REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATION COURT

AT NAIROBI

CBA NO. 216 OF 2018

NAIROBI CITY COUNTY GOVERNMENT.....EMPLOYER

AND

KENYA COUNTY GOVERNMENT WORKERS UNION.....UNION

SALARIES AND REMUNERATION COMMISSION.....INTERESTED PARTY/APPLICANT

JUDGMENT

Background

A brief background of this suit is that on 20th September 2018 this Court registered a Collective Bargaining Agreement, RCA NO. 182 of 2018 between Nairobi City County Government, the Employer, and Kenya County Government Workers Union, the Union. This registration then resulted to the Interested Party/Applicant filing the current Application on 14th February 2018 alleging that Employer and the Union colluded in having the CBA registered and that the guidelines set by the Applicant were not complied with.

The Application is brought under Articles 50, 159(2)(d) and 230 of the Constitution, Section 8, 54, 57, 59 and 60(4) of the Labour Relations Act, Section 12 of Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016. It seeks the following Orders:

1. That this Court certifies the application as urgent.

2. That the service of this Application upon the respondents be dispensed with and the application be heard ex-parte in the first instance.

3. That the Applicant be joined herein as an Interested Party

4. That this Court be pleased to issue an order of stay of the implementation of the 2017 – 2019 Collective Bargaining Agreement registered in Court on 20th September 2018 as RCA No. 192 of 2018 pending the hearing and determination of this application

5. That this Court be pleased to issue an order of stay of the implementation of the Collective Bargaining Agreement pending the hearing and determination of this cause.

6. That this Court be pleased to review and set aside the registration of the Collective Bargaining Agreement registered on 20th September 2018 as RCA No. 182 of 2018 to pave way for due compliance with Articles 230 (4) and 259 (11) of the Constitution of Kenya 2010 and the Salaries and Remuneration Commission Act, 2011 and the guidelines issued by the Applicant.

7. That this Court otherwise recalls its Order for the registration of the 2017-2019 Collective Bargaining irregular for want of compliance with statutory provisions.

The Application is supported by the Affidavit of Anne R. Gitau , the Interested Party's Chief Executive Officer and the Commission's Secretary, sworn on 14th February 2019 and is premised on the following grounds:

a. The registered Collective Bargaining Agreement as registered is illegal as the mandate of the Applicant was disregarded.

b. The Applicant's advice was not adhered to prior to the negotiation, signing and registration of the CBA.

c. The said Collective Bargaining Agreement ought to be set aside as the Applicant was not accorded a chance to be heard.

Employer's Case

The Employer in response to the application filed its Grounds of Opposition on 18th February 2018 together with a Replying Affidavit sworn by David Oseko, the Acting County Attorney. He confirms that the CBA between the Employer and the Union was registered on 20th September 2018 as RCA 182 of 2018.

He contends that this application is defective as it discloses no cause of action and the Interested Party has been improperly enjoined in the proceedings. He avers that the CBA cannot be deemed unconstitutional being a product of a lawful Court Order arising from Cause 2011 of 2018 unless the court order is annulled, set aside, vacated or reviewed altogether.

He avers that the employer cannot be held accountable for its decision to sanction the implementation of the CBA, that the employer has not contravened Articles 230(4), (5) and 259(11) of the Constitution and the Salaries and Remuneration Act in respect of the implementation of the CBA. He avers that the employer sought the Interested Party's advisory which was given and taken into account prior to the registration of the CBA thus it is not true that the Employer failed to comply with the guidelines set out of by the Interested Party.

The Union's Case

The Union filed a Replying Affidavit on 25th February 2019 sworn by Matilda J. Kimetto the Union's Secretary General in reply to the application. She avers that pursuant to Article 41(5) of the Constitution and Section 57(1) of the Labour Relations Act the Union and the employer engaged in consultative meetings and discussions amongst different stakeholders to ensure that there was a suitable CBA and on 5th May 2007 both parties executed the CBA.

She avers that the Union submitted the CBA to the Employer for registration in accordance with Section 60(1) of the Labour Relations Act. However, the employer failed to submit the CBA for registration within the statutory 14 days.

