REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NUMBER 40 OF 2015

NATIONAL HOSPITAL INSURANCE FUND, MANAGEMENT BOARD.....CLAIMANT

VERSUS

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....1ST RESPONDENT

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

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. By its petition dated 18th May, 2015, the Petitioner seeks among others that:-

(a) a declaration that the strike notice issued by the 1st Respondent on 27th April 2015 is unlawful.

(b) an order restraining the 1st Respondent from calling or proceedings with a strike in the circumstances.

(c) a determination by this Court on whether the Petitioner falls under the mandate, province and statutory supervision of the 2nd respondent under the Salaries and Remuneration Commission Act, 2011.

(d) a declaration that the Petitioner as constituted under the Act does not fall under the mandate of the 2nd Respondent.

(e) a declaration that the Salaries and Remuneration Regulations of 2012 offend the intent and object of the Labour Relations Act.

(f) a declaration that the Petitioner is at liberty to conclude the Collective Bargaining Agreement reached in July 2013 with the 1st Respondent.

2. The petition was supported by the affidavit of Millicent Mwangi sworn on 15th May, 2015 who deponed on the main that:-

(a) That the petitioner is a state corporation established under section 3 of the National Hospital Insurance Fund Act, Act No. 9 of 1998 and operate from funds collected under the said Act.

(b) That 2nd Respondent has caused to be published Salaries and Remuneration Regulations, 2012 by which Regulations the 2nd Respondent requires the Petitioner to submit for its approval any change in salaries and remunerations structure. Under the same Regulations, the 1st Respondent, being a trade union is excluded from negotiating salaries and remuneration structures with the 2nd Respondent.

(c) By a Circular dated 4/7/2012 the 2nd Respondent required the Petitioner to commence collective bargaining negotiations with trade unions but subject to the 2nd Respondent's final approval.

(d) That sometime in July 2013, the Petitioner negotiated and concluded terms with the 1st Respondent on collective Bargaining Agreement which it submitted to the 2nd Respondent for approval. The said terms had met the approval of the parent Ministry.

(e) That the terms of the proposed CBA did not receive approval of the 2nd Respondent and the Petitioner in good faith engaged the 1st Respondent in further negotiations with a view to incorporating the concerns raised by the 2nd Respondent. A revised CBA was forwarded to the 2nd Respondent vide a letter dated 1st November 2013.

(f) That the 2nd Respondent did not approve the terms of the CBA and directed the Petitioner to retain the existing remuneration and benefits structure for its workers.

(g) That at their joint meetings held on 9th April 2014 and 7th May 2014, the Petitioner and 1st Respondent negotiated the remuneration proposed for the unionisable employees to allow them comply with the guidelines and circulars issued by the 2nd Respondent. The resulting agreement was again sent for approval vide a letter dated 15/5/2014.

(h) The proposed remuneration structure was considered and the 2nd Respondent directed vide its letter of 16/7/2014 as follows:-

(a) Basic Salary

(i) It directed that management staff be awarded a one off increment of 5% for the year 2013/2014.

(ii) Unionisable Staff gets 5% increase for 2013/2014 per annum.

(b) Allowances

(iii) Unionisable staff allowances were awarded as negotiated in the CBA under Table 1, 2, 3 and 4 thereof.

(iv) Management commuter and medical allowance was awarded under Table 5 thereof.

(i) That the CBA as revised and approved by the 2nd Respondent did not meet acceptance of the 1st Respondent who took the position that the Petitioner and its employees did not fall within the province or purview of the mandate donated by law to the 2nd Respondent.

(j) That the 1st Respondent rejected the CBA as amended and approved by the 2nd Respondent and insists on the execution and strict performance of the CBA reached prior to the input of the 2nd Respondent.

(k) That the Petitioner has in good faith implemented the salary and remuneration structure as approved by the 2nd Respondent in its said letter.

(l) That the 1st Respondent being aggrieved by the decision of the 2nd Respondent then reported a trade dispute to the Ministry of Labour and Social Security Services that the Petitioner had refused to sign the negotiated and agreed CBA.

(m) That while the conciliation was underway, the 1st Respondent in display of utmost bad faith and solely to defeat the process called for a shop stewards' meeting where it was decided that the 1st Respondent files a dispute in Court.

(n) That the 1st Respondent's disregard of the process of conciliation led the Conciliator to issue a Certificate of Unresolved Dispute four (4) days later.

(o) That she verily believed the conduct of the Respondent in issuing the Notice amounts to unfair labour practice, is devoid of merit and evidence of its lack of good faith. She verily believed that the sole intention of the 1st Respondent was to paralyse the operations of the Petitioner.

(p) That the Petitioner seeks from this Court a determination of the legal issues raised in the Petition, particularly whether the Petitioner is subject to the jurisdiction of the 2nd Respondent.

3. The 1st respondent through Mr. Boniface Kavuvi deponed in the main that:-

(a) That the 1st respondent admits that there exist Salaries and Remuneration Rules.

(b) That it is not true that the circular requires the petitioner to negotiate CBA with 1st respondent and seek final approval from the 2nd respondent before implementation. The petitioner's interpretation is contrary to the Regulation Nos. 6, 9, 10, * 18 of the Salaries and Remuneration Commission Regulations 2012 hence untenable.

(c) That the 1st respondent states that before the four year circle CBA was agreed to the petitioner and the 1st respondent had negotiated a two year CBA which the petitioner declined to sign and 2nd respondent too declined to approve but 2nd respondent instead advised the parties negotiate a four year circle CBA.

(d) That I am aware that consultation between the petitioner and the 2nd respondent if were to take place was to take place before commencement of the negotiations as outlined in 2nd respondent Regulations No. 18 of (Commission Regulations 2012) but not after a draft CBA had been printed out and ready for signing.

(e) That the petitioner violated the law when they purported to implement a CBA which had not been signed and registered by this Hon. Court. Section 60 of the Labour Relations Act, 2007 was flagrantly breached. The petitioner therefore did not act in good faith as they allege/purport in averment No. 15 of the Supporting Affidavit. The 1st respondent will urge the Court during the hearing not to recognize any payment made out of the purview of the law to form part of CBA benefits since doing so will be tantamount to legalizing an irregularity.

(f) That the 1st respondent admits the contents of averments in paragraphs 16 and 17 of the supporting affidavit and further states that it participated in the conciliation process in good faith but the petitioner did not since they only attended the meeting which took place on 20th February, 2015 but failed to attend a follow up which was scheduled for 26th February, 2015 which date was tentatively agreed in the first meeting.

(g) That the shop stewards meeting was not meant to derail the conciliation process since there was no subsequent meeting which was to take place after the petitioner deliberately ignored to attend the second conciliation meeting. The meeting was meant to update the shop stewards on the progress of the dispute and other emerging grievances since the issue was long overdue. Permission was sort from the petitioner vide 1st respondent letter dated 30th March, 2015, the petitioner did not raise any question/issue at that time.

(h) That the 1st respondent is conversant with the conciliation process and therefore acted within the law. In the absence of any agreement extending the conciliation process the conciliation period stand to be within the meaning of Section 69 (b) of the labour Relations Act, 2007. The petitioner's allegations therefore has no basis in the law or fact since the conciliator issued a certificate of referral dated 21st April, 2015.

(i) That the failure by the petitioner to respond to 1st respondent letters on the CBA and having complied with provisions of Section 76 of Labour Relations Act, 2007 and Article 41 of the Constitution of Kenya the 1st respondent had no option but to issue a strike notice on 27th May 2015.

(j) That the 1st respondent in reply to the petitioner averment/paragraph no. 20 of the supporting affidavit state as follows:-

(i) That the salaries and Remuneration Commission is a creation of the Constitution at Article 230 with the mandate as stipulated at sub articles (4) (a) & (b) therefore the same read together with Article 260 of the Constitution of Kenya does not merit the 2nd respondent to interrogate the petitioners CBA processes. The definition found in Article 260 does not in any way associate, resemble or fit the petitioner's description and therefore the 2nd respondent has not locus standi to advice, recommend and or intervene on the petitioners CBA process.

(ii) That he is aware of the 3rd respondent circular dated 11th October 2012 referenced 93/2/8 which was very clear on the interpretation of Public Service. The 3rd respondent as provided for in Article 156 of the constitution is the principal legal adviser to the government. His advice therefore stand to be respected.

(iii) That he is aware that the Government of Kenya ratified ILO Convention No. 98 which is adequately protected under Article 2 of the Constitution of Kenya and therefore any action by anybody/institution aimed at interfering with the CBA process which is voluntarily agreed is illegal, null and void.

(iv) That he is conversant with ILO conventions more so ILO Convention No. 98 and subsequent report of the committee of experts on the Application of convention and recommendations at the session in 2013 had their say on issues of autonomy of parties to CBA at paragraph 298 states:-

"In general intervention by the authorities which have the effect of cancelling or modifying the content of Collective Agreements freely concluded by the social partners, or unilaterally extended their duration would therefore be contrary to the principle of free and voluntary negotiation. The detailed regulation by law would also infringe the autonomy of the parties……"

At paragraph 304, the committee noted that "Collective Bargaining as an instrument of social peace cannot be systematically and abusively subjected to judicial scrutiny as to constitutionally without losing its credibility and usefulness"

(v) That at the time of negotiations there was no one time the petitioner indicated to the 1st respondent difficulty in paying the agreed salaries and or benefits and therefore the 2nd respondents action to modify, amend, and or act contrary to what parties agreed voluntarily was not only unlawful but also violated principles of rules of natural justice and further breach to chapter four of the constitution (Bill of rights) at Article 41 of the Constitution of Kenya hence untenable.

4. The second respondent through one Nicholas Pkech Siwatom deponed mainly that:-

(a) That the 2nd respondent is a Constitutional Commission established by Article 230 of the Constitution whose mandate is to set and regularly review the remuneration and benefits of all state officers and to advise the national and county governments on the remuneration of all other public officers.

(b) That in addition to the functions set out above, Parliament enacted the Salaries and Remuneration Act pursuant to Article 252 (1) (d) of the Constitution to provide for additional functions of the 2nd respondent. Section 11 of the Salaries and Remuneration Act, 2012 provides for additional functions of the 2nd respondent to include:-

(i) Inquire into and determine the salaries and remuneration to be paid out of public funds.

(ii) Keep under review all matter relating to the salaries and remuneration of public officers.

(iii) Advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector.

(iv) Conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public officers.

(v) Determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation.

(vi) Make recommendation on matters relating to the salary and remuneration of a particular state or public officer.

(c) That to operationalize its mandate under Article 230 of the Constitution and Section 11 of the Salaries and Remuneration commission Act, the 2nd respondent published, with the approval of the National Assembly, the Salaries and Remuneration Benefits of State and Public Officers Regulations, 2012, whose purpose is to provide the procedure for:-

(i) Submission of remuneration and benefits proposals for state and public officers to the 2nd respondent.

(ii) Reviewing of remuneration and benefits of state and public officers by the 2nd respondent.

(iii) Setting and reviewing of remuneration and benefits for state officers

(iv) Advising on remuneration and benefits for all other public officers.

(v) That in performing the above functions, the 2nd respondent must be guided by the principles set out in Article 230 (5) of the Constitution, including

(i) The need to ensure that total public compensation bill is fiscally sustainable.

(ii) The need to ensure public services attract and retain the skills required to execute their functions and

(iii) Transparency and fairness.

(d) That the National Hospital Insurance Fund (herein referred to as "the fund), where the petitioner is the management board, is a State Corporation established under Section 3 of National Hospital Insurance Fund Act. It is categorized as a Financial Corporation by the State Corporations Advisory Committee and its role is to collect statutory deductions from members of the public and to protect the interest of contributors to the fund.

(e) That although section 35 and 36 of the National Insurance fund Act allows the petitioner to pay out expenses, including salaries and remuneration of its staff from the fund, any moneys held by the fund are public funds pursuant to section 2 of the Public Finance management Act. Consequently, the salaries and remuneration of the Fund's Staff must be done on advice and recommendation of the 2nd respondent pursuant to Article 230 of the Constitution and section 11 of the Salaries and Remuneration Act.

(f) That he has been advised by the 2nd respondent's advocates on record, advise which he verily believe to be sound, that the Fund's Staff are indeed public officers pursuant to the definition of public officers under Article 260 of the Constitutions, Section 2 of the Salaries and Remuneration Commission Act and Section 2 of the Public Officers Ethics Act of 2003. Being public officers, their salaries and remuneration must be done with the advice of the 2nd respondent.

(g) That the 2nd respondent, while performing its mandate under Article 230 of the Constitution and Section 11 of the Salaries and Remuneration Commission Act issued guidelines to all public institutions vide Circular No. SRG/CG/Vol. Vol III dated 4th July 2012. The circular advised, among other things as follows:-

(i) The public service adopts a four (4) year review cycle applicable to all public service organizations with effect from 1st July 2013.

(ii) Public service organizations to immediately commence their remuneration analysis, collective bargaining negotiations and make proposals to the 2nd respondent for analysis and advice and the submissions to be made not later than 31st December 2012.

(iii) All current collective bargaining agreements expire on 30th June 2013 to allow room for new collective bargaining agreements with a four year review cycle.

(h) That in December 2012, the Fund requested for extension of the deadline for submission of proposals for review of remuneration to its staff on the ground that it needed to conclude a collective bargaining agreement it had entered with the 1st respondent for the period of 1st September 2013 to 30th June 2013 and that it had engaged the services of a consultant to carry out job evaluation.

(i) That on 1st November 2013, the fund forwarded to the 2nd respondent negotiated proposals on salary remuneration of the fund's unionisable staff which had been negotiated through a Collective Bargaining Agreement covering the period between 1st July 2013 and 30th June 2015.

(j) That the Fund had failed to seek the advice of the 2nd respondent before the commencement of the negotiations leading to the Collective Bargaining Agreement to enable the 2nd respondent advise accordingly.

(k) That following the insufficient information provided by the Fund and assist the 2nd respondent to analyse the proposals and advise accordingly, the 2nd respondent requested for the Fund's extract of approved budget estimates for 2013/2014, a copy of the last audited financial statements and the current source of funding for personal emoluments vide a letter dated 15th November 2013.

(l) That the 2nd respondent did not however advise on the remuneration and benefits review for unionisable staff of the Fund due to the implementation of the Report of the Presidential Taskforce on Parastatals Reforms on state corporations, specifically on reclassification and reform of parastatals as recommended by the report. This information was communicated to the fund vide a letter dated 10th December 2013 and the 2nd Respondent advised the Fund to resubmit the matter through the parent Ministry.

(m) That on 27th January, 2014, the fund resubmitted the collective bargaining agreement to the 2nd respondent together with a copy of a letter from the Ministry of Health informing the Fund that the Ministry of Health had no objection to the proposals contained in the Collective Bargaining Agreement on condition that there should be no financial implications to the National Treasury in the implementation of the proposals.

(n) That consequently, the 2nd respondent held a meeting on 13th February 2014 to analyse and deliberate on the collective bargaining agreement. During the meeting, it was noted that the collective bargaining agreement did not comply with the guidelines issued by the 2nd respondent on 4th July 2012, particularly on the review cycle of four years.

(o) That consequently, the 2nd respondent held a meeting on 3rd July 2014 to deliberate on the proposed remuneration in the collective bargaining agreement. The 2nd respondent advised, among others as follows:-

(i) The management staff basic salary be awarded a one-off 5% increase for 2013/2014.

(ii) The unionisable staff basic salary should be increased by 5%, inbuilt in the collective bargaining agreement per annum for the period 2013-2017.

(iii) Unionisable staff allowance be awarded as negotiated in the 2013/2017.

(p) The 2nd respondent however noted that the implementation of the award should be subject to availability of funds. This was communicated vide a letter dated 16th July 2014.

(q) That in addition to being guided by the Constitutions, specifically Article 230 (5) the Salaries and Remuneration Commission Act and other enabling legislations and regulations thereunder, the 2nd respondent in advising the Fund took into account the following:-

(i) The fund is a State Corporation which is categorized under financial Corporations – PC 8 by the State Corporations Advisory committee along with other State Corporations such as Deposit Protection Fund Board and national Security fund, and is mandated to collect statutory deductions from the members and protect member's contributions.

(ii) That consequently, the fund's major source of financing is statutory fees from the members (members' contribution) and it receives some agency fees collecting the statutory fees from members.

(iii) Having looked at the fund's financial Statements, budgetary provisions and financial projections for the period under review, the 2nd respondent noted that the fund's finances could not sustain the proposals on salaries and allowances contained in the collective

bargaining agreement between the Fund and the 1st respondent.

(iv) Although the petitioner stated that the proposals in the collective bargaining agreement had been provided for within the budgetary provisions for the financial year 2013/2014 and the projections for the financial year 2014 to 2017, the fund and the 1st respondent based the collective bargaining proposals on the wrong premise that all the monies collected (including members contributions) from and on behalf of members constitute income for the fund and therefore the Fund could draw its recurrent expenditure to settle staff salaries and allowances.

(v) That the 2nd respondent also took into account that fact that the 5% increment was in addition to the annual increment which the Fund's staff are entitled to and receive annually.

(vi) In addition, the 2nd respondent considered the economy's inflation rate (Central Bank reference) for the period under review which ranged between 4.5-5%.

(vii) The 2nd respondent's advice on the proposals in the collective bargaining agreement was based mainly on economic consideration taking into account affordability, sustainability, the law and the relevant guiding circular on review of salaries and allowances issued by the 2nd respondent.

(viii) The 2nd respondent further took into account the fact that the salaries and allowances of the unionisable and management staff had not been reviewed for a period of time and the 2nd respondent view was that the staff needed some incentives to motivate them.

(r) That regulation 18 of the Salaries and Remuneration Benefits of State and Public Officers Regulations, 2012 does not violate the Constitutions and the Labour Relations Act as alleged by the petitioner. The 2nd respondent's role is limited to advising the government (including parastatals and State corporations) on the remuneration and benefits of their officers hence the provision in Regulation 18 (2) that 'the management of a public service organization shall seek the advise of the 2nd respondent before any collective bargaining process is commenced and that it is not the mandate of the 2nd respondent to negotiate with non-state and non-public service organs.

(s) That whereas trade unions and public service organizations with unionisable employees have a right under Article 41(5) of the Constitution and Section 57 of the Labour Relations Act to enter into collective bargaining agreements, the 2nd respondent's role is limited to invoking Article 230 (5) (a) of the Constitution and take into account 'the need to ensure that the total public compensation bill is fiscally sustainable.' The 2nd respondent must therefore weigh the total public wage bill against individual collective bargaining agreement and ensure that the same is fiscally sustainable.

5. In his submissions before the Court, Mr. Ojiambo for the petitioner submitted that the 2nd respondent's mandate is only exercisable in respect of state and public officers holding state office or in the public service whose salary or remuneration is payable directly from the Consolidated Fund or money provided by parliament. According to counsel, the petitioner is neither established by the constitution nor are its employees public officers or holding state offices within the meaning of article 260 of the Constitution. To support this contention counsel drew the attention of the Court to the mandate of the 2nd respondent as provided under article 230 (4) of the Constitution. Counsel further drew the attention of the Court to the definition of state officer, public office and public service as provided under article 260, of the Constitution.

6. Mr. Ojiambo further argued that the Constitution primarily confers two functions to the Commission. That is, to set and regularly review the remuneration and benefits of all state officers and to advice national and county governments on the remuneration and benefits of all other public officers. Counsel relied on a legal opinion given by the Interested Party on 17th December, 2012 to the effect that state

corporations were not established under the Constitution and hence not state organs under the mandate of the 2nd respondent. This opinion counsel submitted was the correct interpretation of the law. Counsel further drew the attention of the Court to its earlier decision in the case of **Chemelil Sugar Company Ltd and 2 Others v. Kenya Union of Sugar Plantation & Allied Workers (2014) eKLR** and **National Union of Water & Sewerage Employees v. Mathira Water Sanitation Company (2013) eKLR.**

7. Mr. Ojiambo urged the Court not to rely on the decision in **Kudheiha v. SRC (2014) eKLR** in which the High Court expounded the definition of public officers to include employees of state corporations.

8. On the issue of the strike notice Counsel submitted, this was unlawful because a strike cannot be called in respect of employees who are engaged in essential services. Counsel relied on section 78(1) (f) and 81(3) of Labour Relations Act. According to Counsel the petitioner's employees are engaged in administration of a national medical insurance scheme relied on by millions of Kenyans hence an essential service. Mr. Ojiambo submitted that the list of essential services under 4th schedule to Labour Relations Act is not conclusive. In this respect counsel relied on the case of **Engineering Workers Union v. Narcol Aluminium Rolling Mills Ltd (2013) eKLR** where the Court held that whether a party is engaged in essential services is both a matter of fact and law. According to counsel, whereas the petitioner is not a hospital facility, the administration of the NHIF is an essential service inextricably connected to hospital services all over the country. Mr. Ojiambo further submitted that the 1st respondent acted in bad faith when its issued the strike notice while conciliation was still going on. According to counsel, the 1st respondent remained inflexible during meetings and negotiations over the dispute. To support the submissions, counsel relied on the case of **BIFU v. Cosmopolitan Sacco Society (2015) eKLR and Kenya Plantation and Agriculture Workers Union v. Unilever Tea (K) Ltd (2014) eKLR.**

9. Mr. Atela for the 1st respondent associated with the submissions by the petitioner on the issue of jurisdiction of the 2nd respondent over the petitioner and added that the 2nd respondent's recommendation to the petitioner on matters of collective bargaining agreement was unlawful and unconstitutional. He further submitted that the 2nd respondent's recommendation of a different percentage of salary adjustment from what was mutually agreed between the petitioner and 1st respondent was a major departure from the spirit of the constitution.

10. On the strike notice, Mr. Atela submitted that the petitioner is not classified as an essential service under the 4th schedule to the Labour Relations Act and that the submission by the Petitioner that it is an essential service has no merit. Mr. Atela further submitted that the 1st respondent issued a strike notice after it was convinced that it had followed due process provided for under section 76 of the Labour Relations Act. According to him, the dispute was on terms and conditions of employment and when the petitioner ignored to participate in the conciliation in good faith by abandoning to attend second conciliation meeting the 1st respondent was left with two alternatives namely to file a dispute in Court or issue a strike notice. The 1st respondent chose to issue the strike notice and that was within the meaning of section 76 of the Labour Relations Act and in line with article 41 of the constitution.

11. Mr. Nyamondi for the 2nd respondent submitted that the petitioner falls under the mandate of the 2nd respondent. To support this submission Counsel relied on the provisions of article 260 of the Constitution and submitted that the Petitioner's employees are public officers within the meaning ascribed to it under the article. Counsel further relied on Public Officers Ethics Act for the definition of a public officer which includes any member, officer employee including an unpaid, part-time or temporary officer of any corporation, counsel, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law. Counsel cited the case of **National Union of Water & Sewerage Employees v. Mathira Water & Sanitation Company & 2 Others (2013) eKLR and Kudheiha Workers v. SRC (2014) eKLR** in support of this submission.

12. According to counsel employees of state corporations are public officers and are subject to the

mandate of the 2nd respondent since their remuneration is paid out of public funds.

13. On the issue whether the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations offend the intent and object of Labour Relations Act and the Constitution, Counsel submitted that section 26 of the Salaries and Remuneration Commission Act allows the Commission to enact regulations for better carrying out of the provisions of the Act. The 2nd respondent therefore acted within the law in enacting the regulations. According to Counsel, they do not violate the Labour Relations Act or the Constitution. Mr. Nyamodi further submitted that in determining whether a legislation is unconstitutional the Court is mandated to consider the objects and purpose of the legislation. According to Counsel, whereas article 41(5) of the Constitution grants the petitioner and the 1st respondent the right to engage in collective bargaining, articles 201 and 230 (5) of the Constitution requires the 2nd respondent to ensure that the total compensation bill is fiscally sustainable.

14. On the issue whether the petitioner can conclude the Collective Bargaining agreement reached in July 2013 with the 1st respondent, counsel submitted that this can only be done in a manner that is constitutional and within the legal limits. According to Mr. Nyamodi, the Collective Bargaining Agreement of July, 2013 was unconstitutional and should not therefore be concluded as it was. The same was unconstitutional because it disregarded the 2nd respondent's constitutional mandate.

15. Ms. Mbilo for the Interested Party in essence supported submissions by Mr. Nyamodi for 2nd respondent and relied more or less on same authorities therefore the Court will not go over them again. The Court is however grateful for her input and commends her.

16. This far, the main issues to be decided in this petition are first whether the petitioner falls under the mandate of the second respondent, second whether the Salaries and Remuneration Commission's regulations 2012 offend the spirit of collective bargaining as envisaged by ILO conventions, the Constitution and Labour Relations Act and finally whether petitioner the should conclude the Collective Bargaining Agreement reached in July, 2013 with the 1st respondent.

a. Whether the petitioner falls under the mandate of the 2nd respondent.

17. It is not in dispute that the 2nd respondent (hereinafter referred to as Salaries Remuneration Commission) is the Constitutional body established under article 230 of the Constitution to set and regularly review the remuneration and benefits of all state officers and to advise national and county governments on the remuneration of public officers. This constitutional provision is elaborated upon by section 11 of the Salaries and Remuneration Commission Act which provides in paraphrase as follows:-

> a. Inquire into and determine the salaries and remuneration to be paid out of public funds to State Officers and other public officers.
>
> b. Keep under review all matters relating to the salaries and remuneration of public officers.
>
> c. Advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector.
>
> d. Conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public officers.
>
> e. Determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation.
>
> f. Make recommendations on matters relating to the salary and remuneration of a particular State or public officer.

18. In order to fall within the mandate of Salaries and Remuneration Commission, the body or organization concerned must of essence be a public body employing or appointed to it, either state officers or public officers. Article 260 of the Constitution defines a public officer as any state officer or any person other than a state officer who holds a public office. A public office is defined under the same article to mean an office in the national government, a county government or public service if the remuneration and benefits of the office are payable directly from Consolidated Fund or directly out of money provided by Parliament.

19. Mr. Ojiambo in his oral submissions before Court argued that the Petitioner did not fall under control of Salaries and Remuneration Commission. According to Counsel, the petitioner is an insurance fund. It receives funds from member's contributions and invests. Expenditure is then projected from income. Once the expenditure is projected it is presented to the Board for approval. According to Counsel, the petitioner is not funded by funds set aside by Parliament. The petitioner competes with players in the market for contributions. Counsel acknowledged that majority of the contributors are public servants but not the only contributors. The Petitioner according to Mr. Ojiambo have contributors from private sector. Counsel further submitted that the petitioner needs to reward employees with competitive salaries to keep competent staff to compete with competitors.

20. Under section 15 of the NHIF Act any person who ordinarily resides in Kenya and has attained 18 years and whose total income whether salaried or self-employed is not less than the amount prescribed by the Board is liable to contribute to the Fund. That is to say contributions to the fund is mandatory to all salaried employees regardless of whether they are in public or private sector. The Fund is permitted under section 34 to invest moneys which are not immediately required to be applied for the purposes of the Act. The Fund therefore derives its income and funding from members contributions and returns on investments made under section 34.

21. There is no provision in the Act for any allocation of moneys to it either from Consolidated Fund Services or Parliament. Further section 11 permits the Board of the Fund to appoint such officers, inspectors and servants as are necessary for the proper discharge of its functions upon such terms and conditions of service as the Board may determine.

22. The powers and functions of Salaries and Remuneration Commission as set out under the Constitution in article 230 (4) are first, to set and regularly review the remuneration and benefits of all State Officers; and advice the national and county governments on remuneration and benefits of all other public officers. The Court has already considered the meaning of public officer and public office in this judgment but of paramount importance at this juncture is that in order to qualify as a public officer, one must either be a state officer or a person employed or appointed in public service of a county or national government and whose remuneration and benefits are payable directly out of money provided by Parliament.

23. As observed earlier in this judgment, the Petitioner derives its funds from member's contributions and returns on investments. There is no provision in the Act for funds to be appropriated to it by Parliament for payment of staff salaries and benefits. Since the mandate of Salaries and Remuneration Commission as provided under article 230 (4) is the setting and reviewing of salaries and benefits of state officers and further advising the county and national government on the remuneration and benefits of all other public officers, and since a public officer has been described as a person appointed to or employed in the public service of a county or national government and remunerated either from Consolidated Fund or money appropriated by Parliament, the Petitioner by reason of deriving their funding from members contributions or returns on investments do not fall under the mandate of Salaries and Remuneration Commission. It is not denied that the Petitioner receives a substantial portion of contributions from employees in Public Service but there are contributions from private sector as well. Member's contributions are their private property and do not constitute public funds.

24. The Petitioner is a contributory Health Insurance Fund started by the Government to ensure wide access to affordable medical insurance especially to majority of employees both in private and public sector. It is like any other insurance company where contributors pool their risk in return for protection from loss or expense arising from the risk assured. The only difference is that membership and

contribution to the Petitioner is made mandatory by law to all persons in employment regardless of whether its public or private sector. The purpose of close legal and supervisory framework over the Petitioner is to ensure members of the public are protected from embezzlement of their contributions or any other mal-practice. The regulatory and supervisory framework is the same as in any other sector such as banks and other institutions offering these essential services to the public.

25. Another aspect of Salaries and Remuneration Commission mandate which needs to be clarified is its role over State Officers and other public officers. Under article 230 (4), Salaries and Remuneration Commission is mandated to ***"set and regularly review the remuneration and benefits of all state officers; and to advice national and county government on remuneration of all other state officers"*** what this implies is that Salaries and Remuneration Commission has the power to set and regularly review the remuneration and benefits of state officers only but when it comes to other public officers in national and county government, Salaries and Remuneration Commission's role is advisory.

26. Black's Law Dictionary defines advice as "guidance offered by one person especially a lawyer, to another. Concise Oxford English Dictionary further defines advice as ***"guidance or recommendation offered".*** The adjective ***"advisable"*** means recommend or sensible.

27. The above aspect brings me to the second issue on whether Salaries and Remuneration Commission regulation 2012 offend the spirit of collective bargaining as envisaged under ILO Conventions, the Constitution and Labour Relations Act.

28. ILO Convention on the right to organize and collective bargaining, 1949 (No. 98) provides at article 4 as follows:-

> **"Measures appropriate to national conditions shall be taken where necessary to encourage and promote the full development and utilization of machinery for voluntary negotiation between employer's or employer's organizations and worker's organizations with a view to the regulation of terms and conditions of employment by means of collective agreements.**

29. Further the report of ILO Committee at 2013 session stated at paragraph 298 as follows:-

> **"In general intervention by authorities which have the effect of cancelling or modifying the content of collective agreements freely concluded by social partners or unilaterally extending their duration would therefore be contrary to the principle of free and voluntary negotiations."**

30. The centrality of collecting bargaining in Industrial Relations cannot from the foregoing be gainsaid. Parties must as far as national conditions permit be allowed to negotiate freely and voluntarily. Whereas Salaries and Remuneration Commission regulations 2012 were intended to provide guidelines to be born in mind while negotiating. It was never the intention that parties were bound by the recommendations especially where such negotiations are within the margin recommended by Salaries and Remuneration Commission.

31. I have perused the correspondence exchanged between the petitioner and Salaries and Remuneration Commission and it would seem that the petitioner was strait-jacketed in its negotiations with the 1st respondent's, its role reduced to merely communicating what Salaries and Remuneration Commission had decided. That could not by any means be considered as negotiations. It would therefore not be far from the truth to say the regulations offend the spirit of collective bargaining hence offend ILO Convention no. 98 and the Constitution.

32. As observed earlier the mandate of the Salaries and Remuneration Commission over public officers employed or appointed to national or county government is advisory. A person with an advisory role cannot insist that the advice given must be taken without modification even when circumstances permit such modification.

33. The Court concedes that Salaries and Remuneration Commission is the body empowered by the Constitution to deal with matters concerning salaries and remuneration of state and public officers however such mandate must be carried as provided both by the Constitution and the enabling statute. The Court observed in the case of **Chemelil Sugar Company Ltd & 2 Others v. Kenya Union of Sugar Plantation & Allied Workers (2014) eKLR** as follows:-

> **"Statutory bodies derive their powers and jurisdiction from the constitutive statute. They have no inherent powers hence no amount of operational creativity or innovation can confer jurisdiction where none exists."**

34. The Court further observed in that Judgment that:-

> **"Whereas the state of the law may currently appear cloudy on the scope and breadth of Salaries and Remuneration Commission's jurisdiction over state corporations generally, this lack of clarity until addressed by Parliament cannot be construed to admit of Salaries and Remuneration Commission's jurisdiction over commercial state corporations especially when the Constitution as currently crafted provides that the mandate of Salaries and Remuneration Commission extends only to cover state officers and public officers whose remuneration is payable directly from the Consolidated fund or directly out of money provided by Parliament."**

35. The Court is alive to the fact that disparities in wages and salaries in public service as well as the concern over the amount of revenue the Government was spending on public wage bill at the expense of development and other essential programmes informed the setting up of the 2nd respondent. However the mandate as expressed in the Constitution is first of all to set and regularly review the remuneration and benefits of all state officers and second, with regard to public officers, offer advice to national and county government on remuneration of such officers.

36. The Constitution is the grundnorm, in other words the Supreme Law of the Land. All laws derive their validity from it therefore any law which contradicts or conflicts with the Constitution becomes void to the extent of such contradiction or conflict.

37. The SRC's Act and regulations made thereunder derive their validity from the Constitution therefore no power or jurisdiction can be conferred by the Act or regulations made thereunder the exercise of which would conflict or contradict the powers donated or contemplated by the Constitution. Further the Act or regulations made thereunder cannot purport to enlarge the jurisdiction or mandate of the 2nd respondent where such enlargement does not have any Constitutional anchoring.

38. As observed earlier in this judgment, the mandate of the 2nd respondent as clearly provided under article 230 (4) of the Constitution is to set and regularly review the remuneration and benefits of all state officers and advise the national and county governments on remuneration and benefits of all other public officers. In other words the 2nd respondent is only mandated to set the salaries and remuneration of state officers but when it comes to other public officers, the 2nd respondent's role is advisory. It is therefore in excess of its jurisdiction to purport to fix or set salaries for public officers.

39. If it be the practice that the advice given by the 2nd respondent to national and county government is taken without any modification, it will remain as such-a practice without more. The 2nd respondent has no legal or constitutional ground to insist that its advice over remuneration of public officers to national or country government must be observed to the latter.

40. This conclusion may be unsettling to the 2nd respondent but unfortunately it is the interpretation yielded from the plain reading of article 230 (4) of the Constitution. If it was the intention of the framers of the Constitution that the 2nd respondent be given the mandate to set and regularly review salaries and benefits of public officers other than state officers as well, then such intention was omitted when finalizing article 230 (4). If that be the case, only an amendment to article 230 (4) can remedy the

situation. Until that is done, no amount of operational creativity can confer such jurisdiction on the 2nd respondent.

41. In conclusion, the Court allows the following prayers only in the petition.

a. A declaration that the petitioner as constituted under the Act does not fall under the mandate of the 2nd respondent.

b. A declaration that the Salaries and Remuneration Commission Act and Salaries Remuneration Commission regulations 2012 in so far as they purport to confer on 2nd respondent jurisdiction to set or restrict remuneration and benefits for public officers other than state officers are inconsistent with the Constitution hence null and void to that extent.

c. The insistence by the 2nd respondent that its advice to the petitioner is binding is counter to the principle of collective bargaining as envisaged under ILO Convention on the Right to Organize and Collective Bargaining, 1949 (No. 98) and by virtue of article 2 (6) of the Constitution, unconstitutional.

d. A declaration that the Petitioner be at liberty to conclude the Collective Bargaining Agreement reached in July, 2013 with the 1st respondent.

e. There will be no order as to costs.

42. It is so ordered.

Dated at Nairobi this 18th day of March 2016

Abuodha Jorum Nelson

Judge

Delivered this 18th day of March 2016

In the presence of:-

……for the Claimant and

……for the Respondent.

Abuodha Jorum Nelson

Judge