REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 1 OF 2015

AND

IN THE MATTER OF ARTICLE 2 (1,2,3,4 AND 5), ARTICLE 3(1), ARTICLES 10,19,20,21(2),22,23,29,33,35,36,41(1,2,3,4 AND 5), 230,258 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA (2010)

AND

IN THE MATTER OF ARTICLES 1, 2 AND 8 OF THE ILO CONVENTION 98-RIGHT TO ORGANISE AND COLLECTIVE BARGAINING CONVENTION, 1949 (NO. 98)

AND

IN THE MATTER OF ARTICLES 1, 2 AND 3 OF THE ILO CONVENTION 87-FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION, 1948 (NO. 87)

AND

IN THE MATTER OF SECTIONS 11, 12, 13 AND 26 OF THE SALARIES AND REMUNERATION COMMISSION ACT, 2011 LAWS OF KENYA

AND

IN THE MATTER OF THE SALARIES AND REMUNERATION COMMISSION (REMUNERATION AND BENEFITS OF STATE AND PUBLIC OFFICERS) REGULATIONS, 2013

BETWEEN

KENYA PETROLEUM OIL WORKERS UNION ..... PETITIONER

VERSUS

KENYA PIPELINE COMPANY LTD ..... 1ST RESPONDENT

SALARIES AND REMUNERATION COMMISSION ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

JUDGMENT

1. The Kenya Petroleum Oil Workers Union (Petitioner) filed a Petition in Court on 9 February 2015 against the Kenya Pipeline Company Ltd (1st Respondent), Salaries and Remuneration Commission (2nd Respondent) and the Attorney General (3rd Respondent) alleging violation of its constitutional rights and fundamental freedoms. The Petitioner sought various reliefs.
2. Together with the Petition was a motion under certificate of urgency.
3. When the motion was placed before Court, it was certified urgent and prayers 1, 2 and 7 were granted. The Petitioner was directed to serve it for *inter partes* hearing on 23 February 2015.
4. On 23 February 2015, the Petitioner sought and got leave to file and serve an Amended Petition/Motion. The Respondents were also directed to file and serve their responses after service of the amended pleadings. The motion was adjourned to 12 March 2015 for *inter partes* hearing.
5. However, on this date, the 3rd Respondent sought and was granted more time to file its documents and a mention was fixed for 27 April 2015 for further directions.
6. On 27 April 2015, the parties suggested and the Court agreed that the Petition be determined by way of the record and written submissions. The Court therefore directed the parties to file and exchange written submissions.
7. The Petitioner filed its submissions/authorities on 18 May 2015 while the 1st Respondent filed its submissions/authorities on 26 May 2015, the 2nd Respondent on 26 May 2015. The 3rd Respondent did not file any written submissions.
8. The Petitioner identified 2 issues in the Petition and 8 in the submissions for determination, the 1st Respondent 6 issues while the 2nd Respondent identified some 8 issues for determination. Save for difference of language, the issues as identified by the Petitioner and 2nd Respondent are in substance similar.

Background

9. The Petitioner and the 1st Respondent have a recognition agreement and pursuant to the recognition agreement they entered into several collective bargaining agreements, the last of which was to expire on 30 June 2013.
10. In an effort to agree a new collective bargaining agreement, the Petitioner forwarded to the 1st Respondent its proposals for the period 2013-2015.
11. The Petitioner and the 1st Respondent met, negotiated and agreed on the terms of the new collective bargaining agreement and on 23 June 2014, the 1st Respondent informed the Petitioner that it had forwarded to the 2nd Respondent the proposed collective bargaining agreement, and therefore it could not firm up on a date for signing the collective bargaining agreement.
12. On 26 June 2014, the 1st Respondent wrote to the Petitioner stating that the 2nd Respondent (through letter dated 17 June 2014) had advised that the collective bargaining agreement be amended to run a 4 year cycle as opposed to a 2 year period agreed and therefore they should meet to chart the way forward.
13. As a result of the advise from the 2nd Respondent, the parties met on 31 July 2014 under the *chairship* of the Federation of Kenya Employers, and agreed to the 4 year cycle proposed in the advise by the 2nd Respondent.
14. The 4 year cycle necessitated the parties to renegotiate on other items including monetary ones. The minutes of the meeting held on 31 July 2014 (and signed on 5 August 2014) indicate that proposals and counter proposals were made and compromises were reached on duration of the agreement, leave travelling allowance, medical scheme, house allowance, subsistence allowance, and salaries (at 30% spread over 4 years of 9%, 6%, 9% and 6%).
15. The compromises were reduced into a draft collective bargaining agreement which was sent to the 2nd Respondent, but through a letter dated 24 October 2014, the 2nd Respondent accepted the execution of the collective bargaining agreement but with 2 amendments. These were a 20% salary increase spread over 4 years (5% each year), and that all other remunerative allowances to remain unchanged (at levels of expired collective bargaining agreement) pending finalization of a

study on allowances.

16. The 1st Respondent informed the Petitioner of the new advise and it further invited the Petitioner to attend a collective bargaining agreement signing on 7 November 2014 (same day).
17. The collective bargaining agreement was eventually signed on 14 November 2014.
18. After signing the collective bargaining agreement, the Petitioner moved to Court. It wanted among other issues, the enforcement of the agreement reached on 31 July 2014 rather then the collective bargaining agreement signed on 14 November 2014.

Petitioner's case

19. The Petitioner alleged that it signed the collective bargaining agreement on 14 November 2014 under duress and circumstances devoid of good faith; that the advise by the 2nd Respondent that remunerative allowances be maintained at existing levels was tantamount to suspension of Article 41 of the Constitution and therefore in violation of Article 24; that the advise by the 2nd Respondent was arbitrary, unreasonable, discriminative and amounted to an unfair labour practice, and that the 2nd Respondent had no role in tabulating and directing the 1st Respondent on the terms of the collective bargaining agreement.
20. The Petitioner also asserted that the 2nd Respondent had breached several provisions of its Act and Regulations as read with the Constitution.
21. The Petitioner further contended that the 1st Respondent had implemented the *collective bargaining agreement* but later reversed sums paid on account of salary purporting that there had been overpayments.
22. In its submissions, the Petitioner contended briefly, that the 2nd Respondent does not have the mandate and cannot issue mandatory advise on salaries for its members because the Petitioner did not participate in the exercise; that the 2nd Respondent could only render advise before commencement of negotiations; that employees of the 1st Respondent are not state or public officers; that the 2nd Respondent ignored the fact that the 1st Respondent was a commercial and financially stable entity; that the agreement reached during the meeting of 31 July 2014 was after advice from the 2nd Respondent and the terms should be upheld; that the collective bargaining agreement was signed in an atmosphere lacking in good faith; that the advise by the 2nd Respondent on salary structure was founded on insufficient data from the 1st Respondent and so the collective bargaining agreement should be set aside and that the 3rd Respondent had given advise stating employees of the 1st Respondent were not state/public officers.

1st Respondent's case

23. The 1st Respondent filed a replying affidavit sworn by its Senior Human Resources Officer.
24. He deposed that the 1st Respondent and the Petitioner entered into negotiations for a collective bargaining agreement and that on 15 May 2014, the parties agreed and a draft was prepared which was submitted to the 2nd Respondent for advise.
25. The 2nd Respondent gave its advise that the duration of the collective bargaining agreement ought to be amended to 4 years, and it also sought further information including approved budgets and audited financial statements from the 1st Respondent before the collective bargaining agreement could be signed.
26. After the advice, the parties met on 30 June 2014, 18 July 2014 and 31 July 2014.
27. On 25 August 2014, the 1st Respondent wrote to the 2nd Respondent informing it of the outcome of the negotiations and seeking approval for the signing of a collective bargaining agreement and confirming that the 1st Respondent was in a position to sustain the proposed wages and allowances.
28. After other correspondence(s), the 2nd Respondent reverted back on 24 October 2014 and advised on a 20% salary increase spread over 4 years, and that ultimately the parties signed a collective bargaining agreement on 14 November 2014 at a colourful ceremony. The increased wages and

arrears were then paid in November 2014.

29. The deponent denied that the collective bargaining agreement was signed under duress, misrepresentation or undue influence.

2nd Respondent's case

30. The 2nd Respondent's Commission Secretary swore a replying affidavit. According to the affidavit, the 2nd Respondent was an independent Commission with the mandate to set and regularly review the remuneration and benefits of all state officers and advise the National and County Governments on the remuneration and benefits of all public officers.
31. The deponent deposed that Artciles 230,249, 252 and 259 and the Salaries and Remuneration Act and the Regulations made thereunder were all applicable and the 2nd Respondent complied with them.
32. It was also deposed that the 2nd Respondent did not act unconstitutionally.
33. The replying affidavit confirmed that the 1st Respondent submitted a draft collective bargaining agreement on 13 June 2014, but because it did not accord with the applicable statutory guidelines and requirements, the 1st Respondent was advised to renegotiate.
34. And that the 1st Respondent resubmitted another draft collective bargaining agreement through a letter dated 25 August 2014, and further advise was given (that salaries be increased by 20% spread over 4 years and all other remunerative allowances be maintained at existing levels) but the 1st Respondent appealed for reconsideration through a letter dated 14 November 2014.
35. On receipt of the appeal for reconsideration, the 2nd Respondent sought more information through a letter dated 31 December 2014 which was provided on 21 January 2015, but the Petitioner and 1st Respondent had already signed a collective bargaining agreement on 14 November 2014 (the Petitioner moved to Court before the appeal was considered).
36. According to the 2nd Respondent's Secretary, the collective bargaining agreement had been signed and it was binding and it was not signed under duress or coercion.
37. Further, the 2nd Respondent asserted through its Secretary that its advise was binding in terms of Article 259(11) of the Constitution and the advise cannot be stayed and that the advise did not violate Article 41(5) of the Constitution.
38. It was further contended that pursuant to the provisions of section 15(6) of the Employment and Labour Relations Court Act, the Court was bound to make reference to the guidelines issued by the 2nd Respondent.
39. In its submissions, the 2nd Respondent mainly reiterated the depositions in its Secretary's replying affidavit.
40. It contended that it had not violated any of the Petitioner's constitutional rights or its Act and the Regulations made thereunder, and that the Petitioner was making a mockery of the law by suggesting that regulations 4, 18(2) and (3) were unconstitutional. According to the 2nd Respondent, it had properly applied the Regulations in advising the 1st Respondent.
41. The 2nd Respondent also submitted that it had not violated the Petitioner's right to collective bargaining and that the 1st Respondent was a state corporation which utilised public funds from the exchequer and therefore its employees were public officers, and therefore it had the mandate to advise on their salaries and benefits.
42. The 2nd Respondent cited the decision of Lenaola J in Nairobi High Court Petition No. 294 of 2013, *Kenya Union of Domestic, Hotels, Educational and Allied Workers Union v Salaries and Remuneration Commission,* to buttress its case. In this regard, Nairobi Cause No. 1882 of 2012, *Chemelil Sugar Company Ltd & Ors v Kenya Union of Sugar Plantation and Allied Workers Union* which suggested that employees of parastalals were not public officers was sought to be distinguished because the Judge had later expressed doubt about the holding therein.
43. According to the 2nd Respondent, any collective bargaining agreememt signed in disregard of its advise would be illegal.
44. The 2nd Respondent also urged that the Petitioner had not met the legal standard for the grant of mandatory and prohibitory injunctions, and therefore the Court could not grant an order for the

signing of a collective bargaining agreement based on the minutes of the meeting held on 31 July 2014 and signed on 5 August 2014.

45. On the advise from the 3rd Respondent that state corporations were outside the ambit of the 2nd Respondent, it was urged that the opinion had subsequently been withdrawn.
46. Lastly, the 2nd Respondent submitted that it had not acted in bad faith.