She further avers that the Union vide a letter dated 28th February 2018 informed the Applicant/ Interested Party of the CBA's conclusion and the Employer's delay in submitting it for registration, and further sought clearance from the Applicant to facilitate registration of the CBA but the Interested Party did not respond to the Union's letter.

She avers that the Union therefore proceeded to submit the Collective Bargaining Agreement to the Court for Registration in Cause No. 211 of 2018. On 31st July 2018 this Court directed the Union to submit the CBA to the Ministry of Labour for processing and on 10th August 2018 the Ministry of Labour informed the Court that the CBA was in conformity with the wages Guidelines, 1973. Consequently, on 20th September 2018 the Collective Bargaining Agreement was registered.

She avers that the Applicant did not challenge the proceedings in Cause No. 211 of 2018 despite being aware of the proceedings and it has not provided any evidence to warrant the setting aside or review of the Order under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules. She further avers that the Applicant did not seek to be enjoined in Cause 211 of 2018 upon which this Application is founded. That the application is misconceived and defective and the Applicant is estopped from challenging the registration and implementation of the CBA as it is a stranger to the proceedings.

Submissions

The parties appeared before Court for the hearing of the Application on 26th February 2019.

Counsel Sitienei for the Applicant/Interested Party submitted that the grounds in support of the application is that the CBA was negotiated, signed and registered in violation of the Applicant's constitutional and statutory mandate and guidelines issued by the applicant.

He argued that the Interested Party is a constitutional Commission established by Article 230(4) as it sets the remuneration and benefits of all public officers. He argued that the Salaries and Remuneration Act 2011 vests the Interested Party with additional functions to those set out under Article 230 of the Constitution and of interest is Section 11(e) of the Act mandates the Applicant to determine the cycle of review of salaries, remuneration and benefits.

He argued that the registered CBA is for a period of 2 years yet the Interested Party has set the cycle for CBAs at 4 years and the position has been communicated to the employers in the public sector. He stated that the chronology of events is in the Affidavit and that the employer did request the Interested Party for advice in September 2016 for a person to guide then in negotiations. The Interested Party responded by giving guidelines to employers which included a request for information to enable the Interested Party advice but before this was done the employer submitted a negotiated and signed CBA to the Interested Party. The CBA had therefore been negotiated and signed without the advice of the Interested Party.

He stated that the Interested Party gives parameters to the public sector employers for purposes of negotiating with the Union and in this case the advice had not been given as the parameters of giving that advice had not been provided. He stated that the Ministry of Labour had written to the Employer in 2018 pointing out the need to obtain the Interested Party's advice. In February 2018, the Union did write that the CBA had been negotiated and signed and this position was confirmed by the employer.

He stated that the language used by the employer was that the discussions between the employer and the Interested Party had been overtaken by events and all the Employer needed was a letter of no objection for proposal of inputting the changes in the (PPI) system. The tenor of the letter confirmed that the employer was ready to start implementing the CBA which they had negotiated, signed and registered erroneously.

He stated that Article 259(11) of the Constitution makes the advice of the Interested Party binding and this was confirmed by the Court of Appeal in Civil Appeal 196 of 2015 consolidated with 195 of 2015. As held by Odek JA the advice of the Salaries and Remuneration Commission is binding and the advice of the Interested Party must be sought and once obtained it is binding on the recipient.

He stated that the Employer and the Union alluded to a pre-existing suit Cause 211 of 2018 which the Interested Party was never a party to as it was never brought to its attention and it was never served with any pleadings. However, that does not make the Interested Party irrelevant or indolent.

In respect of the jurisdiction of this Court, Counsel Sitienei argued that Cause 211 of 2018, the decision of this court therein does not tie the court's hands with respect to CA 216 in which CBA was registered. He stated that they are not asking the Court to set aside any order in Cause 211 of 2018 since the suit revolved around the CBA and parties resolved the issue by consent.

He stated that when parties get embroiled in a dispute and agree to resolve it in a collusive manner to defeat express constitutional and statutory provisions the Court should exercise its inherent jurisdiction to determine any issue that might arise from such collusion.

