



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.49 OF 2015

KENYA UNION OF POST PRIMARY

EDUCATION TEACHERS (KUPPET) PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION RESPONDENT

AON KENYA INSURANCE BROCKERS LTDINTERESTED PARTY

JUDGEMENT

Appearances

Wandabwa Advocate instructed by Wandabwa Advocates for the Petitioner

Rutto Advocate C/O Teachers Service Commission the Respondent

Thuo Advocate, instructed by Simba & Simba Advocates for the Interested Party

Introduction

1. On 8th June 2015, the Petitioner, the KUPPET filed the Petition herein together with a Notice of Motion seeking urgent orders barring the Teachers Service Commission (TSC) from deducting, subtracting or in any manner interfering with the salaries or medical allowances of its members with the intention of forwarding the same to the Interested Party for the purpose of making monthly contributions to the scheme procured by the TSC. The Petition was filed against the TSC and on 24th June 2015, the Petitioner filed an Amend Petition to include the Interested Party.

2. The Petition is supported by the Affidavit of Moses Nthurima the Acting General Secretary of the petitioner. The Respondent filed a Replying Affidavit sworn by Josephine Maundu the human Resource Management and Development Director, and sworn on 24th June 2015.

3. The Interested Party filed their Replying Affidavit on 24th June 2015; a Supplementary Affidavit on 6th July 2015 and both sworn by Sammy Muthui the Chief Operations Officer; and Answer to Amended Petition on 17th July 2015.

The petition

The Petition is seeking the following reliefs

A. For a declaration that the directive by the TSC requiring the members of KUPPET to join, be party to, be members of, to participate in, or contribute to the Medical Scheme Procured from AON Minet for being an infringement of their right to associate.

B. For a declaration that the directive by the TSC requiring the members of KUPPET to join, be party to, be members of, to participate in, or contribute to the medical Scheme Procured from AON Minet for being an infringement of their right to refuse to participate in the unions programs as provided for by Article 41(2) of the Constitution.

C. For a declaration that the directive by the TSC requiring the members of KUPPET to join, be party to, be members of, to participate in, or contribute to the medical Scheme Procured from AON Minet for being an infringement of their right to fair administrative action as provided for by Article 47 of the constitution.

D. For a declaration that the directive by the TSC requiring the members of KUPPET to join, be party to, be members of, to participate in, or contribute to the medical Scheme Procured from AON Minet for being an infringement of their right to associate.

E. a declaration that the TSC requiring KUPPET members without their acquiesce amounts to an unfair labour practice in abrogation of Article 41 of the constitution

F. A declaration that the TSC intended monthly deductions from the medical allowances of KUPPET members without their acquiescence amounts to a deprivation of their property in abrogation of Article 40 of the constitution.

G. An order prohibiting or barring the TSC from deducting, subtracting or in any manner interfering with the medical allowances of the members of the KUPPET with the intention of forwarding the same as their monthly contributions to the scheme procured by the TSC from AON Minet.

H. Any further and other ancillary relief that this Court may deem fit and just to grant in the circumstances of this case

I. Cost of the petition.

4. The Petition is that the Petitioner is a registered trade union with a membership of over 41,000 thousand members as teachers employed by the respondent, a constitutional commission under Article 237 of the Constitution with the mandate to recruit, deploy, discipline and terminate teachers while advising government on matters relating to the teaching profession in Kenya. Around January 2014 a circular was sent on a proposed medical scheme by the Kenya National union of Teachers (KNUT) to teachers. The Petitioner protested to the TSC on this proposal and it was agreed a health provider would be sourced upon consultations. Later the TSC and KNUT agreed to fast track implementation of the proposal to have the Interested Party as a provider. In July 2014 the TSC advertised for expression of interest for the provision of cost effective financing and solution for health care for all teachers. Upon submission of expression of interests, the Interested Party was found successful but TSC cancelled the tender on the grounds that the process was irregular but the Interested Party filed an appeal to the Public Review and Appeals Board, challenging the same. the TSC opposed the appeal citing irregularities but the appeal was allowed and a contract has since been signed between TSC and AON Minet in which all teachers including members of KUPPET are covered and are liable to be deducted monthly contributions from their salaries towards the scheme. Petitioner members are also subject to a deduction to the National Hospital Insurance Fund (NHIF).

5. The Petition is also that the Petitioner has assessed the scheme and it is apparent that the hospitals and clinics from which the subject health services are to be offered are similar to those offered by the NHIF scheme. Save for minor deviations, the scheme is a duplication of the benefits under NHIF and by subscribing to the same, the Petitioner members will lose their medical allowance. Based on government Circular dated 3rd November 2008 on the implementation of the integrated payroll, every teacher should maintain one third (1/3) of their basic salary after all deductions, failure of which the system will reject any deductions exceeding the same in gross basic pay. By reason of this circular, majority of Petitioner's members will go below if any deductions for the scheme are made.

6. The respondents should therefore not impose the scheme on the Petitioner members or make any deduction on salaries towards the same. Any deductions made will cause financial loss to the Petitioner and its members and the orders should be granted.

7. The Petition is based on the grounds that the respondent/TSC has abrogated on the Petitioner's members rights to associate in the medical scheme of its choice; the obligation on the members upon whose hard earned salary is subject to deductions on account of an irregularly obtained scheme amounts to an arbitrary deprivation of their right to their property contrary to Article 40 of the Constitution and any deductions to salary amounts to an unfair labour practice contrary to Article 41 of the constitution. Further that compelling Petitioner members to be party to a medical scheme defiles their freedom to join and participate in the programs of a trade union contrary to the provisions of Article 41(2) of the Constitution and the manner in which the Respondent has conducted the process that has culminated in the subject medical scheme with the Interested Party making Petitioner members a party to contribute towards, amounts to an unfair administrative action contrary to Article 47 of the constitution.

The Petitioner's case

8. The petitioners case is that the Union/KUPPET as the Petitioner had negotiated the medical allowances for its members and subsequently agreed to the procurement of a comprehensive medical scheme but in arriving at the scheme, the Petitioner expected to be consulted but in this case the Respondent formulated the requirements and specifications and singly identified the provider and only then was the Petitioner consulted to approve. A meeting held on 17th November 2014 did not have on the agenda the mooted medical scheme and efforts to have the discussion was rejected by the Petitioner representative. A meeting organised for the 15th of December 2014 where the Interested Party was to do a brief, the Petitioner raised their objections noting some listed hospitals were not available to its members. Another meeting called for the 18th December 2014 the Petitioner's members opposed the proposed medical scheme as by the time the Petitioner was called to approve the scheme, all the details had been agreed upon in their exclusion and hence this petition.

Respondent's case

9. In response, the Respondent states that they are a constitutional commission established under Article 237(1) of the Constitution with functions sets out under the Teachers Service Commission Act, 2012 and consequently the sole employer of all teachers in the public service. As the employer to Petitioner members the Respondent is expected to procure benefits for all its employees subject to the wider government policy and availability of funds. Such benefits are sought at the initiative of the respondent, government policy or following consultations with trade unions. From 1967, teachers in the public service have earned medical allowances in lieu of a medical cover but in 2012 the government passed a policy directive to provide medical cover to all teachers, civil servants and disciplined service in lieu of medical allowance. The Petitioner and their counterpart KNUT refused to be so covered and engaged the Respondent demanding acquisition of a medical scheme under a separate arrangement from that of the civil servants and the disciplined forces. Vide letter dated 28th May 2012, the Ministry of State for Public Service gave directives with regard to civil servants on a medical scheme to be funded through monthly medical allowances of the respective employees and thus, medical allowances to such civil servants was not tenable including teachers. Thus Respondent employees were subject to this government directive/policy hence medical allowances would cease forthwith.

10. Subsequently the Petitioner made demands to the Respondent with regard to a medical scheme for its members where they asked for a comprehensive medical cover and threatened nationwide strike if the demands were not met. In January 2013, the Petitioner mobilised its members to go on strike with demands including the procurement of a comprehensive medical cover for teachers be addressed. This resulted in a memorandum of understanding where the Respondent undertook to negotiate and procure a medical insurance cover for all teachers. The Respondent embarked on a process of procuring a comprehensive medical cover for all teachers and subject to the provisions of the Public Procurement and Disposal Act. **On 2nd July 2014** the Respondent advertised for providers and the Interested Party was successful for a tender of Kshs.5, 593,232,616.00.

11. Upon identification of a suitable medical cover, the Respondent engaged the Petitioner and KNUT with a view to ensure that the details of the said medical scheme were fully understood and a meeting was held on 17th November 2014 where the Petitioner representative was present and it was made clear the medical scheme would be funded from the teachers medical allowances and no funding would be required from the government; medical allowances payable to the teachers would be withdrawn once the scheme was implemented; and to which the Petitioner agreed to be adopted. Subsequent meetings on 15th and 18th December 2014 further reconfirmed the medical scheme.

12. In late December 2014 and January 2015 the Respondent subjected the medical scheme process to further scrutiny and found that there were certain anomalies in the tender award and the same was terminated. There was an appeal by the Interested Party which was approved and the Interested Party allowed to proceed with the tender. The Respondent then concluded a contract with the Interested Party.

13. The Petitioner as filed is made in bad faith as this is an attempt to challenge the procurement process which has since been resolved. The Respondent as the employer has the responsibility for procuring the medical cover on behalf of its employees and the Petitioner has no role in the same. The Petitioner was involved in the consultations that gave approval for the same and cannot now approach Court as herein to challenge the process. The basis of the Petition that the Petitioner members are subject to NHIF deduction is an anomaly as this is a statutory deduction for all employees and any increases in the NHIF affect all and not just the Petitioner members. Increased deductions in NHIF has not enhanced benefits of the NHIF medical benefits and all civil servants covered under NHIF also have entered into similar contracts like the Respondent has with the Interested party and is now funded from medical allowances previously paid to the employees. There is no duplication in benefits offered under NHIF and those funded under the medical cover.

14. The Petition should therefore be dismissed with costs.

Interested Party's case

15. In response to the Petition and Amended Petition, the Interested Party case is that there is an admission by the Petitioner that there was an agreement between them and the Respondent for the provisions of a comprehensive medical scheme, there were consultations prior to the commencement of the procurement of the provider. With the admission, the Respondent then tendered for the provider hence the contract with the Interested Party and thus defeats the purpose of the Petition. The comprehensive medical cover has since been rolled out from 1st July 2015 and the Petition is therefore not filed in good faith.

16. The Interested party also states that on June 2014 the Respondent advertised for expression of interest for the provision of a medical cover, presentations were done in August 2014 and upon submission of bids, they became successful by notification dated 17th November 2014. On 15th December 2014 the Interested Party was invited by the Respondent to a meeting to make a presentation to teachers unions where the Petitioner was represented. There were no irregularities or injustice as the Petitioner has all along been aware of the role of the Interested Party on the provision of a medical cover. In a subsequent meeting held on 18th December 2014, the Petitioner approved the capitation model for the outpatient cover as well as the execution of the contract between the Respondent and the Interested Party. All issues

with regard to the cancellation of the tender were addressed by the Public Procurement Administrative Review Board which directed the Respondent to complete the tender process and execute the contract. Other than the cover offered by the Interested Party, all employees in Kenya are subject to NHIF deductions which enhances the cover given by the Interested Party. The loss of the teachers medical allowance was foreseen when the Petitioner approved the medical cover scheme and to lament about it at this stage is an afterthought. The medical cover procured by the Respondent is above board and nay issue arising from the tender and procurement were dealt with conclusively. It has not been demonstrated as to how the medical cover provided by the Interested Party affects the Petitioner's member's rights and mere citation of such rights is not a confirmation of violation as the medical cover is meant to enhance the medical benefits of employees under the Respondent mandate.

17. If the orders sought are granted, the Interested party shall suffer enormous loss and damage as it will deny the Interested party income while having spent a great deal of money to put the said medical cover in place. The Petitioner members will also suffer loss as they will be denied a benefit of a medical cover. The Petition should thus be dismissed.

Submissions

18. In submissions the Petitioner states that they sought for a medical scheme to be procured by the Respondent on their behalf and in arriving at the same they expected consultations or the process to be participatory. The proposed scheme by the Interested Party was widely circulated to KNUT members but the case was not similar to Petitioner's members. The Petitioner lodged a protest and the Respondent noted that procurement for the same was its function. The Respondent terminated the tendering process due to various irregularities on the basis that the Interested Party had not given material information on its services. The Respondent proceeded singly and formulated the requirements and specifications of the medical scheme, identified a provider and only sought the involvement of the Petitioner after the fact. The consultations held subsequent were not to make changes but for information sharing. No effort was made to bring the Petitioner on board when identifying the provider and the nature of medical scheme to be provided.

19. The Petitioner also submitted that the failure by the Respondent to consult is a violation of the right to fair administrative action bestowed upon them under Article 47 of the Constitution and in this case the Petitioner was left out in the formulation of the medical scheme to be provided to its members. The allegation that the Petitioner had no role in the procurement process is not correct as under the Public Procurement and Disposal Act the Respondent was required to form procurement committee to undertake the procurement on its behalf. The involvement of the Petitioner was imperative. Noting that the medical scheme was for the benefit of the Petitioner's members in lieu of the medial allowance, fair administrative action demanded the involvement.

20. In this case the Respondent has failed to comply with the principles under Article 232(1) of the Constitution and the requirement to involve the Petitioner as a stakeholder in the process of procuring the medical cover as well as sharing of information. It would be thus unconstitutional to compel Petitioner's members to join the medical scheme as this would be contrary to Article 41(20) of the Constitution and the medical cover is the instance of the respondent. the unilateral action by the Respondent should not be made to apply to the Petitioner as this would be to compel petitioners members to associate with the Interested party against their will and contrary to Article 36(2) read together with Article 41(4) (a) of the constitution.

21. The Petitioner has relied on the cases of **Kadilo Mtwana & Another versus Chairman Amalgamated Union of Kenya Metal Workers Union, Cause No 187 of 2013 (Mombasa), Severine Liyali versus Ministry of Foreign Affairs & Others, Petition No. 23 of 2014, JR No. 81 of 2013 Town Council of Kikuyu versus National Social Security Fund and Others.**

22. The Respondent submitted that they have a constitutional mandate with regard to employment of all teachers in the public service and thus procured a medical scheme from the Interested Party upon consultations with the petitioner. As an employer the Respondent thus procured the medical scheme as a

benefit to the Petitioner members as their employees and following a government directive. The provision of such medical scheme is in lieu of the medical allowance given to the Petitioner's members that was to cease so as to finance the medical cover. The Petitioner was involved at all stages of procuring the services of the Interested Party for the provision of the medical scheme/cover.

The Respondent also submitted that the matter herein has been addressed by the PPDA and by filing this petition, the Petitioner is seeking to appeal the decision therein which then ousts the jurisdiction of this court. The Petition as submitted cannot be determined by this court.

23. The Respondent also submitted that the reliefs sought cannot be granted by the Court as jurisdiction is challenged and the Petitioner has failed to prove how its rights have been infringed and if so, such infringement is far too remote to warrant the orders sought. In this regard it will be an unfair labour practice for the Respondent to treat the Petitioner's members separately from other employees by removing them from the medical scheme that is now approved by others. The Respondent will also undergo immense hardship in complying with the orders being sought by the Petitioner in that the platform upon which money payable to teachers as medical allowance from the national treasury to the Respondent has been converted from personal Emolument (PE) to Operations and Maintenance (O&M) hence its remittances to the Respondent will not include medical allowance payable to teachers. As a result the Respondent will be required to source for funds from other votes to pay the Petitioner's members who are over 35,000. A manual system will have to be used for this purpose. The principle of hardship should be applied here to avoid the Respondent getting into the same.

24. The Respondent relied on the cases of **Samuel Kamau Macharia versus KCB Ltd & 2 Others [2012] eKLR**, **Riley Services Limited versus Judiciary [2015] eKLR**, and **Engineers Registration Board versus Jesse Waweru Wahome & Others [2013] eKLR** and **Thugi River Estate Limited & Another versus national Bank of Kenya Ltd & 3 Others [2015] eKLR**.

25. The Interested party on their part submitted that the Petitioner had agreed on principle that a comprehensive medical scheme was necessary for them and for KNUT member and based on such agreement, the respondent proceeded to contract the interested Party for such provision. On 11th July 2013, the Petitioner and Respondent entered into a Memorandum of Understanding noting that based on the government directive, the respondent was to source a comprehensive medical scheme. To now go back and renege on what had been agreed upon is an act of bad faith. The tender that was then awarded to the interested Party was above-board and the petitioner never questioned it and should not be allowed to use the current Petition to challenge it. With the provision of a comprehensive medical scheme, the Petitioner understood that its members were to lose the medical allowance. By a provision of the comprehensive medical cover, there will be no duplication of what the NHIF scheme provides.

26. The Interested Party also submitted that since the award of the tender by the respondent they have gone into great expense in preparations for the comprehensive medical scheme that will cover the Petitioner's members. If the Petition is allowed they will suffer immense prejudice as the scheme is priced on the volumes and at the time of quoting cost, the Interested Party assessed the number of members and dependants and to remove the petitioner's members will affect the pricing of the entire medical scheme. Already the Interested party has incurred costs in preparation for the medical cover country-wide.

27. The Interested Party rely on the cases of **Royal Media Service & 2 Others versus Communication Commission of Kenya & 6 Others, Petition No.557 of 2013**; **Elizabeth Washeke & 62 Others versus Airtel Networks Kenya Limited, Cause no.1972 of 2013**; **Severine Luyali versus Ministry of Foreign Affairs and International Trade & 3 Others [2014] eKLR**; **Behan Okero Advocates versus National Bank of Kenya [2007] eKLR**

Analysis and determination

Whether the court has jurisdiction;

Whether there are constitutional violations; and

Whether the remedies sought should issue.

28. The challenge to the court's jurisdiction came up in the submissions of the Respondent and remotely from the Interested Party. The basis for the same is that the matter has been addressed in accordance with the provisions of the Public Procurement and Disposal Act, the Review Board heard the matter and the current Petition is an attempt to appeal against the decision made. I however find no matter herein with regard to an appeal from any Review Board, the Respondent and the Interested Party admit that the Petitioner was not a party to the matter between them that was before the Review board and to thus raise a challenge to jurisdiction herein on this basis is far-fetched. I hasten to add though that, the jurisdiction of this Court is well set out based on the constitutional mandate granted to Employment and Labour Relations Court Act at section 12. Such jurisdiction on matters of employment and labour relations stretch to constitutional interpretations and application as held in **United States International University (USIU) versus the Attorney General [2012] eKLR;**

... In order to determine whether the Industrial Court has the jurisdiction to deal with matters concerning the enforcement of fundamental rights and freedoms it is important to consider the Constitution as a whole bearing in mind all provisions bearing upon a specific issue should be considered together; this is the principle of harmonization. As was held in Olum v Attorney General of Uganda [2002]2 EA 508, "the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other."

29. Therefore the availability of various remedies is not a bar to a party moving the Court on any one such a remedy. Where a party has a right to approach the Review Board on a challenge to procurement and disposal of public assets or to move the High Court or this Court for any requisite orders that can be protected thus, such a party enjoy such a choice based on appropriate application. See the decision in **Republic versus The Commissioner of lands ex parte Lake Flowers limited, High Court Misc. Application No.1235 of 1998.**

30. My reading of the case and the cited authorities by both parties is that the current Petition is not an appeal, rather it is based on clear constitutional provisions, and the Court is properly seized of the same. Any contestation on jurisdiction of the Court lacks merit.

31. Unionisation in this country is both by mutual consent between party which is then regulated by law and also constitutional. Once parties in an employment relationship constitute the requisite conditions for recognition of a particular union, such a union and the employer become intertwined and interlocked with regard to negotiations of terms and conditions of service/employment and the benefits that go with it. This does not however remove the responsibility upon the employer to ensure that the mandate bestowed upon every employer is undertaken and done effectively. Article 41 of the Constitution therefore sets the conceptual framework within which labour relations are to be understood. In this case I wish to refer to Article 41(5) where collective bargaining is recognised for purposes of ensuring the right under the entire of Article 41 is realised.

32. The provisions under the Constitution thus stated must be read together with the operative law with regard to labour and employment rights regulation, the Employment Act. Employment benefits are thus regulated under the statutory provisions outlined under the Employment Act under the framework of the Constitution as the pillar within which such rights are to be addressed. Whatever the employer or the employee does, the fundamental responsibility is to ensure that fair labour relations are at play. Whether this relates to a benefit or the counter of it, the responsibility. To thus give the benefit of a medical scheme to an employee, the drawback or the counter to it here would be to give up the medical cash allowance paid together with the salary. This is I find to be the essence of the Petition herein.

33. Thus set out, the Petitioner's case is that their members will be disadvantaged in that they have earned the medical allowance for long and if this is withdrawn and in its place or instead they get the comprehensive medial cover, some of their members will lose an income and their monthly pay will go

below the one-third minimum deductions in their gross basic pay. On their part the Respondent see this as a hardship to be imposed upon them after negotiating with the Petitioner and their counterpart KNUT over the scheme only for the Petitioner to renege upon the contracting of the interesting party for no justifiable cause. Equally the Respondent see this as a Petitioner aimed at challenging the procurement process that has since been resolved and settled but the Petition wish to revive it in a different form. The Interested party on their part as herein keen to see that the investment they have undertaken is not lost by the removal from the medical scheme of the Petitioner's members. Also the Interested party have gone through the process of procurement after an award of the tender by the Respondent and held consultations with the petitioner.

34. That said, the Petition is based on key constitutional provisions that should not be lost in the different interests demonstration by the parties. The right to fair labour relations, right to associate, the right to property and to fair administrative actions are core fundamental rights that should grudgingly be protected by the Court for both public and private citizens and legal persons. In this case, the Petition is grounded on the Petitioner's members right to choose a medical scheme that will involve a deduction from their salaries and on this basis then they will be put under a medial scheme they have not chosen or participated in its identification and contrary to fair administrative action principles set out under Article 47 of the constitution.

35. Upon employment, every employer should issue an employment contract. Once unionised such as Petitioner's members are, any review, amendment, review of the employment terms and conditions of work/benefits/duties and responsibilities must be done in writing. For unionised employee, the union is the party to hold any consultations, give consent and ensure the changed terms and conditions of work receive approval for and on behalf of their members. This is the sole purpose of a recognition agreement, collective agreements and to a large extent, the essence of Article 41(2) (c) and 41 (5). Section 10 and 12 of the Employment Act also create a duty upon the employer to reduce all work terms and conditions into writing to ensure the employee is aware at all material time of what benefits they have; what deductions are made from their monthly salaries/wages of pay as the case may be and more fundamentally such a statement must meet the legal requirements on the statutory deductions. Thus any change to such a statement, it is regulated under section 13 of the Employment Act thus;

13. (1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.

36. For Petitioner's members therefore, and noting they are regulated under a collective agreement, any changes to the terms and conditions of employment, such a statement of change is subject to the terms of the collective agreement. None of the parties here have attached the collective agreement for assessment as to the operative requirements where changes are envisaged. However, the requirements that any such change to the terms and conditions of service, whether for a benefit or a drawback for any purpose, the context here being the benefit of Petitioner members getting into a comprehensive medical scheme as against the individual medical allowance, such a benefit must receive the consent and approval of the negotiating entity, the petitioner. In this regard it is not the process, the procumbent, the requirements of the tender award to the Interested party, that are in issue, though ultimately such award is affected; rather it is the consultations and eventual approval that is of essence. Such approval must be unequivocal and unambiguous. To change work terms, whether for a benefit or otherwise, the approval of the employee and herein the union such as the Petitioner is what is of paramount importance. This is an employment and labour relations right that flow within the rights due to the Petitioner for and on behalf of their members once the recognition agreement was drawn.

37. That said, the provisions of Article 47 of the Constitution relate to fairness in the procedure followed in decision making. Members of a trade union are entitled to participate in the activities and programmes and decision making of their union as submitted in this case, KNUT was able to communicate effectively with their members and eventually they gave their approval herein with regard to the medical scheme. The Petitioner was not accorded such a chance, there is no rationale outlined by the Respondent as to why this was not effected in equal measure as to other stakeholder, and whatever rights were to flow to any

other party after the tender award, the Petitioner and their members as the primary stakeholders and parties that were to be the beneficiaries or finance the same medical scheme, held the right of consent. Without such consent, the Respondent cannot proceed and pursue the petitioners' best interests however well-intentioned such a measure is. Consultations with the petitioner, approval from the Petitioner is paramount in their enjoyment of the rights under Article 41 and 47 of the constitution. I find that such rights cannot be circumvented under the justification of principle of hardship. See decision in **Kadilo Mtwana & Another versus Chairman Amalgamated Union of Kenya Metal Workers Union**, cited above. The rules of fairness in employment and labour relations are part of the Bill of Rights that should be protected as a fundamental principle. Such fairness is the staple for fair labour relations as held in **Elizabeth Washeke & 62 Others versus Airtel Networks Kenya Limited & Another, Cause No.1972 of 2013**.

38. In this regard, the Respondent defence is that based on the principle of hardship to allow the petition, they will be put into great hardship as they will be forced to source for funds to finance the Petitioner's medical allowances as the Treasury has already removed the budget head/line in the conversion to the medical scheme now allocated to the Interested party as the entity that got the tender. However, the principle of hardship should be sparingly applied in matters constitutional. To rely on such a principle, the respondents must demonstrate that they have done everything to accommodate the Petitioner short of undue hardship. That it is impossible to accommodate individual employees sharing the characteristics of the Petitioner's demands without imposing undue hardship upon the employer/respondent. The task here that the Respondent must demonstrate is what they have already done to accommodate the petitioner, but rather that no further accommodation is possible without imposing undue hardship. This is well articulated in an old case by the Canadian Supreme Court, in a matter relating to the need to accommodate employees with disability in the workplace and the employer's rationale that they could not do so on the basis that to take such employees would impose undue hardship on the employer. The Court took a rights-approach based on fundamental rights due at the person and for the employees with disability and held that effort must be made to accommodate the employee, such hardship notwithstanding, the employer must demonstrate what measures they have taken to accommodate each employee based on their needs before claiming *undue hardship*. See **British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union, [1999] 3 S.C.R. 3, 35 C.H.R.R. D/257**.

39. In this case, the Petition is that the medical allowances due to the Petitioner members should not be deducted from their salaries. Such medical allowances have been in existence until the new directives on a medical scheme were issued. The withdrawal of the medical allowances was to commence on 1st July 2015 before which time the Petitioner came to Court to secure their rights with regard to safeguarding their medical allowances. The Respondent can therefore not be found to say that they will be put into *undue hardship* since such medical allowances have not been deducted, the right exists to this minute and they will not be forced to go into any *undue hardship* to allocate the same to the Petitioner's members. The internal administrative requirements for such allocations of medical allowances to the Petitioner's members are modalities that the Respondent as an independent constitutional commission can adequately address without encroaching on the rights of the petitioner.

40. The Interested party, though joined herein by the petitioners, they sought to rely on the consultations held between the Petitioner and the Respondent in arriving at the award of the tender for the provisions of medical scheme to them. I find no clear case made by the Petitioner against the Interested Party. The entire Petitioner does not outline what orders are sought against the Interested Party. Though the Interested Party was at pains to argue their case, it was apparent to the Court that they are keen to support the respondent's case noting the business opportunity that shall be lost if the Petition is allowed. This however does not go into the merits of the Petition and to have been joined herein was for no useful purpose. To apply the principles in **Royal Media Services & 2 Others versus Communication Commission of Kenya & 6 Others**, is to lose the issues that I find herein as different from that case. The petitioner herein is fundamentally different to be so equated. There is no particular orders sought against the Interested Party. What the Petitioner is able to claim from the Respondent can be asserted without dragging the Interested Party. Whatever the outcome of the petitioner, the Interested Party are entitled to costs.

41. I therefore find no justification in the Cessation of Petitioner's members' medical allowance on the basis of a government directive as this is not based on any justifiable need, there is no legitimate purpose or rationale. Before the government directive was issued, there existed valid contractual obligations, the Petitioner and the Respondent has an existing Collective agreement that is valid and to interference with the same without the consent of the Petitioner so as to enforce a government directive without taking into account such pre-existing agreement is to defeat the purpose of labour negotiations that are lawful and constitutional. To remove such a benefit from the Petitioner's member without consent is an unfair labour practice and contrary to Article 41 of the constitution, it goes against the principles of fair administrative action contrary to Article 47 of the Constitution and the same is an interference of the Petitioner's members right to associate as under Article 36 of the constitution. To violate such rights that are protected under the Bill of Rights without any justification is an outright disregard to what is fundamental and protected. For the respondent To state that on 18th December 2014, Petitioner agreed to the signing of contract between them and the Interested Party does not stop or prohibit the Petitioner from seeking the protection of their rights under the Constitution at any moment where such rights are violated.

42. With regard to rights under article 40, I find no evidence to support the same. There is no property of the Petitioner or their members that has so far been alienated. With the protection of rights under Article 41, 36 and 47, any such alienation must be with the Petitioner's consent or upon such consultations and participation towards a consent over the same.

43. Before any deduction of medical allowance is made from the benefits dues to the Petitioner's members, I find the need for the process to be consultative and participatory is legitimate, it should have been met and the Respondent had the capacity, time and latitude to do so as these are reasonable demands and in the absence of the same, the Petition must succeed.

Accordingly, I grant the following orders;

- a) I declare that the petitioners rights under Article 41, 36 and 47 of the Constitution were violated by the Respondent when it issued the directive to the Petitioner to the withdrawal their members medical allowances and instead contribute to a medical scheme procured from AON Minet without their consent and or approval;**
- b) The directive to the Petitioner's members to join, be party to, be members of, to participate in, or contribute to the medical scheme from AON Minet is hereby quashed;**
- c) An Order is hereby issued prohibiting the Respondent from requiring the membership of the Petitioner to join, be party to, be members of, to participate in, or contribute to a medical scheme procured from AON Minet without their consent and or approval;**
- d) The Petitioner and the Respondent shall bear their own costs save that the Petitioner shall meet 50% of the Interested party costs.**

Delivered, dated and signed in open Court at Nairobi this 12th August 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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