Evaluation

47. The issues as identified by the parties, though stated to be 8 are cross cutting and the Court will collapse them and address them as hereunder.
48. But the Court also wishes to note that some of the questions posed by the parties have been addressed in the decision of the Court of Appeal in *Teachers Service Commission v Kenya National Union of Teachers (KNUT) & Ors* (2015) eKLR (the *KNUT* case). The KNUT case was decided after close of hearing herein.

Whether Petitioner has capacity to institute the proceedings

49. The initial Petitioner was Kenya Petroleum Oil Workers Union, which is a registered trade union.
50. On 23 February 2015, the Petitioner made an oral application to amend the Petition and the Motion and the Court granted leave. As a result, an Amended Petition and Amended Notice of Motion were filed on 2 March 2015.
51. Among the amendments was the change of the Petitioner to *Kenya Petroleum Oil Workers Union, Nakuru Branch.*
52. The 1st Respondent objects to the capacity of the branch to sue by contending that pursuant to sections 2, 21 and 25 of the Labour Relations Act, only a registered trade union can sue and be sued, and that a branch of a trade union has no such right or capacity.
53. Section 25 of the Labour Relations Act provides for registration of branches of trade unions.
54. In my view, the purpose and objective of registration of branches of trade unions clothe the branches with juridical personality with distinct rights as apart from the mother national union and on that ground, a branch may commence and sustain legal proceedings more so proceedings alleging violation of constitutional rights.
55. I say so because Articles 22 and 258 of the Constitution envisage the capacity and competence of any person to institute proceedings alleging violation or threat of violation of any of the bill of rights or the Constituion.
56. Among the persons envisaged is an association acting in the interest of its members.
57. And person is defined in Article 260 to include incorporated and unincorporated bodies.
58. The objection by the 1st Respondent therefore has no merit or validlity in constitutional petitions, unlike what may apply in ordinary litigation.
59. The above finding resolves issues (ii) and (iii) as raised by the 1st Respondent.

Whether 2nd Respondent has mandate to advise 1st Respondent on salaries and benefits of its employees

60. The anwer to this question is primarily located in the supreme law at Article 230(4)(b) which is to the effect that

> *The powers and functions of the Salaries and Remuneration Commission shall be to –*
>
> *(b) advise the national and county governments on the remuneration and benefits of all public officers.*

61. The 1st Respondent without a doubt is an entity of the national government. The 1st Respondent is a public corporation under the State Corporations Act, and its employees are covered as well by the broad definition of public office and public officer in Article 260 of the Constitution.
62. The Court of Appeal has also had occasion to examine the issue in and the answer was in the

affirmative in the *KNUT case* with Koome JA reasoning and finding that

> *The Constitution provides that SRC's role is to advice the national government on the remuneration and benefits of other public officers. In this case there is room for Unions to negotiate with their employer. In my view the terms and conditions of teachers that are negotiated with the Unions and TSC can only be completed after consultations with SRC as provided under the aforesaid law…. SRC's advice is fundamental in the conclusion of a CBA which deals with terms and conditions of public officers.*

Whether advise is binding

63. Again this question was up before the Court of Appeal in the *KNUT case* and the answer was in the affirmative.
64. Odek JA expressed himself thus

> *Seeking SRC's advice is a constitutional procedural step; the content of the advice given is substantive as it affects the remuneration rights and entitlements of public officers…………the binding nature of the advice given by SRC is a matter of involving interpretation of the following provisions of law……… the binding nature of SRC advice is a constitutional matter dependent on the governance structure established by the Constitution whose essence is separation of powers and sharing of functions among different organs of government and the* Independent Commissions…..*SRC advice is not an advice in personam, it is an advice in rem as it limits and determines remuneration rights and entitlements of public officers. Being an advice in rem, SRC advice binds all persons, state organs and independent commissions*

65. Mwilu JA on her part held that

> *there can be no doubt that SRC has to be involved in its advisory role in negotiations on the conclusion of a CBA involving public officers. The manner and style of how that is to be done is not primary, what is of paramount importance, to my mind, is that SRC's advice has to be sought, and once obtained, it is binding.*

66. The holding by the Court of Appeal is binding upon me because of the principle of *stare decis.*
67. In effect issues (ii), (iv) and (v) as raised by the Petitioner become moot and need not be examined.

When should Salaries and Remuneration Commission render its advice

68. Under the current statutory framework, regulation 18(2) of the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013 provide that the Salaries and Remuneration Commission advice should be rendered before commencement of the collective bargaining.
69. Whether advise at that point is an effective mechanism is not for the Court to determine.
70. Any change to the provision should be effected using the proper legislative process, and not through the Court process unless it is chalenged on the ground of inconsistency with the supreme law.

Whether there was duress in executing the collective bargaining agreement

71. The Petitioner challenged the validity or legality of the collective bargaining agreement signed by its mother union and the 1st Respondent on the ground that it was as a result of coercion and or duress.
72. The duress, it was contended was because it had taken over one and a half years to negotiate the collective bargaining agremenent and the members had become desperate.
73. It is true that fairness demands that negotiations towards concluding a collective bargaining

agreement should take a reasonable time.

74. But with the material placed before it, the Court is unable to determine whether the over 1 year it took to conclude the negotiations can be atrributed to any of the Respondents.

Violation of right to collective bargaining

75. I addressed this issue recently in the case of *Kenya National Union of Nurses v Moi Teaching & Referral Hospital* (2015) eKLR.
76. In my view, there is need to have a relook at the statutory framework governing the operations of the Salaries and Remuneration Commission *vis a vis* the right to collective bargaining.
77. The relook is anchored on fundamental principles governing collective bargaining accepted universally even in international instruments such as ILO Conventions.
78. Good faith is one such fundamental principle in collective bargaining and one of the essential elements of good faith is fair, candid and honest disclosure during negotiations.
79. Good faith during collective bargaining negotiations would therefore require an employer's financial statements/audited accounts to be disclosed to enable the Union appreciate proposals from the employers.
80. The Salaries and Remuneration Commission has been shielded from dealing with Unions and in this respect the Unions are not in position to know and appreciate the factors it takes into consideration in rendering its advise. The current statutory framework appears to stifle the good faith principle and this is a matter of legal concern putting into perspective the right of access to information.

Reversal of salaries

81. There were allegations in the papers that the 1st Respondent had made salary reversals in December 2014 after implementation in the payrols for July, August, September, October and November 2014.
82. The plea was anchored on the agreement reached by the Petitioner and 1st Respondent on 31 July 2014.
83. Because the agreement was not reduced into a collective baragaining agreement, and considering that a collective bargaining agreement becomes legally enforceable only upon registration pursuant to section 59(5) of the Labour Registration Act, the rights accruing under the agreement are still inchoate.
84. Further, the input of the 2nd Respondent had not been factored when the agreement of 31 July 2014 was implemented and in terms of the holding in the *KNUT* case, the issue becomes moot.
85. In my view, it is only fair that the parties be given time to register the collective bargaining agreement signed on 14 November 2014 after which the salary arrears arising therefrom will become due.
86. And considering that the collective bargaining agreement was supposed to run from 2013 (now 3 years) past, the Court in pursuance to the objective of facilitating just resolution of disputes and securing and furthering maintance of industrial peace and relations directs that the collective bargaining agreement be presented for registration at the approriate registry, and thereafter implementation.

Conclusion and Orders

87. The upshot of the foregoing is that the Petition fails save for an order that

(i) the collective bargaining agreement signed on 14 November 2014 be presented for registration forthwith.

(ii) the 1st Respondent computes the arrears arising out of the collective bargaining agreement and files the same with Court within 15 days.

(iii) the Petition be mentioned on 19 February 2016 to confirm compliance and for further

directions.

88. Each party to bear own costs considering the uncertain nature of the law at the time of filing the Petition.

Delivered, dated and signed in Nakuru on this 29th day of January 2016.

Radido Stephen

Judge

Appearances

For Petitioner	Mr. Onyony, instructed by Onyony & Co. Advocates
For 1st Respondent	Mr. Kibanga instructed by Munga Kibanga & Co. Advocates
For 2nd Respondent	Ms. Wafula instructed by Rosalie Wafula Advocate
For 3rd Respondent	Office of the Attorney General on record
Court Assistant	Nixon