He stated that the issue at hand is of great public interest as it relates to payment of employees benefits from public coffers and if two parties decide to agree outside a framework put in place by the law the result of that agreement is null and void. He argued that the Interested Party's position is that the CBA as negotiated and registered is illegal. Further, that the cost implication of the CBA will be colossal in the entire county and there will be legal effect.

He stated that the employer does appreciate that the Interested Party has a role with respect to the CBA and in Clause 47 of the CBA the parties have agreed that the terms of the CBA are subject to SRC's approval. He urged the Court to consider the decision by Rika J in Cause 338 of 2014 and in particular at paragraph 24 of the decision.

Counsel Mboya for the Employer argued that the Employer is constrained to raise issues with the manner that the Interested Party was enjoined in this matter. They were improperly enjoined and their participation is unlawful and irregular.

He stated that the CBA was a product of a lawful court order in Cause No. 211 of 2018 which was adjudicated upon by Radido J and that the Court was being asked to overturn lawful orders of the court issued by a court of concurrent jurisdiction. The Interested Party having failed to seek leave to be enjoined in that suit the representation is defective and an abuse of the process if this Court. Courts of concurrent jurisdiction have made decisions on enjoinment and after a court of concurrent jurisdiction has made an order they have no right to impose themselves. Moreover, that consent orders have more strength and are difficult to set aside than ordinary orders. This is by extension appealing against the decision.

He stated that it is not in dispute that the Interested Party's application is premised on the law and that the Interested Party has a right to give advice and that there was engagement between the employer and the Interested Party.

He stated that there was no evidence that the guidelines were not complied with by raising specific instances to prove that guidelines were both taken into account by the parties to the CBA. It is clear that they were engaged and they complied. According to him the Interested Party is on a fishing expedition. He argued that the CBA was regularly negotiated and registered.

He stated that the Public Management Act requires that the expenditure was not complied with. That the Interested Party has not stated the employer's budget is below 30% or that section 107(2)(b) and (c) have not been complied with. He stated that Treasury and the Ministry of Labour have not opposed the CBA and the Applicant has not provided any evidence but instead sought to dwell on generalities.

He submitted that there is no error and there is no real issue advanced to warrant varying of the orders hence the application should be dismissed as it is bad in law. He argued that the Interested Party is using the court as a Conciliator and the Interested Party must prove the principles of setting aside a contract. That no particulars of fraud between Employer and the Union have been proved.

He submitted that the CBA meets the criteria of Article 230 and 259 of the Constitution. He prayed that the application be dismissed. He dismissed

Counsel Otieno appearing for the Union stated that the first issue for consideration is whether the Interested Party has locus. He relied on the Petition No. 1 of 2017 **Raila Amolo Odinga & another v IEBC & 2 Others** where the Court made reference to the Francis Muruatetu case for joinder of an interested party. He argued that the court ought to take the personal interest or stake. The interest must be clearly demonstrated .The party also ought to show the prejudice to be suffered and must also demonstrate that it is not something remote and that it is clear the Interested party failed to demonstrate prejudice to be occasioned to it if the CBA is implemented.

He referred to the **Cause 724 of 2013 KUDHEIHA v KMTC** wherein the Court stated that the purpose of calling parties to attend court on the date of registration is to give the parties an opportunity to confirm or raise issues. The Court equated registration of a CBA to solemnisation of the CBA. He stated that the Interested Party had admitted that it had been supplied with a copy of the CBA and it cannot come to court and claim they were not aware of the CBA. He argued that the Interested Party ought to have come to court during registration and CBA. That having been registered it cannot be challenged at this stage.

He submitted that the second issue for consideration is whether the Interested Party has met the threshold for review. He argued that the

grounds for review are clearly set, which include, discovery of new and important evidence, error on the face of the record, clarification or any other sufficient reason. He relied on the Odunga's Digest nn Civil Case Law and Procedure at Pg. 57 and decision in Court of Appeal No. 159 of 2010 where the Court stated review is only available where there is an error or discovery of new evidence not available to the Applicant at the time of hearing. He further relied in the ***ELRC Cause 372 of 2015 Willis Ogola Okendo v Collins Oyuu & 3 Others [2017] eKLR*** the Court at page 3 stated that the court appreciates that the Applicant was a layman of advanced age. He explained that the reason they were referring to this case was because the Interested Party has come to Court to seek review on grounds not backed by evidence.

He argued that it is trite law that the Judge who issued the orders sits in this station and there is no reason why the application was not placed before that Court. He stated that Counsel for Interested Party has not asked this Court to seek to amend the section under which the application was filed. He argued that counsel knew the law and had time to go through the relevant statutes and confirm whether the application is brought under the correct provisions of the law and seek to fix the error. He relied on the decision in Supreme Court Appeal No. 9 of 2015.

He stated that the Counsel relied on Article 159 of the Constitution but it was not a mere technicality as it goes to the substance of the case. Article 159 can not be used or circumvented by the Interested Party or hide under it and the Constitution cannot be used to solve their own shortcomings. He relied on the Case No. 550 of 2013 which sets out when a consent order can be set aside.

He further relied on the decision in ***Cause 338 of 2014 Kenya Ferry Services v Dock Workers Union*** at page 5 that the failure of an employer not to seek advice from SRC ought not to prejudice the interests of employees. SRC must not be taken as an institution against agreements in the pubic sector.

He stated that the argument that a CBA shall affect *Wanjiku* is neither here nor there since each County is an employer on its own and with different resources. Further. a matter of public interest is one that touches all and sundry.

He argued that the Interested Party has not stated that it was not aware of registration and has not proved that there was collusion between the Employer and the Union. He urged the Court not to be persuaded by the Applicant's argument.

In a brief rejoinder, Counsel Wanyama who appeared together with the Counsel Sitienei stated that the issue of improper enjoinder does not arise as the Interested Party were joined by a Court Order hence they are properly before this Court.

On the issue of ELRC 211 of 2018, he stated they were not party to that suit and were never invited or aware of the suit. Counsel argued that a consent can be set aside if there is fraud or misrepresentation and the Black Law Dictionary defines fraud as a known misrepresentation of the truth.

She submitted that in the Replying Affidavit both parties were aware that the advice of the SRC had to be sought. She referred to ARG2 of the Supporting Affidavit clearly shows that certain information was sought from the Employer including confirmation of budgetary allocation from Treasury and none of these was given or the letter responded to.

She submitted that the required information was not given and advice given it was not adhered to. She stated both the union and the Employer have been negligent and CBA should be set aside. She stated that the MP Shah case that was relied upon was between two parties in the private sector while this case is in the public service and advice of the SRC must be sought and adhered to according to Section 15(6) of the ELRC Act. She argued that there has been no evidence presented to this Court to show fiscal sustainability or compliance with SRC advice.

She submitted that the CBA cannot be implemented because the National Treasury will only act on the CBA that has been passed through the SRC and conformed with the law. On the issue of review, she stated that the fact that the CBA has been registered without a letter of no objection of SRC and without compliance is a matter of evidence which was not placed before this Court.

She submitted that the applicant has met the threshold of setting aside as this is a matter involving public funds which once expended cannot be paid back. That the Applicant is bound to suffer prejudice if the CBA will be registered without following advice of a constitutional body.

She argued that information was sought but the information was not given and the Applicant's advice was not followed therefore making the registration of the CBA irregular, illegal and unconstitutional. Counsel therefore asked the Court to set aside the illegal CBA.

Determination

The issues for determination are:

a. Whether the Interested Party was rightfully enjoined in this suit.

b. Whether registration of the CBA as RCA No. 182 of 2018 should be stayed, reviewed and set aside to ensure compliance with Articles 230(4) and Article 259(11) of the Constitution and the Salaries and Remuneration Act.

Whether the Interested Party was rightfully enjoined in this suit.

The Applicant/Interested Party in its Notice of Motion filed on 14th February 2019 under Certificate of Urgency sought to be joined as an Interested Party and the Court on the very day Ordered that the Applicant be enjoined as an Interested Party by virtue of its Constitutional Mandate.

In ***Francis Karioki Muruatetu & Another v Republic & 5 Others [2016] eKLR*** the Supreme Court set out the principles to be considered in enjoining a party as an Interested Party. The Superior Court stated that:

> "From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:
>
> One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:
>
> i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
>
> ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
>
> iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court."

The function and powers of the Applicant (Salaries and Remuneration Commission) are laid out under Article 230 (4) of the Constitution which provides:

> **(4) The powers and functions of the Salaries and Remuneration Commission shall be to—**
>
> **(a) set and regularly review the remuneration and benefits of all State officers; and**
>
> **(b) advise the national and county governments on the remuneration and benefits of all other public officers.**
>
> **(5) In performing its functions, the Commission 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 recognise productivity and performance; and**
>
> **(d) transparency and fairness.**

In particular, the Applicant in the grounds in support of the application stated that the registration of the CBA was illegal as its mandate was disregarded. This is sufficient interest by the Applicant that it was sidestepped prior to the registration of the CBA. Further Section 15(6) requires that where applicable, the court ought to make reference to guidelines published from time to time by the Interested Party.

The Interested Party is thus mandated by the Constitution, the Salaries and Remuneration Act and the Employment and Labour Relations Act to participate in the registration of the CBA between the parties herein. The participation of the Interested Parties was relevant to protect the public interest. In ***Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR*** Mativo J held:

> **"**Finally, it is important to distinguish between two kinds of interested party interventions, those where the intervener is seeking to represent the public interest, or merely his or her own private interest. Generally speaking, a case may be appropriate for an intervention if it: (i) raises one or more issues of public importance; and (ii) there is a risk that this public interest may not be sufficiently well-addressed by the submissions of the parties alone. In short, any would-be public interest intervener must ask how they might assist the court in this case; or how they might 'add value' to the court's consideration of the issues before it."

This Court finds that there is sufficient interest to warrant the Applicant's joinder in the suit as an Interested Party.

> **Whether the CBA registered as RCA No. 182 of 2018 should be stayed, reviews and set aside to ensure compliance with Articles 230 (4) and Article 259(11) of the Constitution and the Salaries and Remuneration Act**

The contention is that the Interested Party failed to file this Application under Cause 211 of 2018 when the Union and Employer submitted the CBA for registration thus it cannot now come seeking to have the Order for Registration reviewed. The Union argues that the Interested Party did not file the application under the correct provision of the law and that it also did not meet the threshold for review. This Application was brought under Section 8, 54, 57, 59 and 60(4) of the Labour Relations Act, Section 12 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016, Articles 50, 159(2)(d) and 230 of the Constitution of Kenya. Counsel for both the Employer and the Union submitted that the application seeking to set aside and review the registration of the CBA was brought under the wrong provisions. Counsel Otieno for the Union stated that Counsel for the Applicant had ample time to address the error and seek amendment of the application to incorporate the correct provisions of the law. Counsel for the Applicant admitted

that it was erroneous and relied on Article 159 of the Constitution.

The Application was only grounded on Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 which entails the review of an Order. Article 159 of the Constitution provides that there should be no undue regard to technicalities but this does not translate to the disregarding procedure. The Employer and Union have not demonstrated how they were prejudiced by the reference to the many provisions of the law. They did not suggest it was intentional or intended to mislead them.

As was held in the case of ***Nancy Nyamira & Another V Archer Dramond Morgan Ltd [2012] eKLR*** where Ngugi J –

> **"**Next, the Defendant argues that the Plaintiffs' application must fail because it cites the wrong provisions of law. The Enforcement Application cites Order XLIV, Rule 17**.** *The Defendant correctly points out that there is no such rule. As many cases have now held, and notwithstanding Sir Udoma's remarks* ***Salume Namukasa v Yozefu Bukya*** **(1966) EA 433,** invoking the wrong provision of law does not necessarily spell doom to an otherwise meritorious application. This was the holding in *Gitau v Muriuki* [1986] KLR 211 which *I now follow to hold that in as long as a party's invocation of the wrong provision of law is not in bad faith, meant to mislead or otherwise causes injury or prejudice to the other side, the Court will not dismiss an application solely on account of wrong invocation of a provision of the law on which the application is grounded."*

The role of the Interested Party in CBA's involving County Governments

Article 230 (4) of the Constitution provides that the SRC function is to advise the national and County Governments on the remuneration and benefits of all public officers.

The parties herein do not dispute that there was communication between them and the Applicant, regarding the CBA. Anne R. Gitau in her Supporting Affidavit states that in a letter dated 9th September 2016 the Applicant provided the Employer with its guidelines to assist in the process of negotiations but the Employer submitted a negotiated, signed and concluded CBA without considering the guidelines. It is further submitted that they did not provide the information sought by the respondent.

The Employer in its Replying Affidavit sworn by the David Oseko states that it sought the Interested Party's advisory which was given and taken into account by the Court prior to the registration of the CBA. It averred that the communication with the Interested Party was annexed as PKW2 but no such annexure was attached to its Replying Affidavit. He did not state when the court considered such information or how that information was brought to the court's decision.

In the Letter dated 2nd September 2016 annexed to the Supporting Affidavit the Employer sought a technical person well vast in CBA negotiations to guide them. In response to this the Applicant in its letter dated 9th September 2016 informed the Employer that in order for the Commission to provide advice on the financial items of the CBA Nairobi County Government would be required to submit several documents that were listed therein. It is not until 5th June 2017 that the Employer responded thus:

> "Nairobi County Public Service Board, Nairobi City County Government and Kenya County Government Workers Union have been negotiating a Collective Bargaining Agreement from February 2017 and have finalized on the negotiation process. In line with your Circular Ref. No. SRC/ADMCIR/1/1 (118) dated 21st March 2014 which gave guidelines on the requirements that are to be met before the conclusion of the Collective Bargaining Agreement, the County hereby submit [the] CBA document for your perusal and advice."

This letter by the Employer seems to merely have been aimed at informing the Applicant that the CBA had been negotiated and finalized. The intention of the letter was not aimed at adhering to the advice given by the Applicant in its letter dated 9th September 2016. Notably, the response by the Applicant in its letter dated 13th June 2017 was that the Claimant had negotiated the CBA contrary to the guidance provided in the letter dated 9th September 2016 and further advised the Employer not to register the CBA as it analysed the Employer's request. The Applicant in its letter dated 18th July 2017 stated thus:

> "The Salaries and Remuneration Commission while analyzing your request to provide parameters noted key omissions despite the Commission having provided guidance…The Commission is therefore constrained to provide advice on the CBA as submitted. The County Government may however, seek for advice from the Commission on the CBA while adhering to the Commission's guidelines as earlier provided. This will require the County Government to re-submit the following information:…"

The Employer does not seem to have responded to this request for re-submission of documents despite a reminder letter being sent on 20th September 2017. The Ministry of Labour on 19th February 2018 advised the Union to resubmit the negotiated CBA between the Employer and the Union to the Applicant for advise and the Union forwarded the CBA and documents to the Applicant in its letter dated 28th February 2018. Consequently, the Applicant in its letter dated 5th March 2018 addressed to the County Secretary and copied to the Union and the Ministry informed the Employer thus:

> "…Further, despite the Commission's request for additional information to enable provision of the advisory to conclude the CBA, the County Government has not responded on the matter, it has been brought to the attention of the Commission that the Union had proceeded to have the irregularly negotiated CBA registered through the MEASL & SP.
>
> …Consequently, the forwarded CBA does not meet the threshold for clearance by the Commission and you are therefore, advised to adhere to the outlined guidelines in this matter."

From the entire correspondence on the already negotiated CBA the conclusion is that both the Employer and the Union were aware that the Interested Party had to give clearance to the CBA before it was submitted for registration. It has not been demonstrated that the Employer complied with the advice of the Interested Party as given in the letters referred to above.

Section 11(c) of the Salaries and Remuneration Commission provides:

> **"In addition to the powers and functions of the Commission under Article 230 (4), the Commission shall-**
>
> **(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;"**

Article 230 (4) and Section 11 of the Salaries an Remuneration Commission make it mandatory for the Commission to advise both national and county governments on the remuneration and benefits of other public officers. The process of negotiations between trade unions and unionized public officers is set out in Rule 18 of the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013 which states:

> **1. The Commission shall not negotiate with a trade union when determining, reviewing or advising on remuneration and benefits of State or public officers.**
>
> **2. The management of a public service organization with unionisable employees shall seek the advice of the Commission before the commencement of any collective bargaining process with the respective union on the sustainability of the proposal of the union.**
>
> **3. Where the collective bargaining process referred to in paragraph (2) is successful, the management shall, before the signing of the agreement, confirm the fiscal sustainability of the negotiated package with the Commission."**

In a nutshell, Regulation 18 requires two main steps (1) that a public entity is to seek advice before the commencement of collective bargaining process and (2) prior to the signing of the CBA the public entity is to confirm its fiscal sustainability with the Commission, the Applicant. The Employer was therefore to ensure that these two processes were complied with prior to submitting the CBA for registration. The Employer has only alleged that it sought advice but has not shown that it complied with the advice. There is also no indication that the County confirmed its fiscal sustainability on the registered CBA. The advice was sought after the CBA had been negotiated and signed thus disregarding the provisions of Article 230(4), Section 11(4)(c) of the Salaries and Remuneration Commission and Regulation 18 of the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013.

In the Court of Appeal's decision in ***Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR*** the court had occasion to discuss the role of the Interested Party in collective bargaining in the public sector. The court stated as follows –

> "The Supreme Court in **Communications Commission of Kenya & 5 Others –V – Royal Media Services Limited & 5 Others**, Petition Nos. 14, 14A, 14B and 14C of 2014 at paragraph 169 stated the independence clause is a shield against influence or interference from external force and the body in question must be seen to be carrying out its functions free of orders, instructions or any other intrusion from external forces. A literal reading of Article 230(4)(b) of the Constitution shows that SRC is not one of the envisaged external forces against whom the shield of independence can be waved. The Constitution vides Article 230(4)(b) and (5) has integrated SRC in the determination of all matters relating to remuneration and benefits of public officers. The practical consequence is that SRC has an integrated, over-arching centripetal force in the determination of remuneration and benefits payable to public officers which includes teachers. Using company law analogy, the advice given by SRC is like a floating charge hovering all over public service and when it descends, it attaches, crystallizes and binds anything and everything that it lands upon. I believe that the drafters of the Constitution never intended SRC to be a toothless bulldog that barks, barks and barks again without biting – SRC has teeth and can bite, must bite and shall bite. SRC is the forum for determining fiscal sustainability of the remuneration and benefits of all public officers. One ignores SRC at his/her own peril."

Counsel for the Union relied on the decision in ***Kenya Ferry Services Limited v Dock Workers Union [Ferry Branch] 2014 eKLR*** and submitted that the Court in that case held that the failure to take advice from the SRC should not prejudice the Employees' right of collective bargaining. That case is distinguishable from the case before the court herein. The claimant union therein sought the court's interpretation on whether Ferry Workers are Public Servants. In any event, that was before the decision of the Court of Appeal referred to above that overrides the said decision.

Can the CBA be set aside?

A CBA under Section 2 of the Labour Relations Act is defined as a written agreement concerning terms and conditions of employment between an employer and a trade union. A CBA generally is a binding contract between the parties whose effect is provided under Section 59 of the Labour Relations Act and whose implementation takes effect after its registration in Court.

Consequently, a CBA just as a contract may be set aside on the same principles that would apply in setting aside a contract. In ***Social Service League, M.P. Shah Hospital v Kenya Union of Domestic, Hotels, Educational Institutions and Allied Workers [2018] eKLR*** , cited by the Union, Radido J held:

> "A collective agreement is a contractual agreement like any other left to party autonomy, save that it is underpinned by specific statutory provisions which if breached would render it or the offending clauses illegal.

Apart from the illegality, the normal legal principles in setting aside a contract would apply, and these include establishment that there was fraud or misrepresentation."

Counsel Otieno for the Union submitted setting aside the CBA the Court would similar to setting aside a Consent Order. This would therefore mean that the CBA may be set aside should there have been fraud, misrepresentation, mistake, collusion or illegality. Counsel for the Applicant argued that there had been collusion between the Employer and the Union to register the CBA without involving the Applicant despite its mandate being strictly set out under the Constitution. I do not think collusion has been established on the facts before the court. However, it has established illegality as the negotiation and registration of the CBA was contrary to Article 230(4), Section 11 of the SRC Act and Regulations of the SRC Regulations.

The Employer herein failed to involve the Applicant during the negotiation of the Agreement. Though the Ministry of Labour and Social Protection in its letter dated 10th August 2018 found that the Agreement was in conformity with the Wages Guidelines issued on 29th August 1973 and the amendments made in 23rd November 2005, the Employer was in addition required to get clearance of SRC on the fiscal sustainability of the CBA as the SRC would have to issue a no objection certificate before the CBA is implemented.

Both Counsel for the Employer and Union argued that the Applicant ought to have filed the Application in Cause 211 of 2018. The Notice of Motion filed the Union in Cause 211 of 2018 primarily sought to compel the Respondent to implement the CBA dated 5th May 2017 which had been signed but was yet to be registered in court due to the Respondent's failure to submit the CBA for registration under section 60(3) of the Labour Relations Court. The Applicant was never a party to Cause 211 of 2018. The Applicant stated that it was not aware of the proceedings in Cause 211 of 2018. The Applicant cannot therefore be faulted by the failure to file the Application in Cause 211 of 2018. The Applicant therefore rightfully filed this Application in this suit as it is the suit in which the CBA was registered.

The employer and union have made reference to the orders of this court in Cause No. 211 of 2018 in which this court advised the applicant Kenya County Government Workers Union to submit the CBA to the Minister for processing. This was in line with Section 60 of the Labour Relations Act, which is also relevant to the issue in this application. Section 60(2) and (3) provide that–

> **(2) The employer or employer's organisation which is party to an agreement to be registered under this section shall submit the agreement to the Industrial Court for registration.**
>
> **(3) If an employer or employers' organisation fails to submit the collective agreement to the Industrial Court as specified in subsection (1), the trade union may submit it.**

In Cause 211 of 2018, the Union had sought the following orders –

> 1. That this application be certified urgent and proceed ex-parte in the first instance.
>
> 2. That pending the hearing and determination of this Application the Respondent be compelled to implement the Collective Bargaining Agreement dated 5th May 2017.
>
> 3. That pending the hearing and determination of the Claim the Respondent be directed to implement the Collective Bargaining Agreement dated 5th May 2017.
>
> 4. That pending the hearing and determination of this Application the Respondent be directed to implement the Collective Bargaining Agreement dated 5th May 2017.
>
> 5. That pending the hearing and determination of this Application a declaration be issued that the Collective Bargaining Agreement herein signed by the parties is legally binding and enforceable.
>
> 6. That pending the hearing and determination of the claim a declaration be issued that the Collective Bargaining Agreement herein signed by the parties is legally binding and enforceable.
>
> 7. That cost of this Application be provided for.

Since the Act is self-acting, the union did not need the court's intervention to have the CBA submitted for registration, hence the court's orders advising it to submit the CBA for registration instead of seeking orders to compel the Employer to do so.

The said orders of the court did not direct or require the Minister to process

the CBA without compliance with the procedures and regulations that are applicable to the registration of collective bargaining agreements.

Conclusion

In conclusion, I find that the negotiation and subsequent registration of the CBA is tainted by illegality in that the same was done in contravention of Article 230(4) of the Constitution, Section 11 of the Salaries and Remuneration Commission Act, Section 15(6) of the Employment and Labour Relations Court Act and Regulations 18 of the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations 2013. **The registration of the Collective Bargaining Agreement No. RCA 182 of 2018 is accordingly set aside.**

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE