follows:

a) Determination that the Respondent's actions infringe on the Claimant Union's members Constitutional Right to fair Labour Practices;

b) Order that the Respondent Organization commences/continue effecting the annual increment to its staff members whenever due.

c) Permanent Order directing the Respondent Organization to grant annual increment to its unionisable members for July 2018, October 2018 and January 2019 to staff members who were due till their retirement and or exit from employment.

d) An order compelling the Respondent Organization to pay staff members salary incremental arrears as a result of failure to grant July 2018, October 2018 and January 2019 to staff members.

e) Permanent Order restraining the Respondent, its servants and/or agents from victimizing, intimidating, coercing, harassing, terminating from employment, dismissing or disciplining from the Union Membership the unionisable employees and the Claimant members except through due process of the law.

f) An Order as to cost of the application.

The Respondent filed its Response dated 10th June 2020 in which it avers that only about 263 are members of the Claimant union of its employees against the Respondent's unionisable staff of 2714. That the Claimant does not represent a simple majority of unionisable employees of the Respondent and that there cannot therefore be a legally recognizable recognition agreement between the Claimant and the Respondent. It contends that the Claimant has no *locus standi* to initiate and agitate this Claim. That while the Claimant union represents employees from only two former institutions, it has no capacity to represent all the employees of the former institutions. Further, that while the said former institutions' unionisable employees were represented by different trade unions, none of the other former trade unions has to date garnered a simple majority of the Respondent's unionisable employees and hence no recognition agreement has ever been signed with any union.

The Respondent avers that it is not in a position to honour the claim as Treasury has not availed funds for it to pay the salary increments. That it was only able to implement the harmonised salaries for six months from 1st January to 30th June, 2018 in the 2017/2018 financial year after Treasury availed Kshs.500 million through Authority to Incur Expenditure (AIE). That for the financial year 2018/2019, the additional funding for payment of the harmonized salary was not factored in the printed estimates. That the amount required for payment of the harmonized salaries in line with the implemented increments was Kshs.51,989,000/=. That it has continued to request for additional funds and expedition of the process of allocation of funds from the relevant authorities and remains committed to ensuring that staff get the annual increments upon provision of funding.

The Respondent denies that it has in any way violated the law. It avers that under the provisions of the Constitution and the KALRO Act, its employees are public officers drawing salaries and benefits from the consolidated fund, and it has no mandate to set or review salaries and benefits of its employees as the same is determined by the Cabinet Secretary in consultation with the SRC. It avers that the Claimant has not demonstrated that the Respondent received the funds and failed to channel the same towards the implementation of the harmonized salary structure and increments. The Respondent avers that it cannot be compelled to pay without allocation of funds by the Treasury and that the Claim herein is therefore fatally defective and incompetent for non-joinder and misjoinder. That the orders sought by the Claimant can only be directed against Parliament and Treasury. It prays for the claim to be dismissed with costs to the Respondent.

The matter was dispensed by way of written submissions.

Claimant's Submission

The Claimant union submits that the issue in dispute and subject to determination is not Recognition and/or union membership but the enforcement of the harmonized terms of service which the Respondent as an employer has breached by failing to implement and/or has selectively implemented. That it is nevertheless acting in the interest of one or more of its members who are employees of the Respondent, which is allowed under **Articles 22 and 258 of the Constitution of Kenya**. It relies in the decision of the court in **Kenya Private University Workers Union v Aga Khan University Hospital [2019] eKLR** to the effect that recognition and collective bargaining agreements are not the determinants of *locus standi* and that union membership gives the union *locus standi* to represent employees.

It further submits that the union is before court upon referral from the Labour Office going by the ***Certificate to Industrial Court dated 7th August 2019*** that was issued by the Conciliator and as per the provisions of **Section 73 of the Labour Relations Act** as read with **Rule 5 of the Employment and Labour Relations Court Rules, 2016.**

It submits that the Respondent is bound by the advice given by SRC under **Article 230 (4) (b)** as read with **Article 259 (11)** which advice is not something that can be accepted or rejected in discretion. The Claimant relies on the case of **Teachers Service Commission v Kenya Union of Teachers & 3 Others, (2015) eKLR** cited in **Council of County Governors v Attorney General & 2 Others; Commission on Revenue Allocation & 15 Others (Interested Parties) [2019] eKLR** where the Court interpreted the binding nature of advice given by a Commission as set out in Article 259(11) of the Constitution to mean advice that is a mandatory condition precedent for a valid exercise of power or function and held that the advice given by SRC is binding.

The Claimant submits that the Respondent's act of selectively paying its employees as per the harmonized terms of service while

disregarding other employees contravenes **Article 41 of the Constitution** on fair labour practices and is a breach of the employment contracts between the Respondent and its employees. That **section 52 of the Kenya Agricultural and Livestock Research Act No. 17 of 2013** further provides that all rights, obligations and contracts which, immediately before the coming into operation of the Act were vested in or imposed on a former institution, shall be deemed to be the rights, obligations and contracts of the Respondent. That the Respondent has not adduced any evidence to show the efforts it has made (if any, and which is denied) to request for funds from the Treasury to pay the increments and implement the harmonized structure. That therefore the terms and conditions were incorporated into the employment relationship by statute that led to the employer creating rights and obligations in the employment relationship where are binding terms and subject of this Claim.

It is submitted by the Claimant that the Respondent's selective action is also discriminative and detrimental to the Claimant Union's members, some of whom are soon to retire. That the same further contradicts **Article 27 of the Constitution, section 5 of the Employment Act** and **Clause B. 22 (1) of the Public Service Commission Human Resource Policy, 2016.** It relies on the case of **Erastus K Gitonga & 4 others v National Environmental Management Authority; Law Society of Kenya (Interested Party) [2019] eKLR** where the court found that the unequal treatment in terms of the allowances provided to the claimants amounted to discrimination and unlawful labour practice.

Further, that the **ILO Equal Remuneration Convention, 1951 (No. 100) on 7th May 2001** provides that,

> ***"Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value."***

The Claimant urges that the Court to declare the conduct of the Respondent as prejudicial, discriminatory and inconsistent with the letter and spirit of the Constitution and further require the Respondent to fully abide by or honour the harmonized and board approved terms of service.

Respondent's Submission

The Respondent submits that the issue of recognition was raised in **ELRC No. 1272 of 2017 as consolidated with Cause No. 650 of 2015; Union of National Research Institutes Staff v Kenya Sugar Research Foundation (KESREF) & 2 Others.** That the law does not permit parties to institute fresh litigation because of new views they may want to entertain over the same subject matter. That the issue in dispute in the instant suit is therefore *res judicata*. That the Claimant is by this suit attempting to set aside the Orders made in the said suit yet there is on appeal or application to review the said Orders. It relies on **Nairobi H.C Petition No. 59 of 2015; Okiya Omtatah Okoiti v Communications Authority of Kenya and Others** and asks this Court to find that this Claim is incompetent for being *res judicata*.

The Respondent submits that **Section 54(1) of the Labour Relations Act** provides that an employer, including one in the public sector shall recognize a trade union for purposes of Collective Bargaining if that trade union represents the simple majority of unionisable employees. Further that according to **Black's Law Dictionary Nineth Edition,** a majority always refers to more than half of some defined or assumed set; a group of more than half of a total: a group of more than fifty percent and that a "majority" without further qualification usually means a simple majority; half plus one. That given the Respondent has 2162 unionisable employees, the simple majority would be 1081 employees. That the Claimant cannot enter into a recognition agreement with it as it has a membership of 236, which is below the statutory required minimum.

It is submitted by the Respondent that the funds to implement the Claimant's prayers must be appropriated by Parliament. That **Article 206 of the Constitution** establishes the Consolidated Fund and monies may only be withdrawn from the Fund on appropriation by an Act of Parliament in accordance with **Articles 206(2)(a) and 206(4)** or as per **Article 222 and 223 of the Constitution**. That it has demonstrated at *page 111 of its annexure 'EK3'* that the Minister of Agriculture responded to its numerous and persistent requests for additional funding as follows:

> *"The state Department for Crop Development and Agriculture Research submitted your requests to the National Treasury requesting additional funding for operations and maintenance. However, due to the tight fiscal space the country is operating in the National Treasury is not in a position to provide the additional funds. Further to this, KARLO is advised to rationalize its expenditure and prioritize activities within its FY2019/2020 approved budget.*
>
> *This therefore is to inform you that the National Treasury is not in a position to provide additional funding to KALRO for operation and maintenance in the FY 2019/2020".*

The Respondent submits that it has therefore not refused to implement the Claimant's claim, that the same has been occasioned by statutory, constitutional and financial constraints beyond its control. To this front, it relies on **Civil Appeal No. 196 of 2015, Teachers Service Commission v Kenya National Union of Teachers & Others** at paragraphs 236 to 255. The Respondent further relies on the case of **Narok County Council v Transmara County Council (2000) 1 EA 161** and **Commissioner of Lands v Kunste Hotel Limited (1997) eKLR**, where the court stated that it is trite that if Statute has provided for the procedure to do a certain act, that procedure must be followed.

The Respondent submits that the non-availing of funds by the Treasury to pay the increased and harmonized salary structures was an intervening event that vitiated the contract between the parties and rendered the continued sustenance of the said contract impossible. That the doctrine of frustration of contract therefore comes into play to excuse further performance by the Respondent and that this proposition was aptly upheld by the court in **Nairobi ELRC No. 2274 of 2015, Joshua Nyagol Onyango & Others v Relief & Missions Logistics Limited** that the doctrine of frustration operates to excuse further performance where:

> *i). It appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that the same fundamental things or state of this will continue to exist, or that some particular person will take place, and*

ii). Before breach of performance becomes impossible or any possible in every different way to that contemplated without default or either party, owing to fundamental change or circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more erroneous does not of itself give rise to frustration.

On the claim on victimisation, it is the Respondent's submission that the Claimant has not produced any document indicating that the Respondent has threatened to victimize the Claimant's members. That the said prayer is speculative and so remote that it should not be granted. It further submits that the Claimant cannot be heard to seek reliefs in advance without any breach by the Respondent.

Analysis and Determination

Having considered the pleadings and submissions, the issues for determination are:

1. Whether the Claimant Union has locus standi to bring this suit.

2. Whether the claim is *res judicata.*

3. Whether failure by the Respondent to implement the harmonized terms of service constitutes infringement of the Constitution of Kenya and the contracts of employment between the Respondent and its staff.

4. Whether the Claimant is entitled to the reliefs sought.

Locus Standi

It is the Respondent's submissions that because the Claimant union has no simple majority or recognition agreement with the Respondent, it has no *locus standi* in the instant suit.

This Court has had occasion to deal with the issue of *locus standi* of a trade union in similar circumstances in several cases and has time and again explained that the issues of representation and recognition are different. The issue of representation is a constitutional right under Article 36 and 41 of the Constitution and Section 4 of the Labour Relations Act.

Article 41(2)(c) provides that every worker has a right to form, join or participate in the activities and programmes of a trade union. This refers to membership. Section 4(1) and (2) of the Labour Relations Act echoes the said provisions and provides –

4. Employee's right to freedom of association

(1) Every employee has the right to—

(a) participate in forming a trade union or federation of trade unions;

(b) join a trade union; or

(c) leave a trade union.

(2) Every member of a trade union has the right, subject to the constitution of that trade union to—

(a) participate in its lawful activities;

(b) participate in the election of its officials and representatives;

(c) stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and

(d) stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of this Act or a collective agreement.

It is by virtue of membership that a trade union acquires the right to represent an employee on the rights of an employee. It does not require a simple majority of membership or a recognition agreement to do so. Section 48 of the Labour Relations Act provides the procedure for joinder by an employee to the membership of a trade union by signing of Form S in the Act, which is a check off form for deduction of union dues. Union dues are authorised deductions under Section 19(1)(f) of the Employment Act and by virtue of Section 48, are approved and gazetted by the Minister or Cabinet Secretary in charge of labour matters.

On the contrary, recognition agreement is provided for Section 54(1) to (3) of the Labour Relations Act which provides –

54. Recognition of trade union by employer

(1) An employer, including an employer in the public sector, shall recognise a trade union <u>for purposes of collective bargaining</u> if that trade union represents the simple majority of unionisable employees.

(2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union <u>for the purposes of collective bargaining if the</u> trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.

(3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.

[Emphasis added]

As expressly provided, a simple majority is only necessary for purposes of a recognition agreement and it is a recognition agreement that gives a trade union the right to negotiate a collective bargaining agreement.

In **Cause No. Nairobi 1272 of 2014** and **Kisumu Cause No. 272 of 2014** this court had the opportunity to consider the question whether the Claimant had a right to enforce terms and conditions of service with respect to the Respondent's employees by virtue of Sections 53, 54 and 55 of the Kenya Agricultural and Livestock Research Act and stated as follows –

"The court has noted that although the 3rd respondent has stated that Kenya Union of Commercial Food and Allied Workers had a recognition agreement and had negotiated several collective bargaining agreements with Coffee Research Foundation which was affected by the Kenya Agricultural and Livestock Research Act, the said union has not applied to be enjoined in these proceedings and neither has the 3rd respondent. It would therefore be speculative to make any findings in respect of the said union.

Under Section 53 of the new Act, the staff of the 1st and 2nd respondents were to be absorbed on same or improved terms and conditions of service. Under Section 55 any court proceedings were to be carried on or prosecuted by or against the 3rd respondent herein.

I therefore find the argument by the 3rd respondent on simple majority to be misplaced as the recognition agreement that was existing between the claimant and the 1st and 2nd respondents respectively was taken over by the 3rd respondent and the terms of service negotiated for the staff of the 1st and 2nd respondents were transferred cither at the same or improved level. Recognition is therefore not an issue in this case but rather, the negotiation of terms and conditions of service.

The 3rd respondent's argument on threshold for recognition is further not supported by any evidence of the number of employees in the 3rd respondent's employment after the merger who are members of the claimant union as against those who are not. The issue of lack of simple majority s argued by the 3rd respondent is thus not an issue as there is no evidence to support the same.

There is therefore no proof that the level of membership of the claimant went below the threshold of simple majority. Further, the 3rd respondent has not initiated any process for termination of recognition agreement on the basis of lack of a simple majority in the manner provide for in law. It is worth noting there is no provision under the law for automatic lapse or termination of a recognition agreement on the ground that the union no longer has a simple majority among staff of an employer.

I however agree with the 3rd respondent that following the collapse of the 1st and 2nd respondents together with other research institutions into one body, there is need for reorganisation of the relationship between the claimant and the 3rd respondent and it will not be possible to proceed with the claim herein as filed. I also do not think that SRC features in such reorganisation as SRC is only to be consulted at the time of negotiation of terms and conditions of employment where they touch on the areas that SRC is mandated to set or advise on such terms and conditions of employment."

Both parties have heavily quoted from the said judgment.

As observed in the judgment, the Respondent inherited the liabilities of the defunct organisations which had recognition agreement with the Claimant. The Respondent has not, as pointed out in the said judgment, taken any steps to terminate the recognition agreements on grounds that the Claimant had no simple majority. Lack of simple majority is no bar for a union to negotiate a collective agreement for as long as a recognition agreement that gave the union a right to negotiate is still in force.

Further, the fact that this matter was instituted in this court following the process of conciliation provided for under Section 62 to 73 of the Labour Relations Act means that the dispute is properly before this court. Section 62(1) provides that –

62. Reporting of trade disputes to the Minister

(1) A trade dispute may be reported to the Minister in the prescribed form and manner—

(a) by or on behalf of a trade union, employer or employers' organisation that is a party to the dispute; and

(b) by the authorised representative of an employer, employers' organisation or trade union on whose behalf the

trade dispute is reported.

Section 65(1) further provides –

65. Minister to appoint conciliators

(1) Within twenty-one days of a trade dispute being reported to the Minister as specified under section 62, the Minister shall appoint a conciliator to attempt to resolve the trade dispute unless—

(a) the conciliation procedures in an applicable collective agreement binding on the parties to the dispute have not been exhausted; or

(b) a law or collective agreement binding upon the parties prohibits negotiation on the issue in dispute.

Further, Section 73(1) provides –

73. Referral of dispute to Industrial Court

(1) If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.

For the foregoing reasons, the Claimant has *locus standi* to file the instant suit.

Res Judicata

The Respondent submitted that the claim herein is *res judicata*, the same having been the subject of **ELRC Cause No. 1272 of 2017 as consolidated with Cause No. 650 of 2015: Union of National Research Institutes Staff v Kenya Sugar Research Foundation (KESREF) and Others**. The Respondent cites the determination in the said suit in support of its averments where the court states –

"I however agree with the 3rd respondent that following the collapse of the 1st and 2nd respondents together with other research institutions into one body, there is need for reorganisation of the relationship between the claimant and the 3rd respondent and it will not be possible to proceed with the claim herein as filed. I also do not think that SRC features in such reorganisation as SRC is only to be consulted at the time of negotiation of terms and conditions of employment where they touch on the areas that SRC is mandated to set or advise on such terms and conditions of employment.

Conclusion

For the foregoing reasons I make the following orders –

*1. That the suit herein, that is **Nairobi Cause 1272 of 2014** as consolidated with **Kisumu ELRC Cause 276 of 2014** are not capable of being prosecuted as filed due to the impact of the Kenya Agricultural and Livestock Research Act which merged all research institutions dealing with research in agriculture and livestock under the 3rd respondent KALRO.*

2. That the parties (the claimant and 3rd respondent) are directed to meet with a view to agreeing on a relationship for purposes of future negotiations.

3. That the members of the claimant who have been absorbed by the 3rd respondent will continue with their membership as their right of association is not affected by the Kenya Agricultural and Research Act.

4. That for the foregoing reasons the suit herein is terminated and should there be any dispute the same will have to be processed as a fresh dispute in the a manner provided in the Act.

5. That each party shall bear its costs."

The subject matter of a suit is not determined by the orders granted but by the facts and the prayers sought. Section 7 of the Civil Procedure Act defines res judicata elaborately as follows:-

7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the

same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

***Explanation.* — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.**

***Explanation.* — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

***Explanation.* — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

***Explanation.* — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

***Explanation.* — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.**

***Explanation*. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.**

In the suit referred to by the Respondent, the issue in dispute was negotiation of terms and conditions of service in a collective bargaining agreement. The Respondent in its submissions also points out, correctly, that *"the Claimant had sought reliefs in respect of the proposed Collective Bargaining Agreement (CBA) which it claimed the Respondent had refused to negotiate."* The issue in dispute in the instant claim as reported to the Minister of Labour is –

"*Failure to grant annual increment in July 2018, October 2018 and January 2019 to staff members who were due."*

The basis of the claim is stated at paragraphs 11 to 21 of the Memorandum of Claim as set out below –

"*11. Employees' of the defunct institutions were earning different salaries hence the need to harmonize their salaries by the Respondent Organization.*

12. The Respondent Organization through a letter dated 2nd February 2016, informed its staff members they had received a harmonized salary structure from Salaries and Remuneration Commission (SRC) in order to eliminate the salary disparities.

13. As a result, the Respondent Organization developed harmonized salary scales for Kenya Agricultural Livestock Research Organization Staff.

14. The harmonized salary scales for Kenya Agricultural Livestock Research Organization Staff were as per the Salary and Remuneration Commission salary structure guide for the Kenya Agricultural and Livestock Research Organization (KALRO).

15. The harmonized salary scales was to be applicable to all the employees of the former institutions who were to be in service on or after 1st July 2017

16. Further, the Respondent Organization informed stakeholders that the KALRO Board had approved the implementation of the harmonized terms of service.

17. The new salary scales was to supersede all the previous salary scales which were in force prior to the merger.

18. The new salary scales for KALRO staff provided for incremental dates as follows:

i. Where the incremental date falls on 1st July, 2017 officers will be granted their annual increments on the existing salary scales before their salaries are converted to the new salary points;

ii. ……..

iii. Where two (2) or more salary notches are bracketed together and convert to a single point, those on the higher salary notches will retain their current incremental date, while those serving on the lower salary notch(es) will receive their next increment on 1st July 2018 and will adopt 1st July as their future incremental date;

19. Further, the Human Resource Policies and Procedures Manual for the Public Service provides that an officer's annual incremental date shall be the first date of the month one is appointed

20. The Claimant Union through various letters has requested the Respondent Organization to effect the skipped annual increment for July 2018, October 2018 and January 2019 together with the resultant arrears

21. Despite all the reminders and request by the Claimant Union, the Respondent Organization has deliberately refused and

declined to abide by the terms of service to grant annual increment in July 2018, October 2018 and January 2019 to staff members who were due."

I do not see how the issue in dispute herein and the issue in dispute in Cause 1272 of 2017 and Cause 650 of 2015 could be construed to be the same as to justify a plea of *res judicata*. I find that the issues in dispute in the instant suit and the earlier suit are different and the plea of *res judicata* misplaced and unavailable to the Respondent in the instant suit.

Failure to implement harmonised salaries

The Respondent does not deny that it failed to impellent annual salary increases as alleged by the Claimant. Its plea is that its employees are public officers whose remuneration and benefits are paid directly out of money provided by Parliament by appropriation under Article 206 of the Constitution. That no money for expenditure on the harmonised salary and salary increments was reflected in the 2018/2019 and 2019/2020 budget policy statements on the expenditure estimates for the said years as approved by parliament. It states that it implemented the harmonised salaries for six months (1st January – 30th June 2018) in the 2017/2018 financial year when Treasury availed Kshs.500,000,000 to the Respondent. That it had a deficit of Kshs.270,873,000 for implementation of harmonised salaries and increments for financial year 2018/2019.

The Respondent submits that the Claimant has not demonstrated that the Respondent has received the money and failed to implement the harmonised salaries and salary increases.

The Respondent relies on **Civil Appeal No. 196 of 2015** between **Teachers Service Commission v Kenya National Union of Teacher** where the Court states that responsibility to prepare a budget is not a guarantee that funds will be appropriated by Parliament. That case is however distinguishable from the instant suit because the salary increment in the said suit was a result of a court award which had not been budgeted for and had not been approved by Parliament. In the instant suit the salary increment and harmonised salary was already part of the terms of service of the Respondent's employees that had been budgeted for and approved by SRC and the Board of the Respondent. The arguments in the TSC case are thus not applicable in the instant suit as it was an offer of salary increment made by TSC in violation of the Constitution which offer was awarded by the Court after TSC reneged on the same. The Court of Appeal held that the offer by TSC was ultra vires the Constitution and therefore the award was null and void. Further that there was no legitimate expectation or estoppel applicable in respect of the offer by TSC, as a legitimate expectation cannot override the law.

In the instant suit the Respondent referred to a letter from the Cabinet Secretary for Agriculture as follows –

"The state Department for Crop Development and Agriculture Research submitted your requests to the National Treasury requesting additional funding for operations and maintenance. However, due to the tight fiscal space the country is operating in the National Treasury is not in a position to provide the additional funds. Further to this, KARLO is advised to rationalize its expenditure and prioritize activities within its FY2019/2020 approved budget.

This therefore is to inform you that the National Treasury is not in a position to provide additional funding to KALRO for operation and maintenance in the FY 2019/2020."

The Court agrees with the Respondent that without funding it is not able to implement the harmonised salaries and annual salary increment. The Court further notes that the Respondent is committed to ensure that staff get the annual increments upon provision of funding. It has demonstrated the efforts it has made towards seeking allocation of funds for implementation of the harmonised salary structure and annual increments.

In view of the reason given by the Respondent for the non-implementation of the annual increases, an order of the court directing it to pay would be in futility. It is trite that courts do not make orders in futility.

In any event, in the instant suit, I find that the failure to pay annual increments sought in the claim was not deliberate but as a result of reasons beyond the Respondent's control.

Conclusion

For the foregoing reasons, the claim must fail, but not because it has no merit. It is because the prayers sought are outside the control of the Respondent and further, because the Respondent has undertaken to pay as soon as Treasury avails the funds.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF OCTOBER 2020

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