



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 71 OF 2019

(Before Hon. Lady Justice Hellen S. Wasilwa on 22nd October, 2019)

THE UNION OF KENYA CIVIL SERVANTS.....PETITIONER

-VERSUS-

THE PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF PUBLIC SERVICE,

YOUTH AND GENDER AFFAIRS.....2ND RESPONDENT

RULING

1. The Petitioner/Applicant filed in its Notice of Motion filed on 26th April 2019 seeks the following orders:-

1. *Spent.*

2. *Spent.*

3. ***THAT*** the interim conservatory orders do issue stopping and/or halting the deduction and/or variation of the housing allowance of civil servants in various job group categories as purported by the Public Service Commission, pending the inter-partes hearing and determination of the instant Application.

4. ***THAT*** interim conservatory orders do issue stopping and/or halting the deduction and/or variation of the housing allowances of civil servants in various job group categories as purported by the Public Service Commission and the Salaries and Remuneration Commission, pending the hearing and determination of the instant Petition.

5. *The costs of this application be borne by the Respondents.*

6. *Any other remedy that this Court deems fit and just.*

2. The application is based on the grounds that:-

1. *The Respondents herein have arbitrarily, illegally and unreasonably and without colour of right purported to reduce the house allowance of civil servants contra to Articles 27 (1) (4) (41) and 47 of the Constitution and the Collective Bargaining Agreement entered into on 27th June 2017 between the government through the Ministry of Public Service, Youth and Gender and Union of Kenya Civil Servants.*

2. *The government has illegally withheld monies belonging to civil servants for the month of March and without justification or written reasons.*

3. *The Petitioner and its members continue to suffer arbitrary action by the state and that public interest lies in favour of the Petitioner and its members because by granting the orders sought the Court would be giving effect of the Petitioner and its members rights. It further holds that in granting the orders the Court will be upholding the CBA registered on 20th December 2017.*

3. The Petition is supported by the Affidavit of Jerry Saoli Ole Kina. He deposes that the Applicant raised its concerns with the Chairman of the Public Service Commission in its letter dated 1st April 2019 but did not receive any response to the letter.

4. In response to the application, the Respondents filed a joint Replying Affidavit sworn by Mary Kimonye, on 29th May 2019, the Principal Administrative Secretary/Accounting Officer in the Ministry of Public Service Youth and Gender Affairs, State Department of Public Service.

5. She deposes that the house allowance clustering regions was based on a circular dated 18th June 2001 Ref No. OP.18/1A/VIII/41 which the categories; Category 1: Nairobi, Category 2- Major municipalities (Mombasa, Kisumu, Nakuru, Nyeri, Eldoret, Thika, Kisii, Kitale & Malindi), Category 3: Other Municipalities and Category 4: Other areas.

6. She deposes that the Salaries and Remuneration Commission (SRC) in its circular Ref No. SRC/ADM/CIR/1/13 dated 10th December 2014 reviewed the allowances in the public service and payable house allowance as follows: Category 1: Nairobi, Category 2: County headquarters only (Mombasa, Kisumu, Malindi, Kilifi, Lamu, Kwale & Naivasha), Category 3: County Headquarters only (Nyeri, Eldoret, Kericho, Kakamega, Kisii, Embu, Nanyuki, Nakuru, Lodwar & Garissa), Category 4; Other areas.

7. She further deposes that the SRC Circular faced a number of challenges from the clustering leading to a review vide its Circular dated 11th August 2015 Ref No. SRC/TS/MDP/3/12 (2) with the categorisation as Category 1: Nairobi, Category 2: Former major municipalities (Mombasa, Kisumu, Nakuru, Nyeri, Eldoret, Thika, Kisii, Malindi & Kitale), Category 3: Other former municipalities and category 4 other municipalities.

8. She avers that the clustering used in the IPPD payment of house allowance is based on the sub-location where the officer has been deployed in with the Gazette Notice No: CIX No. 75 dated 26th October 2007.

9. She avers that in view of the complaints received from officers whose stations of deployment were mapped to the wrong local authorities, the 2nd Respondent carried out a review of the Municipal boundaries in line with Gazette Notice No. CIX No. 75. As a result, all sub-locations/wards, villages were mapped to the correct local authorities which are attached to the payment of house allowance.

10. She avers that the Respondents did not vary, alter or change the house allowance of civil servants as negotiated in the CBA. However, the changes which led to an increase or decrease in the rates of house allowances from the month of March 2019 for individual civil servants were only occasioned by accurate implementation of Gazette Notice No. CCIX No. 75.

11. She avers that the orders sought by the Petitioner are against public interest and policy and if granted they will occasion hardship to the Respondents and affect their constitutional mandate.

12. The Applicant filed a Further Affidavit sworn on 10th June 2019. He deposes that issues raised by Mary Kimonye are merely speculative and ignore the existence of the CBA.

13. He further deposes that the review of the Municipal Boundaries undertaken by the 2nd Respondent was done in 2007 while the CBA was registered in 2017 thus the Respondents were aware of the effect the Municipal Boundaries Review had to the Applicant's members.

14. The Application was heard by way of written submissions but only the Respondents submissions were on record.

Respondents' submissions

15. The Respondents submitted that they acted legally as per their mandate provided under Article 234 of the Constitution and that their actions and those of SRC were guided by the values and principles in Articles 10 and 232 of the constitution. They however stated that the payable allowances are determined by the SRC and not the Respondents pursuant to Article 230 (4) of the Constitution.

16. They submitted that in the balance of public interest, the Respondents should be allowed to accurately implement Gazette Notice No. CIX No. 75 dated 26th October 2017 and the Circulars by SRC as per the principles of the Public Finance Management act. In support of this, they relied on the decision in **Speaker Nakuru County Assembly & 46 Others v Commission on Revenue Allocation & 3 Others [2015]eKLR** where the Court emphasised the need for prudence in the use of public funds and the need to follow the lawful processes set under the Constitution and relevant statute.

17. It submitted that the Petitioner has not demonstrated any reasonable and/or justifiable cause to warrant issuance of the order sought as the house allowances provided in the CBA under the 4 categories have not been affected and remain the same.

18. They further submitted that the Petitioners have not demonstrated to the Court with precision the specific Articles of the Constitution that have been violated by the Respondents herein and the manner of violation as stated in **Annarita Karimi Njeru v Attorney General (No.1) (1979) eKLR 154.**

19. They submitted that the Petition is not based on genuine public interest but rather the private interest of some members who have been overpaid house allowance based on the duty stations being inaccurately mapped.

20. They argued that the Petition and Application lack merit and the Petitioner should not be granted the orders sought as this could have the effect of fettering the Constitutional mandate of the Respondents as maintained by Article 234 of the Constitution. They therefore urged the

court to dismiss the Application and Petition.

21. I have examined the averments of both Parties herein. From the Applicants averments, the Respondents are trying to implement a circular dated 18th June 2001 and a further circular No. SRC/ADM/CIR/1/2013 Vol 111(126) Dated 10th December 2014.

22. The Applicants however aver that these circulars contravenes their CBA signed by the Government and the Applicant and registered by this court on 20/12/2017.

23. In considering whether to grant the interim orders sought or not I note that on the face of it, a government circular which was issued earlier than a CBA registered in Court cannot override the contents of the CBA.

24. It is apparent that the government circular being sought to be implemented will need to be reconsidered and if any flaws corrected before full implementation. In the circumstances, I find the Applicants have a prime facie case. I find the Applicants' application has merit. I therefore allow the application in terms of prayer No. (d) pending the hearing and determination of this Petition that; "***interim conservatory orders be and are hereby issued stopping and/or halting the deduction and/or variation of the housing allowances of civil servants in various job group categories as purported by the Public Service Commission, pending the inter-partes hearing and determination of the instant Application***".

25. Costs in the cause.

Dated and delivered in open Court this 22nd day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyandieka for Petitioner – Present

Akuno holding brief Kinyua for Respondents - Present