



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NUMBER 186 OF 2016**  
**BETWEEN**  
**UNION OF NATIONAL RESEARCH INSTITUTE STAFF OF KENYA [UNIRISK].....CLAIMANT**  
**VERSUS**  
**KENYA MARINE AND FISHERIES RESEARCH INSTITUTE [KMFRI].....RESPONDENT**

**Rika J**

**Court Assistant: Benjamin Kombe**

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**Zachariah Achacha, Secretary-General, for the Claimant Union**

**Kadima & Company Advocates for the Respondent**

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**JUDGMENT**

1. In its Statement of Claim filed on 10<sup>th</sup> March 2018, the Claimant Union identifies 5 issues in dispute. It is stated that the Respondent has failed to negotiate 5 items in the incoming CBA, namely: -

- General wage increase.
- Basic salaries.
- Leave allowance.
- Commuter allowance.
- Effective date.

2. Parties have an active CBA signed on 17<sup>th</sup> July 2013, to last for 2 years. They negotiated the next CBA and agreed on all other issues, except the issues identified to be disputed above.

3. The Respondent filed its Statement of Response on 8<sup>th</sup> December 2016. Its position is that it is a state corporation, and does not have the mandate to negotiate with the Claimant, without the approval or guidance of the Salaries and Remuneration Commission [SRC]. The Respondent is otherwise ready and willing to conclude CBA. The last communication received by the Respondent from the SRC was on 2<sup>nd</sup> November 2016. The SRC indicated it would look into the CBA and respond appropriately.

4. The Central Planning and Monitoring Unit [CPMU] filed its Report on disputed items in Court, on 30<sup>th</sup> June 2017. It is observed by the CPMU, that the Respondent is a state corporation classified under PC 4B, alongside other corporations such as Coffee Research Foundation, KEFRI, KIRDI, KEMRI, KESFRI and Tea Research Foundation. It is also observed by CPMU that the Respondent sought the advice of SRC on issues in dispute way back in March 2016, and at the time of preparing CPMU Report, no advice had passed from SRC to the Respondent.

5. Parties filed Submissions based on the CPMU Report, as ordered by the Court. The Respondent hinges the bulk of its Submissions on the constitutional mandate of the SRC, and the inability of the Respondent to move forward in the process of collective bargaining, without the SRC having discharged its mandate with regard to the issues in dispute herein. The Claimant submits it is entitled to collectively bargain with the Respondent under the Labour Relations Act 2007 and the Constitution of Kenya. It has given reasonable proposals to the Respondent on the disputed collective bargaining subjects. There are no counter-proposals made by the Respondent.

#### **The Court Finds:-**

6. The Parties have found themselves unable to move forward, because the SRC has not given its advice to one of the Parties, who is bound to take into consideration such advice, the Respondent herein. Parties have in the past been able to negotiate, conclude and implement CBAs.

7. The Respondent sought advice from SRC way back in 2016. 3 years later, no advice from the SRC is available. Article 230 of the Constitution of Kenya creates the SRC. Its powers and functions comprise setting and reviewing regularly the remuneration and all benefits of all State Officers; and, advising the National and County Governments on the remuneration and benefits of all other Public Officers.

8. It is accepted in decisions of this Court cited by the Respondent, such as *Banking Insurance & Finance Union v. Kenya Post Office Savings Bank Limited [2017]e-KLR*; and *National Union of Water Sewerage Employees v. Mathira Water & Sanitation Company Limited & 2 Ors [2013] e-KLR*, that SRC mandate extends to Employees of parastatals. Employees of the Respondent herein, who are represented by the Claimant Union, fall within the advisory mandate of the SRC.

9. That said, this mandate, must not be exercised in a manner that stifles, stunts, or denies, the rights of other persons under the Constitution. The Claimant and the Respondent have the right to engage in collective bargaining under Article 41[5] of the Constitution of Kenya.

10. The Court has a responsibility, in recognizing and upholding the constitutional mandate of the SRC, under a given Article of the Constitution, not to violate the rights of the Claimant and the Respondent given by another Article of the Constitution.

11. The advice of the SRC has been sought and not given. The CBA subject matter, is almost outliving the intended collective bargaining cycle set by the SRC itself- of 4 years. The SRC is clearly in abuse of its mandate, by failing to advise the Respondent, and thereby preventing the Parties herein from concluding the collective bargaining process. This abuse has resulted in gross violation of the right of the Parties to engage in collective bargaining.

12. The other actors in the process, including the Labour Office, the CPMU and the Court have discharged their mandates, in moving the process forward. CPMU is an economic unit and advises the Parties through its reports. Its reports also guide the Court in resolving disputed economic items. The absence of the advice of the SRC should therefore not shut down collective bargaining. It cannot be the intention of the Constitution, the Labour Relations Act or ILO Convention No. 98 on Right to Organize and Collective Bargaining, that the process is frustrated by the inaction or inability of one actor.

13. The Court is satisfied that encountered with such a grave dereliction of constitutional obligation by the SRC failing to advise the Respondent, it must step in and assist the Parties in actualizing their rights and obligations under Article 41[5] of the Constitution.

14. The advice of the SRC has been sought, and not given to the Respondent, for 3 years. Failure by the SRC to give advice one of the Parties in the collective bargaining equation, should not result in the end of the collective bargaining process, little less deprive the Court of its mandate to look at the issues in dispute objectively, and provide a solution as the Court is mandated to do, under the Constitution and the Employment and Labour Relations Court Act.

15. Terms and conditions of employment are defined through Collective Bargaining Agreements; Individual Contracts between Parties; Written Laws; or Decreed by Judgments of the Employment and Labour Relations Court. This can be read in Section 26[2] of the Employment Act 2007. Parties are permitted under the Labour Relations Act, to submit unresolved disputes to the Employment and Labour Relations Court. The Court does not, in resolving disputed collective bargaining subjects, contrary to a legal misconception that appears to be gaining a foothold, abrogate the right of the Parties to freely negotiate and agree. The role of the Court is to impose a solution, on deadlocked processes, because the collective bargaining process must not be left dangling in the wind indefinitely. Parties are assisted by the Court to cross over to the next collective bargaining cycle. Compensable factors are not static, making it necessary to review the collective terms and conditions of employment regularly, to reflect current economic reality. As of today, the Parties herein ought to be focused on the Collective Bargaining Agreement succeeding the one subject matter of this dispute. How will they make up for the time lost in delayed conclusion of the process?

16. There is urgent need for all the actors in this process to play their roles, and assist the process to move forward. It is not clear why the SRC has not advised the Respondent. There is no correspondence on record to suggest why. It is unseemly to change collective bargaining cycles for public Servants from 2 years to 4 years, and fail to facilitate Parties in concluding collective bargaining, within the enlarged period of 4 years. Such failure creates the impression that Article 41(5) of the Constitution, has become to millions of Public Servants, a dead letter law. It is the view of the Court, against this background, that the following orders are appropriate:-

**a. The Respondent is granted 90 days from the date of this Judgment to seek the advice of the SRC in writing.**

**b. A copy of this Judgment, the CPMU Report, and Closing Submissions of both Parties, shall be forwarded to the SRC by the Respondent.**

**c. The Court shall review the dispute at the end of the 90 days and give a final determination of the contested items, with or without the input of the SRC.**

**Dated and delivered at Mombasa this 22<sup>nd</sup> day of March 2019.**

**James Rika**

**Judge**