



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. 30 OF 2014

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS
PETITIONER**

VERSUS

**SALARIES AND REMUNERATION COMMISSION 1ST
RESPONDENT**

**THE ATTORNEY GENERAL 2ND
RESPONDENT**

AND

**NATIONAL SOCIAL SECURITY FUND
INTERESTED PARTY**

Mr. Kurauka for the Petitioner

Mr. Arua for the 1st Respondent

M/S Chesina for 2nd Respondent

JUDGMENT

1. The Petition dated 23rd May 2014 and supported by verifying Affidavit of Mr. Boniface M. Kavuvi was filed on 27th May 2014 seeking for orders against the 1st Respondent;
 - a. That an order of mandamus do issue to quash the 1st Respondent's circular dated 4th July 2012.
 - b. That an injunction do issue to prevent the 1st Respondent from implementing its circular to the Petitioner dated July 2012.
 - c. That an injunction do issue to prevent the 1st Respondent from interfering with the Petitioner's members' salaries and benefits in any way other than statutory deductions allowed by the law.
 - d. That a declaratory be made that the 1st Respondent violated the constitutional rights of Petitioners contrary to Article 41 of the Constitution of Kenya, 2010.
 - e. That a declaratory be made that the 1st Respondent's action violated the Petitioner's members'

- right as set out under Article 41 of the Constitution of Kenya.
- f. That a declaratory be made that the Salaries and Remuneration Commission Act, 2011 is void to the extent of its inconsistency with the Constitution of Kenya, 2010.
 - g. An order for compensation of the Petitioner hereof.

2. The Petition is based on the grounds that; Pursuant to the circular dated 4th July 2012, by the 1st Respondent addressed to the Chief Executives of State Corporations and Statutory Bodies, among others the first Respondent, contends that it was the mandate to set and regularly review, the remuneration and benefits of the Petitioner's members.

3. That pursuant to the said circular, 1st Respondent and citing Article 230(5) of the Constitution has ousted the mandate of the Petitioner to make representation and in free heart and voluntary association regulate the relations between it and National Social Security Fund (NSSF) for the interest of all unionsable employees.

The Petitioner and NSSF have a valid Recognition Agreement (CBA) and have over the years negotiated and concluded several Collective Bargaining Agreements reviewable after two years each. The one in question IS for the period 1st July 2013 to 30th June 2015.

4. The 1st Respondent has since stopped the signing and the subsequent implementation of the parties voluntarily agreed Collective Bargaining Agreement citing Article 230 of the Constitution.

5. This forced the Petitioner to issue a fourteen (14) days strike notice the NSSF on 7th January 2014 to expire on 20th January 2014.

6. On 20th January 2014, the NSSF filed an application under certificate of urgency vide Cause No. 35 of 2014 in which orders to stop the Applicant's / Petitioner's members from proceeding on strike were issued but later on vacated giving rise to the Applicant's Petitioner's members striking on 9th April 2014.

7. The strike was called off on 10th April 2014, once the Petitioner was served with Court orders.

8. On 11th April 2014, the Court directed the NSSF to pay the agreed salaries at the parties negotiation meeting pending negotiations for a further two years to make a four (4) years circle as proposed by the 1st Respondent.

9. In purporting to have the mandate to set and regularly review the remunerations and benefits of the Petitioner's members, the 1st Respondent violates the Petitioner's and its members' rights and freedoms as follows:-

- i. its right to fair labour practice in contravention of Article 2(6), 19, 20 & 41 of the Constitution.
- ii. right to freedom of association in contravention of Article 36 of the Constitution.
- iii. right to freedom of association and right to collective bargaining in violation of Article 36 and 41 of the Constitution and ILO convention No. 87 and 98.

Response

10. The 1st Respondent filed a Replying Affidavit to the Petition sworn to by Anne R. Gitau, the Secretary of the Salaries and Remuneration Commission (SRC) on 25th June 2014 in which she states, SRC is established under Article 230 of the constitution and has the mandate *inter alia*, to set and regularly review the remuneration and benefits of the state officers, and to advise the National and County Government on the remuneration and benefits of all public officers.

11. That under Article 230(5) SRC is guided by the following principles:

- 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 recognize productivity and performance; and
- d) transparency and fairness.

12. That these powers of SRC are augmented under the Salaries and Remuneration Act, 2011 under section 11(4) and 13(1)(d).

13. That under Section 13(1)(d,) SRC has power to take any measures it considers necessary to ensure that in harmonization of salaries and remuneration, equity and fairness is achieved in the public sector.

14. That a public officer is defined in law as a person who holds a public office under a national or local government and authorized by that government to exercise some specific functions.

15. That section 11 of SRC Act, 2011, vests upon the 1st Respondent powers to inquire into and advise on the salaries and remuneration to be paid out of public funds.

16. That the National Social Security Fund is a state corporation generating revenues from public funds hence the intervention by SRC. The 2nd Respondent, initially opted to be struck off from the suit since its role is superfluous in that SRC has an advocate on record and NSSF as per NSSF Act 2013 Section 5(2) is a body corporate under its constitutive instrument, capable of suing and being sued in its own name.

17. The 2nd Respondent however on 6th January 2015, filed grounds of opposition to the application and the Petition to wit; an order of *mandamus* cannot issue to quash the 1st Respondent's circular dated the 4th of July 2012.

18. That an injunction cannot issue to stop that which has already happened. That there is no proof SRC is interfering with the Petitioner's members' salaries and benefits. That the Petitioner has not shown what compensation it requires. That reliefs sought have been overtaken by events once the circular dated 4th July 2012 was published.

19. That the Petition be dismissed with costs.

20. Determination

- i. Is NSSF a state corporation generating revenue from the public funds?
- ii. What role if any has SRC got in determination of remuneration of the employees of NSSF?
- iii. What remedy if any is available to the Petitioner?

Issue I

21. The circular dated 4th July 2012 by the 1st Respondent was addressed to the Chief Executives of State Corporations and Statutory Bodies which include NSSF. Pursuant to the issuance of the circular, the 1st Respondent stopped the signing of a CBA between the Petitioner and the NSSF.

22. In the said circular, SRC has guided State and Public Officers that;

- i. SRC will undertake review of remuneration and benefits of state and public officers every four years and has
- ii. Provided the procedure and factors to be considered in preparing and submitting proposals of salary review to SRC; SRC has further provided guidelines for negotiations between public

service organizations with trade unions as follows;

- a. the Public Service Organizations shall seek advice of the commission before commencing collective bargaining process with the respective union;
- b. where the collective bargaining process is successful, the management shall, before the signing of the agreement, confirm the fiscal sustainability of the negotiated package with the Commission;
- c. a CBA concluded before the commencement of these regulations shall be deemed to have been concluded under these regulations.

23. It is the said guidelines which the Petitioner states interfered with the signing of the CBA between it and the NSSF and is aggrieved by the regulations and the guidelines aforesaid which it purports interfere with freedom of collective bargaining between an employer and a recognized union.

24. The Honourable the Attorney General in its advisory opinion to Mr. S. K. Kirogo, Secretary of State Corporations Advisory Committee dated 11th October 2012 opined;

“The definition of a public officer in Article 260 of the Constitution does not include an employee of a state corporation from the definition of the terms “public service” and “state organ.” A person who is an employee of a state corporation or a member of the board or council of a state corporation cannot be considered to be employed in the public service because a state corporation is not a state organ by virtue of not having been established under the Constitution. The guidelines that have been issued by the Salaries and Remuneration Commission do not apply to a state corporation In view of the foregoing, it is my opinion that the Salaries and Remuneration Commission does not have the power to make recommendations on matters relating to the salary and remuneration of an employee of a state corporation.”

25. The issue for determination is whether the members of the Petitioner, who are employees of NSSF qualify as public officers whose remuneration and benefits are subject to regulation by SRC.

26. This Court adopts the reasoning of Abuodha J. in **Industrial Cause at Nairobi Cause Number 1882 of 2014 Chemilil Sugar Company Limited, Muhoroni Sugar Company Limited and South Nyanza Sugar Company Limited versus Kenya Union of Sugar Plantation and Allied Workers** in which the learned Judge held:

“State Corporations may be classified into three major types, Namely; Commercial Corporations; Independent Regulatory Agencies and Research Institutions, (Public Universities; Tertiary Education and Training Institutions).”

The Petitioner herein fall in the first category as were the Claimants in the case above.

27. The learned Judge went on to say;

“It is the ultimate intention of the Government that Commercial State Corporations be self sustaining with minimal financial intervention from the National Treasury.”

28. The Judge then went on to determine whether the money held by a commercial parastatal is a public fund within the meaning given to the term in the Constitution.

“Public Fund” has the meaning assigned to it by the Exchequer and Audit Act Cap 412 of the Laws of Kenya which includes, revenue, any trust or other moneys held whether temporary or otherwise by an officer in his official capacity either alone or jointly with any other persons whether an officer or not.

29. This Court holds as was held by Abuodha J. that NSSF is not a state organ within the meaning of Article 260 of the Constitution. That is to say, NSSF is not a commission, office, agency or any other body established under the Constitution.

30. The Petitioner derives its existence from the NSSF Act, 2013 and State Corporations Act.

31. Secondly, the employees of NSSF who are also members of the Petitioner, are not public officers within the meaning of Article 60 of the Constitution. Their remuneration and benefits are not payable directly from consolidated fund or directly from money provided by Parliament. As Justice Abuodha added, neither the National Treasury nor Parliament in the Government Budget cycle appropriate public funds for the direct payment of salaries and remuneration for the employees of NSSF.

32. NSSF is entirely responsible for the wage bill of its employees which money is generated from the operations, and investment of NSSF or borrowing from financial institutions and/or National Government.

33. This is notwithstanding that the initial capital to establish the parastatal may have come from Government.

This Court holds as Justice Abuodha held;

Commercial State corporations such as NSSF in which the Government is a Trustee, investor or borrower lie beyond the mandate of the Salaries and Remuneration Commission.

34. Therefore, the circular dated 4th July 2012 is not applicable whatsoever to collective bargaining and determination of terms and conditions of employment between the Petitioner and the Interested Party, National social Security Fund.

All the parties are so directed by the Court.

35. The Respondent are to pay the costs of the Petition.

Dated and Delivered at Nairobi this 28th day of August, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE