



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO 2029 OF 2015**

**BANKING INSURANCE & FINANCE UNION (KENYA).....CLAIMANT**

**VERSUS**

**KENYA POST OFFICE SAVINGS BANK LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This action which is brought by the Banking Insurance and Finance Union (Kenya) arises from a dispute on proposals on account of monetary items for the Collective Bargaining Agreement for the period running from June 2013 until June 2015.
2. The Respondent filed a Memorandum of Response on 8<sup>th</sup> February 2016. By consent of the parties, the matter proceeded by way of written submissions.

**The Claimant's Case**

3. On 14<sup>th</sup> March 2014, the Claimant forwarded its proposals to the Respondent but received no response. After four months the Claimant reminded the Respondent to forward its counter proposals in order to allow the parties to commence negotiations.
4. The Respondent finally sent its counter proposals on 18<sup>th</sup> November 2014, after a trade dispute had been reported to the Minister for Labour, Social Security and Services on 23<sup>rd</sup> October 2014.
5. A Conciliator was appointed but the parties failed to agree. On 14<sup>th</sup> April 2015, the Conciliator filed a certificate of an unresolved dispute.
6. The Claimant proposes a 30% general wage increment for the 1<sup>st</sup> year and another 30% for the second year. The Claimant's proposal is based on the following parameters:

<b>1<sup>st</sup> Year</b>	<b>2<sup>nd</sup> Year</b>	
Consumer Price Index (CPI)	10%	10%
Wage differential	15%	15%

Productivity	03%	03%
Profit sharing	02%	02%

7. The Claimant further proposes an increment in house allowance as follows:

Job Groups	Current (Kshs)	June 2013(Kshs)	June 2014(Kshs)
7-8	8,000	25,000	35,000
9-10	7,200	30,000	40,000

8. The Claimant also proposes the following:

- a. Two (2) months' gross salary as leave allowance against an existing rate of Kshs. 5,000;
- b. Outpatient medical cover at Kshs. 150,000 per family per annum against an existing cover of 24,700;
- c. A monthly commuter allowance of Kshs. 10,000 up from 2,000;
- d. A monthly sundry (extraneous) allowance for cashiers, customer care officers and agent support officers amounting to Kshs. 5,000 up from 500.

### **The Respondent's Case**

9. In its Memorandum of Response dated 5<sup>th</sup> February 2016 and filed in Court on 8<sup>th</sup> February 2016, the Respondent states that it forwarded its counter proposal on the Collective Bargaining Agreement to the Claimant on 18<sup>th</sup> November 2014.

10. The Respondent submits that being a state agency, it was required to seek guidance and authorization from its parent ministry, being the National Treasury as the well as the Salaries and Remuneration Commission.

11. The Respondent records its willingness to negotiate the terms of the new CBA. In joint meetings held on 8<sup>th</sup> January 2015 and 23<sup>rd</sup> January 2015, the Respondent presented its financial statements which reflected a negative financial position and requested for a deferment of the negotiations for twelve (12) months owing to its lack of financial capacity to pay any increment to the Claimant's members. The Claimant did not accede to the Respondent's request.

12. In subsequent meetings the Respondent conceded to an increment of 4% which was later revised to 6%. The Claimant however stuck to its proposal for a 10% general wage increment.

13. Finally in a joint meeting held on 19<sup>th</sup> February 2015, the Respondent acceded to the Claimant's proposal for a 10% wage increment for the year 2013/2014 and a 10% increase for the year 2014/2015 to be implemented at 5%; 5%. It was further agreed that the arrears for July 2013 to June 2014 be paid in full and the subsequent year be staggered at 2% and the balance of 3% be paid in February 2016.

14. The Respondent informed the Claimant that the proposed payment schedule was subject to approval by the National Treasury and the Salaries and Remuneration Commission. The parties met with the Conciliator on 24<sup>th</sup> February 2015 when it was agreed that the Respondent be allowed time to seek approval of the proposed salary increment from the National Treasury.

15. On 23<sup>rd</sup> April 2015, the parties met and agreed to have the salary confirmed at 10% and on 22<sup>nd</sup> July 2015, the Respondent's Board met and passed a resolution approving the 10% salary increase on the CBA

for 2013/2015. On the basis of this approval, the Respondent wrote to the Principal Secretary, National Treasury seeking the ministry's guidance and approval. The matter was awaiting finalization when the Claimant came to Court seeking reliefs including issues that were not in contention during the negotiations and conciliation process.

### **Submissions by the Salaries and Remuneration Commission**

16. The Salaries and Remuneration Commission (SRC) filed a report dated 20<sup>th</sup> January 2016. In its analysis of the proposed CBA, SRC considered the following:

- a. The Respondent's ability to pay;
- b. Comparative analysis to ensure equity and fairness; and
- c. Fiscal sustainability of the additional cost.

17. With regard to the Respondent's ability to pay, SRC states that the financial implication of implementing the basic salaries in the proposed CBA would range from Kshs. 22,858,212 to 35,068,788 per year. SRC observes that the Auditor General had given a qualified opinion on the Respondent's books of account for the FY 2012 and 2013 due to uncertainty of recovery of debts amounting to Kshs. 1.97 billion. Further, the Respondent's total income had been on a declining trend from 2012 to 2015 with the exception of the year 2013.

18. Additionally, the Respondent had been reporting losses from the year 2012 to 2015 with a cumulative loss of Kshs. 8.14 billion. Owner's equity and revenue reserves as at 31<sup>st</sup> December 2015 stood at negative Kshs. 5,914,194,619 and 8,333,015,894 respectively.

19. In undertaking a comparative analysis, SRC compared the Respondent's current basic salaries with those of Agricultural Finance Corporation (AFC), Industrial and Commercial Development Corporation (ICDC) and Industrial Development Bank (IDB). SRC reports that the Respondent's basic salaries are higher than its comparators and the aligned salary structure for the civil service.

20. Overall, SRC advises that the Respondent retains the existing remuneration levels until it can demonstrate ability to pay and sustain any salary increment. The Respondent is also advised to adhere to the SRC guidelines in CBA negotiations.

21. On fiscal sustainability, the Respondent proposes to fund the additional cost by re-allocating other votes which SRC submits does not amount to generation of revenue. At the time of writing this judgment, the National Treasury had not approved this proposal. SRC concludes that the sustainability of the proposed wage increase was not feasible in the foreseeable future.

### **Findings and Determination**

22. From the pleadings and submissions filed by the parties the following two

- (2) issues have emerged for determination by the Court:
  - a) The role of the Salaries and Remuneration Commission (SRC) in the negotiations between the parties;
  - b) The import of the submissions by SRC.

### **The Role of SRC**

23. In its submissions filed on 10<sup>th</sup> October 2016, the Claimant submits that the SRC has no role in the

negotiations between the parties because the Respondent's employees are neither state officers nor public officers as defined under Article 260 of the Constitution. Further, the Claimant states that employers and trade unions have a constitutional right under Article 41 to engage in collective bargaining.

24. Article 230(4) of the Constitution sets out the role and mandate of SRC as 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 of all other public officers.*

25. Section 11 of the Salaries and Remuneration Commission Act amplifies the role of the SRC as follows:

- a. *Inquire into and determine the salaries and remuneration to be paid out of public funds to state officers and other public officers;*
- b. *Keep under review all matters relating to the salaries and remuneration of public officers;*
- 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;*
- d. *Conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices;*
- e. *Determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;*
- f. *Make recommendations on matters relating to the salary and remuneration of a particular state or public officer.*

26. While the role of SRC under Article 230(4) (a) is clear, the extent of its role under Sub Article(b) remains a sticky issue. The Court was referred to the decision by **Nduma J** in ***Kenya Union of Commercial Food and Allied Workers v Salaries and Remuneration Commission & 2 others [2015] eKLR*** where the learned Judge citing with approval the decision by **Abuodha J** in ***Chemelil Sugar Company Limited & 2 others v Kenya Union of Sugar and Allied Workers [2014] eKLR*** held that commercial parastatals in which the Government is a trustee or investor lie beyond the mandate of SRC.

27. With tremendous respect to my brother Judges, I take another path. It is my view that in establishing SRC under the 2010 Constitution, Kenyans wanted to cure two related mischiefs; first, an unchecked wage bill and second, glaring wage disparities within the public sector. I further hold that 'public sector' was intended to cover all parastatals, including those in the commercial sector. I say so because the wishes of Kenyans which I have stated above cannot be achieved with the SRC only dealing with the salaries and benefits for state officers and some public officers.

28. I must also take judicial notice that even the parastatals operating in the commercial sector often turn to Government for financial bailout. The fact that they may fully cover their operational costs cannot therefore be a valid reason for placing them beyond the reach of SRC.

29. To this extent I agree with the holding by **Rika J** in ***National Union of Water Sewerage Employees v Mathira Water and Sanitation Company Limited 2 Others [2013] eKLR*** that the mandate of SRC under Article 230(4)(b) must extend to cover all manner of public servants, including employees of state corporations.

30. That said, I have reached the conclusion that the Respondent, being a state corporation, falls within the mandate of SRC and no CBA ought to have been negotiated without the input of SRC.

## **The import of the submissions by SRC**

31. According to the submissions by SRC which I have set out substantively in the foregoing parts of this judgment, the Respondent lacks the financial capacity to meet the obligations under the proposed CBA.

32. Additionally, following the decision of the Court of Appeal in *Teachers Service Commission v Kenya National Union of Teachers [2015] eKLR* the advice of SRC under Article 230(4)(b) on remuneration and benefits of all public officers is binding and any exercise of power that ignores this advice is invalid.

33. In light of the foregoing I make the following orders:

a. All agreements reached between the Claimant and the Respondent on account of the proposed CBA for period running from June 2013 to June 2015 are nullified;

b. The parties are directed to commence fresh negotiations in line with the guidelines issued by SRC.

34. Each party will bear its own costs.

35. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10<sup>TH</sup> DAY OF FEBRUARY 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Munoru (Union Representative) for the Claimant

Mr. Ouma for the Respondent