REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 69 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: THE RETURN TO WORK FORMULA

BETWEEN KENYA MEDICAL PRACTITIONERS, PHARMACIST

AND DENTIST UNION AND GOVERNMENT

AND

IN THE MATTER OF: EMPLOYMENT ACT CAP 236

AND

IN THE MATTER OF: ARTICLE 41 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ADVISE/DECISION ON 20™ APRIL, 2017 BY THE

1st RESPONDENT TO UNILATERALLY AMEND THE RETURN TO WORK

FORMULA TO THE DISADVANTAGE OF APPLICANT DOCTORS

BETWEEN

DR. EVANS K. KEDOGO.....1ST APPLICANT

DR. WANGARI L. KARANJA.....2ND APPLICANT

VERSUS

SALARIES AND REMUNERATION COMMISSION...1ST RESPONDENT

MINISTRY OF HEALTH.....2ND RESPONDENT

COUNCIL OF GOVERNORS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

KENYA MEDICAL PRACTITIONERS,

PHARMACISTAND DENTIST UNION.....INTERESTED PARTY

JUDGMENT

The Ex parte applicants Dr. Evans K. Kedogo and Dr. Wangari L. Karanja are both registered medical doctors employed by the Ministry of Health, the 2nd respondent.

They have brought this application against the Salaries and Remuneration Commission, a body established under the constitution with mandate as set out in the Constitution as the 1st respondent. The 3rd respondent, the Council of Governors is a statutory body established under the Intergovernmental Relations Act, 2012 with the primary function of coordinating the 47 County Governments within the Republic of Kenya. The 4th respondent, the Attorney General, is the Legal Advisor of the Government. The Kenya Medical Practitioners has been joined as an Interested Party.

The genesis of this application is a circular dated 12th January 2012 from the Office of the Prime Minister introducing Emergency Call Allowance for doctors deployed in Hospitals with effect from 1st December 2011. During the negotiations of the Return to Work Formula signed on 14th March 2017 following the doctors' strike, it was agreed at paragraph 4 thereof to rename the Emergency Call Allowance as Doctors Allowance and that the allowance be paid to all medical practitioners. Vide an advisory dated 20th April 2017 the Salaries and Remuneration Commission (hereinafter referred to as the SRC) declined to approve the renaming of the Emergency Call Allowance and the payment of the allowance to all doctors.

The relevant part of the advisory reads as follows-

> **"Emergency Call Allowance**

Renaming Emergency Call Attendance to Doctors' Allowance disregards and negates the principle on which the Emergency Call Allowance was awarded leaving a lacuna; the need for Doctors to be consulted on Emergency call still exists. Further, the Commission advises that renaming allowances based on cadre other than need, is likely in create a ripple effect as is likely to trigger similar requests across other cadres and professionals in the public sector."

The Ex parte applicants were aggrieved by the advisory from the SRC because doctors who do not serve in hospitals and health facilities or who perform administrative functions were excluded from the allowance.

It is on the basis of the forgoing that the Ex Parte applicants seek the following orders –

1. An order of *Certiorari* to remove to this honourable court and quash the directive of the 1st Respondent vide circular Ref: SRC/TS/HWI/3/23 VOL.II (17) of 20th April, 2017 to the 2nd and 3rd Respondents, directing them to substitute Doctors' Allowance in the 14th March, 2017 Return To Work Formula (RTWF) between the Interested Party and the National and County Governments, with Emergency Call Allowance, to the detriment of the Applicants;

2. An order of *Certiorari* to remove to this honourable court and quash the directive of the 1st Respondent vide circular Ref/SRC/TS/CGOVT/3/61 VOL.III/ (136) of 14th September, 2015 to the 2nd and 3rd Respondents, directing them to exclude doctors not serving in hospitals from being paid Emergency Call Allowance, Non-Practice Allowance, Risk Allowance and Extraneous Allowance as contained in the 12th December, 2011 Return To Work Formula between the Interested Party and the 2nd Respondent;

3. An order of Prohibition, prohibiting the 2nd and 3rd Respondents from acting upon the directive of the 1st Respondent contained in the 1st Respondent's circulars Ref. SRC7/TS/CGOVT /3/61 VOL.III/ (136) of 14th September, 2015 and Ref: SRC/TS/HWI/3/23 VOL.II (17) of 20th April, 2017;

4. An order of *Mandamus* compelling the 2nd and 3rd respondents to pay in arrears all payable allowances to doctors as provided for in both the 12th December 2011 and 14th March 2017. Return to Work Formulae withheld and or withdrawn from the affected doctors since 1st December 2011;

5. That the costs of the application be provided for.

The ex parte applicants argue that the circular from SRC is unprocedural, illegal, unconstitutional and in breach of Section 138 of the County Government Act as it had the effect of varying salaries and remuneration of the applicants to their disadvantage.

They further argue that the circulars discriminate against the excluded doctors and will expose them to pecuniary embarrassment, that the

doctors had legitimate expectations, that the 2nd respondent acted unreasonably and arbitrarily, that the decision is irrational, disproportionate and against the principles of natural justice and will lead to discrepancies in payment of doctors.

The 1st respondent filed a replying affidavit of JOHN K. MONYONCHO, the Acting Commission Secretary of the 1st respondent in which it sets out the constitutional and statutory mandate of the 1st respondent under Article 230 of the Constitution and Salaries and Remuneration Commission Act. He deposes that Emergency Call Allowance was approved by the Government in January 2012 and was applicable to all doctors deployed in hospitals irrespective of grade and was intended to compensate the eligible officers for being on call based on the nature of their duties and responsibilities. That in September 2015 the allowance was extended to all doctors in County and national hospitals. That following the strike by doctors a Return to Work Formula was signed on 14th March 2017, which renamed the emergency call allowance as doctors' allowance and extended its coverage to all medical practitioners, pharmacists and dentists. That when the 1st respondent received the Return to Work Formula forwarded through the 3rd respondent's letter dated 21st March 2017 it responded by letter dated 20th April 2017 in which it advised against the renaming and expansion of coverage of the allowance as explained in the letter.

It is deposed that the advice in the letter was within the mandate of the 1st respondent, that the allowance was intended for the specific purpose, which would become superfluous if granted to all doctors irrespective of whether or not their work required them to be on call. That it would further be a derogation of the constitutional principle that the public compensation ought to be fiscally sustainable.

He deposes that the 1st Respondent did not act ultra vires or abuse its powers, that there was no bad faith, bias or breach of natural justice nor was the decision tainted by procedural improprieties, illegality or irrationality.

The 2nd respondent filed a replying affidavit of JULIUS KORIR, the Principal Secretary in the Ministry in which he deposes that the Return to Work Formula was signed without seeking the advice of the 1st respondent, that upon seeking the said advise, the 1st respondent advised against the renaming of the Emergency Call Allowance to Doctors Allowance and gave its reason for the advice. Mr. Korir deposes that the 2nd respondent is bound by the advice of the 1st respondent as stated by the Court of Appeal in **Civil Appeal No. 196 of 2015 TEACHERS SERVICE COMMISSION –V- KENYA UNION OF TEACHERS & 3 OTHERS,** that the 1st respondent acted within its constitutional mandate and there was no violation of Section 138 of the County Governments Act.

It is further Mr. Korir's deposition that the ex parte applicants are members of the Interested Party who agreed to withdraw all suits to allow parties negotiate the Return to Work Formula.

The 3rd respondent filed grounds of opposition in which it states that this court does not have jurisdiction to hear this dispute, that the entire proceedings are premised on a conflation of the meaning of "advice" and "decision", that these proceedings countermand judicial review philosophy as directed at policy rather than procedure for decision making and that the prayers sought are not warranted.

Submissions

The ex parte applicants submit that since the advice of the 1st respondent is binding as stated by the Court of Appeal decision in **TEACHERS SERVICE COMMISSION –V- KENYA UNION OF TEACHERS & 3 OTHERS** (supra) the advice is actionable, that the advice is a binding decision as it is binding on the 2nd respondent and in that sense it is actionable as an administrative action, that such decisions must therefore be fair and transparent, must recognise productivity and performance and must be equitable. That the decision must conform to Section 138 of the County Government Act.

It is submitted that emergency call allowance is an old-fashioned term that is no longer in existence as no doctor is on call, that very few doctors, if any, undertake emergency call, that the circulars are discriminative, that the advice of the 1st respondent to the National and County Governments is a decision and is therefore actionable.

For the 1st respondent Mr. Wakwaya submitted that it had the mandate to issue advisory decisions and make the decision within the scope of the law under Article 230 of the Constitution and Section 11 of Salaries and Remuneration Commission Act. That the only reason the Ex parte applicant sought review is the misinformed position that the decision was based on unreasonableness, that there was no unreasonableness in maintaining the title "*emergency call allowance*" rather than "*doctors' allowance*" proposed in the Return to Work Formula.

Mr. Wakwaya submitted that the 1st respondent was not involved in mediation process in which the "emergency call allowance" was renamed "doctors' allowance" as alleged by the Ex-parte applicant. He further submitted that it is not true that the 1st respondent is the one which came up with the renaming of the allowance, that it is the Interested Party which made the proposal that the allowance be renamed and extended to all doctors.

It was further Mr. Wakwaya's submissions that the Collective Bargaining Agreement (CBA) was signed on 30th June 2017 while the advice of the 1st respondent was issued on 30th April 2017 on the negotiating table, that nothing would have been easier for the Ex parte applicants who were represented by the Interested Party to raise this issue through the Interested Party and have it negotiated.

He submitted that the Ex-parte applicants have failed to show that the 1st respondent's decision is tampered with irrationality or unreasonableness or that the decision was discriminative in terms of Article 24 of the Constitution. He submitted that in any event Article 24 allows the limiting of certain rights.

He prayed that the application be dismissed.

For the 3rd respondent Mr. Okubasu submitted that this court has no jurisdiction to determine the instant application as it is premised on Section 2 and 3 of the Fair Administrative Actions Act read with Section 15 of the Employment and Labour Relations Court Act, that the Ex Parte applicants have not pursued any internal remedies within their reach. He submitted that the Ex Parte applicants who are members of a union ought to have raised their issues with the union. He submitted that the Return to Work Formula required all parties to withdraw all proceedings filed in court and this application is contrary to the said agreement. He urged the court to down its tools for these reasons.

He further submitted that judicial review is a special jurisdiction of the court to review administrative decisions of administrative bodies and tribunals, that it is concerned with procedure and not merits of the decision. He submitted that the question whether or not the Ex parte applicants are entitled to emergency allowance is not a question of procedure but a policy decision to be made by a substantive body. That a person not qualified cannot arrogate to itself the role of making a policy decision.

Mr. Okubasu submitted that the renaming of the allowance was an offer made by the Government which was subject to the 1st respondent's advice, that it is not beach of the 1st Respondent's scope to determine that an allowance is to be made in a different way.

Mr. Okubasu submitted that at the CBA at page 15 particulars of doctors' allowances agreed upon are not uniform, that no complaint had been made that the house allowance of a doctor in Nairobi was different from that of doctors in other towns. That the Ex parte applicants had also not complained about some doctors being paid hardship allowance because they worked in hardship areas while others were not paid the same allowance. He submitted that the 1st respondent stated its reasons for not approving the change of the title of the allowance and extending it to all doctors.

Mr. Okubasu further submitted that the 1st, 2nd and 3rd reliefs sought by the Ex Parte Applicants has been overtaken by the signing of the CBA. He further submitted that the prayers seeking payment of allowances before the 3rd respondent came into existence cannot be granted. He urged the court to decline the application.

Determination

I have considered the pleadings, the written and oral submissions of the parties. I have further considered the authorities citied by the parties. The issues for determination are the following –

1. Whether this court has jurisdiction to determine this application;

2. Scope of judicial review applications; and,

3. Whether the Ex parte applicants are entitled to the prayers sought.

Jurisdiction

It is the respondents' submissions that this court has no jurisdiction to hear this application on grounds that it was brought more than six months after the decision sought to be quashed was made, citing Order 53 of the Civil Procedure Act. The question whether Order 53 is applicable to judicial review cases grounded on the Constitution has been raised in a number of cases including **REPUBLIC -V- COMMISSIONER FOR LANDS & 13 OTHERS EX –PARTE ERERI COMPANY LIMITED AND 8 OTHERS [2013] eKLR** and the case of **REPUBLIC -V- MINISTRY FO HEALTH EX-PARTE PIUS WANJALA AND 2 OTHERS [2017].** In both cases, the court held that the six months limitation period under Order 53 Rule 2 applies only to judgments, orders, decrees, convictions or other proceedings from an inferior court or tribunal. I think this is a matter that is now settled and I do not need to belabour the issue any further. Suffice to confirm that the instant application is not subject to Order 53 and this court has jurisdiction to hear and determine the application.

Scope of Judicial Review

It is a settled principle that judicial review is not concerned with merits of a decision but with the process. Judicial review orders are available where the court finds that there was illegality, irrationality or impropriety of procedure.

In the instant application, the Ex parte applicants aver that the decision of the 1st respondent has the effect of interfering with their salaries contrary to Section 138 of the County Government Act. Section 138 of the County Government Act provides that –

138. Arrangements for public servants

1. Any public officer appointed by the Public Service Commission in exercise of its constitutional powers and functions before the coming to effect of this Act and is serving in a county on the date of the constitution of that county government shall be deemed to be in the service of the county government on secondment from national government with their terms of service as at that date and—

a. the officer's terms of service including remuneration, allowances and pension or other benefits shall not be altered to the officer's disadvantage; and

b. the officer shall not be removed from the service except in accordance with the terms and conditions applicable to the officer as at the date immediately before the establishment of the county government or in accordance with the law applicable to the officer at the time of commencement of the proceedings for the removal; and

c. the officer's terms and conditions of service may be altered to office's advantage.

2. Every public officer holding or acting in a public office to which the Commission had appointed the officer as at the date of the establishment of the county government shall discharge those duties in relation to the relevant functions of the county government or national government, as the case may be.

3. The body responsible for the transition to county governments shall in consultation with the Public Service Commission and relevant ministries facilitate the redeployment, transfers and secondment of staff to the national and county governments.

4. The provision under subsection (2) shall not preclude—

a. the County Public Service Board or other lawful authority from promoting or appointing the officer to another public office in the county; or

b. re-deployment by the relevant lawful authority.

5. The period of secondment under subsection (1) shall cease upon the transfer of a public officer from the national government to a county government or upon the release of an officer by the county government to the national government.

6. Appointment of a public officer by the Commission includes appointment of a public officer on powers delegated by the Commission.

7. The provisions of subsection (1) shall not apply to a public officer serving in a county government and performing national government functions under the Constitution or any written law.

The applicants are not employees of County Governments nor is the 1st respondent bound by Section 138 of the County Government Act. The mandate of the 1st respondent is provided for in the Constitution and the Salaries and Remuneration Commission Act, which requires that it advise on salaries and remuneration to be paid out of public funds. Such advice would entail either agreeing or disagreeing with a request made to it as was the case herein where it declined the request. It has not been suggested that proper procedure was not followed in arriving at that decision. It has further not been suggested that the 1st respondent acted outside its mandate.

The only reasons advanced by the Ex-parte applicants are that the decision would reduce their salaries and that they would suffer discrimination by being excluded in the payment of the allowance, and that they have legitimate expectation. It is further the Ex-parte applicants' averment that the decision is unreasonable, arbitrary, irrational and disproportionate.

As has been pointed out by the respondents, the advice of the 1st respondent is binding. In the decision of the Court of Appeal in **TEACHERS SERVICE COMMISSION (TSC) -V- KENYA UNION OF TEACHERS (KNUT) & 3 OTHERS [2015] eKLR**, it was held that the advice of the 1st respondent once obtained is binding upon state organs and any power or function exercised without that advice is invalid.

On the issue of reduction of salaries, any allowance paid without first obtaining the advice of the 1st respondent is both unconstitutional and illegal and therefore invalid. Such payment cannot be the basis for a claim of reduction of salary or legitimate expectation. No legitimate expectation can be founded on an illegitimate decision or action as the very word implies. A legitimate expectation can only be founded on a legitimate action or right that is valid. It cannot be used to validate an illegitimate act or invalidate a legitimate decision.

On the issue of discrimination, both the 1st respondent and 3rd respondents have aptly stated that the doctors' call allowance was introduced for a very legitimate purpose being to compensate doctors who are required to be on call. The Ex-parte applicants cannot therefore argue that it was irrational for the 1st respondent to advice against the change of the title of the award if it would have the effect of changing the very intention for which the allowance was introduced. The fact that the Ex-parte applicants are not entitled to the allowance does not mean they are discriminated. The allowance was introduced for a specific purpose for which they do not qualify. As pointed out by counsel for the 3rd respondent, a doctor who gets lower house allowance cannot complain about discrimination if this is because they are located in a town that attracts a lower house allowance, nor can a doctor in a place that is not designated hardship area complain that they are discriminated because they do not earn hardship allowance.

I therefore do not find that the decision of the 1st respondent irrational, unreasonable or discriminative to entitle the Ex Parte Applicants the orders sought.

The respondents further raised the issue about the Ex-parte applicants being non-suited. The Return to Work Formula that is the subject of this application was between the 1st, 2nd and 3rd respondent. The Ex-parte applicants were not party to the same. They are members of the Interested Party who although served, did not file any response or participate in these proceedings. This therefore begs the question if the Ex Parte applicants have capacity to contest the decision of the 1st Respondent to disallow the changes proposed in the Return to Work Formula which they are not party to.

The Return to Work Formula in which the proposal was made to change the title of emergency allowance to doctors' allowance was negotiated by the Interested Party on behalf of its members who include the Ex Parte Applicants. I agree with the 1st and 3rd respondents that the ex-parte applicants, not being party to the Return to Work Formula, should have taken up their grievances with the Interested Party who

would then negotiate with the 1st and 2nd respondents on their behalf. They cannot directly raise issues on an agreement which are not party to.

The Interested Party having failed to participate in these proceedings, the court can only presume that it had no interest in the proceedings or in the issues raised by the ex parte applicants.

Conclusion

From the foregoing, I find that the ex parte applicants have not proved that the decision of the 1st respondent was unconstitutional, illegal, unprocedural, unreasonable or irrational to warrant the grant of the orders sought in their application. I further find that the ex parte applicants having not been party to the Return to Work Formula in respect of which the impugned decision was made, they are non-suited in these proceedings.

The result is that the application dated 7th May 2017 is dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE