



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**COLLECTIVE BARGAINING AGREEMENT NO. 1 OF 2015**

**KENYA NATIONAL UNION OF NURSES..... CLAIMANT**

**V**

**MOI TEACHING AND REFERRAL HOSPITAL BOARD.....RESPONDENT**

**SALARIES AND REMUNERATION COMMISSION ..... 1<sup>ST</sup> INTERESTED PARTY**

**MINISTRY OF LABOUR..... 2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The Kenya National Union of Nurses (Union) and Moi Teaching and Referral Hospital Board (employer) signed a collective bargaining agreement on 3 February 2015.
2. Pursuant to section 60 of the Labour Relations Act, 2007, the employer was under a statutory obligation to submit the collective agreement to Court for registration within 14 days. The employer did not.
3. The Union thus moved Court under certificate of urgency on 5 May 2015 seeking the registration of the collective agreement. The Court directed the application to be served upon the employer and the Ministry of Labour, as an interested party.
4. When the application came up for *inter partes* hearing on 19 May 2015, the Union, employer and Ministry were represented. The Salaries and Remuneration Commission also sent a representative. The representative of the Salaries and Remuneration Commission informed the Court that the collective agreement had been signed without notice to the Commission.
5. The Court thereafter directed the employer and the Interested parties (Salaries and Remuneration Commission-1<sup>st</sup> Interested Party and Ministry of Labour-2<sup>nd</sup> Interested Party) to file appropriate documents before the hearing of the Union's application.
6. The parties filed and exchanged affidavits, documents and submissions and the same were highlighted on 28 July 2015.

**Union's case**

7. The Union's case is that it negotiated in good faith and voluntary heart with the employer and a collective bargaining agreement was signed on 3 February 2015, but the employer had failed to submit it to the Court for registration as demanded by the law.
8. According to the Union, the employer's conduct was in breach of Article 41 of the Constitution.
9. According to the Union, the 1<sup>st</sup> Interested party had a limited role of advising the employer on remuneration and salaries but it had failed to carry out the advisory role in a *fair and honest* manner. This was because it had not produced any study/evaluation on the remuneration of nurses despite being in existence for over 3 years.

10. In the view of the Union, the role of the 1<sup>st</sup> Interested party was purely advisory and the employer had the option of accepting the advice or rejecting it, and that the ultimate decision was that of the employer.
11. The Union cited the decisions in Petition No. 294 of 2013, *Kenya Union of Domestic, Hotels, Educational and Allied Workers v Salaries and Remuneration Commission*, Cause No. 1882 of 2014, *Chemelil Sugar Company Ltd & 2 Ors v Kenya Union of Sugar Plantation and Allied Workers & Salaries and Remuneration Commission*, Petition No. 3 of 2015, *Teachers Service Commission v Kenya National Union of Teachers & Ors* and Cause No. 1664 of 2012, *National Union of Water & Sewerage Employees v Mathira Water and Sanitation Company Ltd & Ors*.

### **Employer's case**

12. The employer's Director filed a replying affidavit, and submissions were also made.
13. According to the affidavit, it was admitted that a collective agreement had been signed with the Union but the failure to submit it for registration was because the 1<sup>st</sup> Interested party had raised issues which had not been addressed. It was also deposed that the advice of the 1<sup>st</sup> Interested party was sought after the negotiations were completed but the advice came late after the collective agreement had been signed.
14. In submissions, it was contended on behalf of the employer that it and the Union carried out voluntary negotiations after industrial unrest at Moi Teaching and Referral Hospital and that the collective agreement was the result.
15. It was also contended that the National Treasury had not stated that it did not have funds to meet the financial obligations arising out of the collective agreement.
16. On the role of the 1<sup>st</sup> Interested party, it was urged that previously the Industrial Relations Charter provided a framework for social dialogue among the tripartite partners (unions, employers and government) but the new legal landscape that brought in the 1<sup>st</sup> Interested party did not set out clear guidelines on how it would interact with the traditional social partners.
17. This, it was submitted had created a challenge in industrial relations where industrial peace was paramount.
18. According to the employer, the new structure appeared to stifle social dialogue where negotiations had traditionally been carried out in a good environment, because the Regulations made by the 1<sup>st</sup> Interested party to govern salary collective bargaining between employers and unions were made without consultations with all the partners.
19. In the view of the employer, the role of the 1<sup>st</sup> Interested party was to advise but not set salaries of public officers and the advice could not even be equated with the advisory opinion of the Supreme Court.
20. In a parting shot, the employer suggested that the legal framework governing the operations of the 1<sup>st</sup> Interested party should be amended after consultations with employers and Unions.

### **1<sup>st</sup> Interested party's case**

21. In an affidavit by the Chief Executive of the 1<sup>st</sup> Interested party, it was deposed that the employer submitted to it proposals and counter proposals from both the employer and the Union on 3 September 2014.
22. According to the affidavit, correspondence was exchanged with the employer. The 1<sup>st</sup> Interested party was seeking more information.
23. The employer provided the information and on 19 December 2014, the 1<sup>st</sup> Interested party wrote to the employer to convey its decision that the employer was to get confirmation from the National Treasury before it could tender its advise.
24. A meeting was held between the 1<sup>st</sup> Interested party and the employer on 13 January 2015, and advice was ultimately rendered on 27 January 2015. Material for our purposes is that the advise was that basic wages were to be retained at the levels in the expiring collective agreement.
25. In submissions, the 1<sup>st</sup> Interested party asserted that it rendered advice and what was outstanding was confirmation on availability of funds from the National Treasury but none was given.

26. The advise, it was urged was binding because of Article 259(11) of the Constitution, though the advise was amenable to judicial review.
27. It was further submitted that the role of the 1<sup>st</sup> Interested party did not breach Article 41 of the Constitution and that the collective agreement was signed in disregard of the advise that was given.
28. The right to collective bargaining, it was contended was not absolute and the role of the 1<sup>st</sup> Interested party was not to stifle collective agreement negotiations.
29. In this respect, the 1<sup>st</sup> Interested Party submitted that registering the collective bargaining agreement would be illegal.
30. On case law, the 1<sup>st</sup> Interested party submitted that in *Petition 3 of 2015, Teachers Service Commission v Kenya National Union of Teachers & Ors*, the Court failed to uphold the independence of the 1<sup>st</sup> Interested party and thus failed to apply the principle of harmony in interpreting the Constitution.
31. The 1<sup>st</sup> Interested party identified some 4 issues arising for determination in its written submissions.

## **2<sup>nd</sup> Interested party's case**

32. The 2<sup>nd</sup> Interested party's case was that it received the collective agreement from the employer but it did not meet legal requirements (section 60(6) of the Labour Relations Act) because there was no input by the 1<sup>st</sup> Interested party.

## **Issues for determination**

33. After considering the pleadings, documents and submissions by the parties, the Court has identified the issues for determination as, first, *whether the Salaries and Remuneration Commission advised the employer*, second, *whether the advice of the Salaries and Remuneration Commission is binding on employers of public officers*, third, *what is the nature and extent of the advise by the Salaries and Remuneration Commission (whether the Salaries and Remuneration Commission can legally set the remuneration of public officers and last, what should be the legal consequences of an employer in the public service disregarding the advice of the Salaries and Remuneration Commission*.

## ***Whether the Salaries and Remuneration Commission advised the employer***

34. It is not disputed that the employer submitted to the 1<sup>st</sup> Interested party the proposals by the Union and its own (employers submissions) through a letter dated 3 September 2014.
35. Thereafter several correspondences were exchanged in which more information was sought and furnished. A meeting was also held on 13 January 2015.
36. Ultimately, the 1<sup>st</sup> Interested party, through a letter dated 27 January 2015 rendered its advice to the employer.
37. The advise was that house allowances, hardship allowance, leave allowance had been harmonized and the employer should use the harmonized allowances as a basis for negotiations with the Union.
38. The employer was further advised that all other terms with a financial implication should be maintained at the existing levels. Five (5) reasons were given for the advise to maintain the existing terms and these were briefly, *firstly*, that the Employment and Labour Relations Court had awarded a 24% basic salary increase to members of KUDHEIHA for the years 2012/2013 – 2013/2014 and a majority of the employer's staff including nurses had benefitted, *secondly*, the staff of the employer had benefitted from a harmonized salary structure from around 17 December 2014, *three*, change in salaries for nurses employed by the employer would destabilise existing salary structures across the public service, *fourthly*, the employer had not confirmed that the National Treasury had funds for the proposed increases and lastly, a job evaluation for public officers was underway.

39. The employer acknowledged receipt of the advice through its letter dated 2 February 2015.
40. But the fact remains, and the Court finds that the 1<sup>st</sup> Interested party tendered advice to the employer prior to the signing of the collective bargaining agreement.
41. However, the Collective bargaining agreement now sought to be registered was signed the next day. It is apparent from its contents that the advice of the 1<sup>st</sup> Interested party on maintaining existing basic salaries was ignored or disregarded.

### **Whether the advice was binding**

42. The Union took a strong position on this question. According to it, the advice by the 1<sup>st</sup> Interested party was purely advisory in respect of public officers employed by both the National and County Governments and public institutions such as the employer.
43. This position was taken further by the Union which contended that the advice was not binding and the employer was not under a statutory obligation to ‘swallow hook and sinker’ the advice.
44. The Court of Appeal in *Teachers Service Commission v Kenya Union of Teachers (KNUT) & Ors* (2015) eKLR, dealt with the question of whether the advice of the 1<sup>st</sup> Interested party was binding upon the Teachers Service Commission.
45. This decision was rendered by the Court of Appeal after the parties herein had concluded making their submissions and its conclusions directly impact the present case. It is also binding on me. The Court will make reference to it as may be necessary.
46. In the appeal, Githinji JA held that *the advice of SRC under Article 230(4)(b) on remuneration and benefits of all public officers is binding on national and county governments and any power or function exercised without that advice is invalid.*
47. Azangalala JA on his part reached the conclusion that *SRC’s advice to TSC is pursuant to Constitutional provisions and must be binding to achieve not only SRC’s objectives but also those of the Constitution.*
48. Otieno Odek JA on his part had this to say, *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 and the Judge came to the conclusion and finding that the advice given by SRC is binding.*
49. Koome JA also reached the same conclusion. Her ladyship reasoned *The Constitution provides that SRC’s role is to advise 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.*
50. In the end, Koome JA found that *the advice envisaged of SRC to TSC is binding to TSC.*
51. Mwilu JA, on her part also reached a similar conclusion as the other learned Judges. The Judge observed 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.*
52. The Judge in effect concluded that *the prior advice of SRC had to be sought before TSC could*

*make an offer on basic salary to the Unions. That advice from SRC binds TSC.*

53. The above citations leave no doubt that the advice by the Salaries and Remuneration Commission is binding not only upon the Teachers Service Commission but other public body employers, not only in terms of Article 259(11) but as well in terms of Article 230(4)(b) of the Constitution.

54. But I wish to make some observations regarding this hot potato question.

55. In my view, in order to answer the question whether the advice of the Salaries and Remuneration Commission is binding, a relook at Article 259(11) of the Constitution is necessary. It provides

If a **function or power** conferred on a **person under this Constitution** is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.

56. The above provision raises a legal question which can only be made by making reference to Article 230(4) (b) of the Constitution which provides

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 other public officers.

57. And that question simply put is, who is the **person** who has the power or function to fix the remuneration of public officers (excluding state officers)? The answer is not difficult to decipher. It is not the Salaries and Remuneration Commission but the national and county governments or such legal entities created pursuant to law.

58. Under Article 230(4)(b) of the Constitution, the role of the Salaries and Remuneration Commission is to advise.

59. And the advice is to be rendered to the public body mandated with the function or power to fix remuneration. That would logically be the public body employer, such as the Respondent here.

60. Some public bodies or employers such as the Teachers Service Commission or the Judicial Service Commission are creatures of the Constitution and draw their functions and powers at the first instance from the Constitution and then from enabling statutes.

61. Then, some public body employers such as the Respondent herein do not draw their functions and powers directly from the Constitution. Some are statutory creatures.

62. For these statutory creatures, the function and power to employ and fix remuneration does not flow from the Constitution. For them, in my view, the function or power of fixing of remuneration of public officers is not strictly speaking a constitutional function or power.

63. To illustrate, the question may be posed whether the County Governments have been clothed with a constitutional power or function to fix the remuneration of their employees.

64. Or to stretch it further, do public bodies such as the employer (or other parastatals/corporations) here derive their powers or functions as relates to contractual relationships (including employment) from the Constitution?

65. In my humble view, the mandate, power or function is located elsewhere, either in statute or the common law.

66. And it would mean therefore that a proper construction of the text of Article 259(11) of the Constitution does not expect these statutory public bodies to be bound by the advice of the Salaries and Remuneration Commission. They are not the *person* envisaged under Article 259(11) of the Constitution. The *person* envisaged therein is one whose functions and powers are conferred by the supreme law.

67. And therefore, to suggest that the advice of the 1<sup>st</sup> Interested Party is binding, recourse must be found elsewhere.

68. I have perused the Constitution and have not found direct guide on the binding nature of the advice. I would suppose it could be as a result of looking at the spirit of the Constitution, which is a living document and more so Articles 230(5) and 259(1) of the Constitution, the Salaries and

- Remuneration Act and other statutes and the common law.
69. It could also flow from the requirement that the Constitution should be interpreted in a manner which promotes its purposes, values and principles (purpose and objective of establishing the Salaries and Remuneration Commission).
70. Or may be from the principle that the Constitution should be construed as a whole and no one provision should be construed as above the other. I believe that is what is referred to as the principle of harmony.
71. But the parties did not address me on the trajectory I am taking and prudence requires that I say no more.
72. Before concluding on this question just a remark on the functions and powers of the Teachers Service Commission.
73. The Teachers Service Commission directly draws its powers and functions from the Constitution. It has as one of its constitutional functions the recruitment and employment of teachers. That is unlike the employer here. The employer in the present case is not a creature of the Constitution. It does not exercise any direct constitutional powers or functions.
74. The holding by the Court of Appeal is binding upon me and therefore I must find that the advice of the Salaries and remuneration Commission is binding upon all employers of public officers.

***What is the nature and extent of the advice by the Salaries and Remuneration Commission?***

75. The Salaries and Remuneration Commission is explicitly clothed with the Constitutional mandate to set the remuneration of state officers. But when it comes to public officers (employees of National and County Governments), the mandate is to advise the National and County Governments.
76. The Salaries and Remuneration Commission has the function of advising on remuneration of public officers putting into context the principles set out in Article 230(5) of the Constitution.
77. And because the Constitution has set out the principles that the Salaries and Remuneration Commission ought to consider in rendering advice, its advice is susceptible to judicial review or challenge before the Courts of law where such advice does not reflect the said principles. The advice should be legal, fair, rational and proportional. It must also recognise the constitutional rights of other persons.
78. The Union herein has presented the instant application on behalf of its members. It also enjoys certain rights *qua* trade union. It faulted the 1<sup>st</sup> Interested party's advice on the grounds that it was not *fair and honest*. The reason it gave was that 3 years after its establishment, the 1<sup>st</sup> Interested party had not conducted a job evaluation for (on) nurses.
79. The Union also placed reliance on Article 41 of the Constitution. One of the primary rights enjoyed by trade unions is the right to collective bargaining. The items for bargaining include remuneration and benefits.
80. The right is equally enjoyed by employers and both the national government and its organs and county governments are employers.
81. Traditionally, collective bargaining and industrial relations in general have been carried out in voluntary heart and good faith. Good faith is so fundamental to collective bargaining and industrial relations and the niche it occupies is similar to that of natural justice or *audi alteram partem* rule in public/administrative law.
82. Now, when the Union and the employer commenced negotiations, it was expected that the same would be in voluntary heart and good faith.
83. Good faith is a fairly well established principle in many legal systems and it has been the subject of many scholarly writings and judicial determinations from Australia to the United States of America. It is a framework for cooperation between capital and labour.
84. Good faith imposes a procedural compliance threshold to improve the quality of negotiations between unions and employers and of primary importance is the requirement for disclosure of relevant information from both sides which would be reflected in the outcome of the negotiations. Good faith also requires the bargaining parties to give genuine consideration to the proposals from each side.
85. Good faith in collective bargaining detests unfair conduct that undermines or stifles the freedom of association and the right to collective bargaining. The parties should act honestly and apply

- reasonable standards of fair dealing with a view to reaching agreement.
86. Section 57 (2) of the Labour Relations Act provides the statutory foundation for good faith in collective bargaining in this country. But the said section in my view is a direct offshoot of the constitutional right to fair labour practices and the right to organise in Article 41(1) and (4) of the Constitution.
  87. But the statutory framework governing the operations of the Salaries and Remuneration Commission out rightly outlaws the 1<sup>st</sup> Interested party from directly engaging with Unions. The Unions therefore would not have access to the information and the considerations the Commission uses in rendering advice to the public body employers. The Union will not have the information relating to fiscal sustainability and other economic indicators the Salaries and Remuneration Commission rely on.
  88. It is not even clear whether public body employers would have access to the information during the course of negotiations.
  89. But nevertheless, the employer is expected to be bound by the advice of the Salaries and Remuneration Commission.
  90. This new architecture established by the establishment of the Salaries and Remuneration Commission is antithetical to what has been known in industrial relations in this country and internationally, and ILO Convention 144 is germane in this respect. Traditionally, the Industrial Relations Charter has recognised a tripartite system where the employers, the employees (unions) and the government interacted in good faith (social dialogue).
  91. Social dialogue therefore rotated around the 3 traditional partners, but it appears that in the case of public service, a fourth partner has been brought in. A partner whom the legal framework appears to shield from the active field of play.
  92. The new legal architecture therefore reveals a disharmony between the constitutional and statutory mandate of the Salaries and Remuneration Commission and the right of trade unions to collective bargaining with employers (government/public institutions) in case of public officers.
  93. But in my view, the disharmony can easily be resolved. The resolution is located in interpreting the words used in granting the Salaries and Remuneration Commission a mandate over the remuneration of public officers and giving meaning to the right of trade unions to collectively bargain with employers.
  94. The formula I would adopt would be that although the Salaries and Remuneration Commission has the duty to advise the employers (public institutions), it must allow the employers a margin of appreciation to enable the employers negotiate in a voluntary heart and good faith.
  95. The Salaries and Remuneration Commission also ought to make available the data it relies on to the unions to ensure *equality of arms* during the negotiations.
  96. And this would necessitate that the Salaries and Remuneration Commission in giving advice must not give rigid positions to the employers but allow them a range or window within which to tackle the proposals from the Unions.
  97. As it is, in giving the advice, the Salaries and Remuneration Commission is at a more advantageous position. It knows the proposals from the Unions, the counter proposals from the public institutions and the size of the national cake. More often than not, the Unions would not know the size of the national cake or the fiscal and budgetary provisions/requirements.
  98. Because the Salaries and Remuneration Commission is forbidden by statute from negotiating with the Union, the actual information, data and figures it puts into consideration may not be available to the Union to further good faith negotiations, hence the Commission must allow the particular public employer a margin of appreciation.
  99. In the present case, the 1<sup>st</sup> Interested party did not allow the employer any margin of appreciation. Its advice was that the salaries be maintained at the existing levels. And it contended that a job evaluation within the public service was underway.
  100. In practical terms, the 1<sup>st</sup> Interested party set the remuneration of the Unions members using criteria which was not available to the Union and maybe the employer.
  101. In my view that was a wrong/unfair exercise of the Salaries and Remunerations Commissions constitutional powers vis a vis the right of unions and employers to collectively bargain.
  102. As already stated such negotiations should be in voluntary heart and good faith and good faith includes full and material disclosure.
  103. In all fairness, it may be necessary for the appropriate organs to have a relook at the statutory

- framework on the operations of the Salaries and Remuneration Commission and such relook ought to involve the stakeholders in industrial relations and labour.
104. The relook also need to consider international instruments such as the ILO Declaration on Fundamental Principles and Rights at Work and the Tripartite Consultation (International Labour Standards) Convention, 1976.
105. But that is all I can say considering the Court of Appeal holding on the binding nature of the advice by Salaries and Remuneration Commissions.
106. The Union and the employer disregarded the advice of the 1<sup>st</sup> Interested party and went ahead to conclude and sign a collective bargaining agreement. It is necessary to examine the legal consequences of the same.

***What should be the legal consequences of an employer in the public service disregarding the advice of the Salaries and Remuneration Commission?***

107. This is not an easy question to answer. None of the parties before Court addressed it at all.
108. But the Court of Appeal held that any agreement reached without the involvement of the Salaries and Remuneration Commission would be invalid.
109. I can say no more.

**Conclusion and Orders**

110. In so far as the partners here ignored the advice of the 1<sup>st</sup> Interested party, and in view of the principle of *stare decisis*, I have no option but to dismiss the application here.
111. The order which commends itself here is to direct the parties to go back to the negotiating table and reach a mutually agreed deal on the outstanding issues after putting into consideration the 1<sup>st</sup> Interested parties advise.
112. Each party to bear own costs considering the nature of the dispute and the unclear state of the law at the time the dispute was commenced and argued in Court.

**Delivered, dated and signed in Nakuru on this 18<sup>th</sup> day of December 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Union Nurses	Mr. Omulama, Industrial Relations Officer, Kenya National Union of Nurses
Respondent	Mr. Masese, Senior Legal Officer, Federation of Kenya Employers
For 1 <sup>st</sup> Interested Party	Ms. Wafula instructed by Rosalie W. Wafula Advocate
For 2 <sup>nd</sup> Interested Party	Ms. Khatambi, Litigation Counsel, Office of the Hon. Attorney General
Court Assistant	Nixon