



**County Public Service Boards National Consultative Forum & 47 others
v Salaries and Remuneration Commission (Petition E029 of 2023)
[2024] KEELRC 13557 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13557 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E029 OF 2023

B ONGAYA, J

DECEMBER 19, 2024

**IN THE MATTER OF ARTICLES 10, 22, 23, 27, 42, 47, 230 (4), 232, 234, 235, 251, 259, 260 –
MEANING OF STATE OFFICE (G) AND (Q), OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF SECTIONS 57, 58, (5) (A) (B),
59, 59A OF THE COUNTY GOVERNMENTS ACT**

**IN THE MATTER OF SECTION 11 OF THE SALARIES AND REMUNERATION
COMMISSION ACT, 2011 AS READ TOGETHER WITH REGULATION
14 OF THE SALARIES AND REMUNERATION (REMUNERATION AND
BENEFITS OF STATE AND PUBLIC OFFICERS) REGULATIONS, 2013**

**IN THE MATTER OF THE VIOLATION OR THREATENED VIOLATION OF
ARTICLES 3, 10, 20(1), 27(1) & (2), 41, 47, 230(4) AND (5), 232, 251, 259, 260
(MEANING OF STATE OFFICE (G) & (Q) OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

**COUNTY PUBLIC SERVICE BOARDS NATIONAL CONSULTATIVE
FORUM 1ST PETITIONER**

MOMBASA COUNTY PUBLIC SERVICE BOARD 2ND PETITIONER

KILIFI COUNTY PUBLIC SERVICE BOARD 3RD PETITIONER

LAMU COUNTY PUBLIC SERVICE BOARD 4TH PETITIONER

TAITA TAVETA COUNTY PUBLIC SERVICE BOARD 5TH PETITIONER

GARISSA COUNTY PUBLIC SERVICE BOARD 6TH PETITIONER

WAJIR COUNTY PUBLIC SERVICE BOARD 7TH PETITIONER

ISIOLO COUNTY PUBLIC SERVICE BOARD 8TH PETITIONER

MERU COUNTY PUBLIC SERVICE BOARD 9TH PETITIONER



EMBU COUNTY PUBLIC SERVICE BOARD	10 TH PETITIONER
MAKUENI COUNTY PUBLIC SERVICE BOARD	11 TH PETITIONER
NYANDARUA COUNTY PUBLIC SERVICE BOARD	12 TH PETITIONER
TURKANA COUNTY PUBLIC SERVICE BOARD	13 TH PETITIONER
WEST POKOT COUNTY PUBLIC SERVICE BOARD	14 TH PETITIONER
SAMBURU COUNTY PUBLIC SERVICE BOARD	15 TH PETITIONER
TRANS NZOIA COUNTY PUBLIC SERVICE BOARD	16 TH PETITIONER
BARINGO COUNTY PUBLIC SERVICE BOARD	17 TH PETITIONER
BUNGOMA COUNTY PUBLIC SERVICE BOARD	18 TH PETITIONER
SIAYA COUNTY PUBLIC SERVICE BOARD	19 TH PETITIONER
KISUMU COUNTY PUBLIC SERVICE BOARD	20 TH PETITIONER
KISII COUNTY PUBLIC SERVICE BOARD	21 ST PETITIONER
NAIROBI COUNTY PUBLIC SERVICE BOARD	22 ND PETITIONER
KWALE COUNTY PUBLIC SERVICE BOARD	23 RD PETITIONER
MANDERA COUNTY PUBLIC SERVICE BOARD	24 TH PETITIONER
THARAKA NITHI COUNTY PUBLIC SERVICE BOARD	25 TH PETITIONER
KITUI COUNTY PUBLIC SERVICE BOARD	26 TH PETITIONER
KIRINYAGA COUNTY PUBLIC SERVICE BOARD	27 TH PETITIONER
TANA RIVER COUNTY PUBLIC SERVICE BOARD	28 TH PETITIONER
MARSABIT COUNTY PUBLIC SERVICE BOARD	29 TH PETITIONER
MACHAKOS COUNTY PUBLIC SERVICE BOARD	30 TH PETITIONER
NYERI COUNTY PUBLIC SERVICE BOARD	31 ST PETITIONER
MURANG'A COUNTY PUBLIC SERVICE BOARD	32 ND PETITIONER
KIAMBU COUNTY PUBLIC SERVICE BOARD	33 RD PETITIONER
UASIN NGISHU COUNTY PUBLIC SERVICE BOARD	34 TH PETITIONER
ELGEYO/MARAKWET COUNTY PUBLIC SERVICE BOARD	35 TH PETITIONER
NANDI COUNTY PUBLIC SERVICE BOARD	36 TH PETITIONER
LAIKIPIA COUNTY PUBLIC SERVICE BOARD	37 TH PETITIONER
NAKURU COUNTY PUBLIC SERVICE BOARD	38 TH PETITIONER
NAROK COUNTY PUBLIC SERVICE BOARD	39 TH PETITIONER
KAJIADO COUNTY PUBLIC SERVICE BOARD	40 TH PETITIONER



KERICHO COUNTY PUBLIC SERVICE BOARD 41ST PETITIONER
BOMET COUNTY PUBLIC SERVICE BOARD 42ND PETITIONER
VIHIGA COUNTY PUBLIC SERVICE BOARD 43RD PETITIONER
BUSIA COUNTY PUBLIC SERVICE BOARD 44TH PETITIONER
NYAMIRA COUNTY PUBLIC SERVICE BOARD 45TH PETITIONER
MIGORI COUNTY PUBLIC SERVICE BOARD 46TH PETITIONER
HOMABAY COUNTY PUBLIC SERVICE BOARD 47TH PETITIONER
KAKAMEGA COUNTY PUBLIC SERVICE BOARD 48TH PETITIONER

AND

SALARIES AND REMUNERATION COMMISSION RESPONDENT

RULING

1. The respondent Salaries and Remuneration Commission filed an application by the notice of motion dated on 05.08.2024 and through learned Counsel Mr. James Sitienei Advocate. The application was under Articles 48, 50(1), and 159 (2) of *the Constitution*; section 1A of the *Civil Procedure Act*; rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016; and, order 42 rule 6, order 51 rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of law. The a seeking the following orders:
 - a. The application be certified urgent and heard on a priority basis.
 - b. The Honourable Court be pleased to stay its judgment and orders issued on Friday 24.05.2024.
 - c. Costs of the application be provided for.
2. The application was supported by the attached affidavit of Anne R. Gitau MBS the Chief Executive Officer and the Commission Secretary of the respondent, together with, her supplementary affidavit sworn on 12.11.2024 and made on the following grounds:
 - a. That on 24.05.2024 the Hon. Justice Byram Ongaya delivered a Judgment issuing, inter alia, the following reliefs:
 - i. Declaratory orders that SRC cannot suo moto set and advise on the salaries and benefits of the members of county public service boards and of all other public officers serving in the county public service without considering and advising on the memorandum of recommendations on the salaries and benefits submitted to SRC by county public service boards pursuant to section 59(1)(g) of the County Government Act as read together with article 234(4)(b) of *the Constitution*.
 - ii. Declaratory orders that the SRC a year prior to the next every four years' remuneration review cycle for public and state officers shall issue sufficient regulations providing for participatory process of determining the methods for objective job appraisals (job evaluation) and determination of fair and transparent compensation including step-by-step stakeholder involvement within ascertainable and predetermined timelines for each step, and, upholding the guiding principles and values as found in the judgment.



- iii. Declaratory orders that the petitioners, a year prior to the next every four years' remuneration review cycle for public and state officers, shall issue guiding instruments for undertaking the power and function to make recommendations to SRC including the related functions and powers as found in the judgment.
 - b. That the judgment of the court directly affects the respondent's/applicant's ability to review and/or advise on the remuneration and benefits for county public service employees. Any delay in hearing the stay application shall lead to confusion and significant disruption in the remuneration processes for a significant number of public officers in the county government.
 - c. That given that the judgment requires actions to be taken "a year prior to the next every four years' remuneration review cycle," there is a time-sensitive element. Delaying the hearing could impact the respondent/applicants ability to comply with these new requirements unless stay is granted.
 - d. That the orders, directing the respondent to promulgate new regulations and the petitioners to issue guiding instruments, necessitate intricate legislative and administrative processes that fall outside the purview of the respondents/applicants authority. Such directives impinge upon the legislative domain, which, pursuant to Article 94(1) of *the Constitution* of Kenya, 2010, is the exclusive preserve of Parliament.
 - e. That should the respondent be compelled to execute the orders prior to the adjudication of its intended appeal, such implementation would precipitate systemic and far-reaching alterations to the public sector remuneration framework. These changes, once effected would be of such a fundamental and pervasive nature as to render them practically irreversible, even in the event of a successful appeal.
 - f. That the instant application encompasses matters of paramount public interest, with far-reaching implications for the governance and administration of remuneration across the entire public service sector. These issues are of such national importance as to warrant expeditious judicial intervention and issuance of stay to safeguard the public interest in effective governance and judicious management of public resources.
 - g. That unless stay is granted, the respondent's intended appeal shall be rendered nugatory if substantial changes are implemented in accordance with the judgment before the appeal is heard.
 - h. That the respondent being dissatisfied with the entire judgment rendered on 24.05.2024 duly filed and served a notice of appeal on 27.05.2024 and requested for certified copies of typed proceedings on the same date.
 - i. That the respondent has a right of appeal and should be allowed to ventilate the issues and appeal before the court of appeal.
 - j. That in the circumstances, it is in the interests of justice that the Honourable Court's orders and judgment rendered on 24.05.2024 be stayed pending the outcome of the respondent's intended appeal before the Court of Appeal.
3. The petitioner has in reply filed a replying affidavit of Samson Kibii sworn on 17.10.2024 and through Ngwele & Company LLP Advocates, and stated thus:
 - a. That despite the orders and directions issued by the court on 24.05.2024 the respondent has failed to adhere to the same and thus can be deemed to be in contempt of court.



- b. On or about 19.06.2024 in accordance with the above orders by the court, the petitioners wrote a letter dated 19.06.2024 to the respondent, informing them that they would be making a courtesy call on 25.06.2024 to their commissioners to review & consult on the implementation of the Court's judgment issued on 24.05.2024.
- c. On or about 25.06.2024 the petitioners after making their way to the respondents offices were informed that the commissioners were away and thus the meeting with the commissioners could not take place.
- d. The petitioners once again wrote a letter dated 17.07.2024 requesting the respondent to abide by the judgment of the court and to convene a consultative meeting between itself and all the parties herein in order to discuss the draft regulations.
- e. In a letter, dated 02.08.2024 the respondent addressed the petitioners informing them that they will not be available for the meeting within the timelines provided by the petitioner and that they would revert on a convenient date for the meeting.
- f. It is now 5 months since the Honourable Court issued an order of mandamus compelling the respondent to engage with and consider memorandum of the county public service boards before reviewing the remuneration and benefits for public officers in the public service of the county executive and the respondent has failed to engage and convene a meeting with the petitioners thus been in contempt of the court orders issued by the court.
- g. The respondent developed regulations for the remuneration of state and public officers and tabled them to the national assembly on 25.06.2024, which is a contravention of the orders of the court issued on 24.05.2024.
- h. On 12.09.2024 a letter referenced SRC/TS/29 Vol. II(29) informed the petitioner that it had held a meeting, without the respondents' knowledge, and in disregard of the Court's orders on 09.09.2024 where they deliberated on remuneration and benefits for public officers in the county executive for the FY 2024/2025 and thus they were advising on the review of remuneration structure for public officers in the county government.
- i. The petitioners by a letter dated 17.07.2024 requested the respondent to withdraw the draft SRC Regulations that were tabled in Parliament on 25.06.2024 within 7 days as the same was in contempt of court orders issued on 24.05.2024.
- j. The respondent has no prima facie case and has failed to prove that their case raises arguable issues that need to be dispensed by this court.
- k. The application does not satisfy the second requirement for grant of conservatory order being violation of rights.
- l. The applicant has failed to demonstrate how denial of conservatory orders shall render their appeal nugatory.
- m. The applicant has failed to demonstrate eminent threat or violation of their rights if conservatory orders are not issued.
- n. The application fails to demonstrate how the public interest shall be affected negatively if the court does not issue the orders sought in the application.



4. Further, the petitioners filed an application by the Notice of Motion dated 18.10.2024 through Ngwele & Company Advocates and supported by the affidavit of Samson Kibii, sworn on 18.10.2024. Seeking the following orders:
- a. That pending the hearing and determination of the instant application, the Honourable Court do issue conservatory orders staying the consideration and approval by the National Assembly of the draft regulations titled “The Salaries and Remuneration Commission (Remuneration and Benefits of State and other Public Officers) Regulations, 2022” that were table before the National Assembly on 25.06.2025 in contravention of the orders issued by this Court on 24.05.2024.
 - b. That pending the hearing and determination of the instant application, the respondent and contemnors be barred and or otherwise denied audience before this Honourable Court in respect of any other proceedings herein (save for responding to the application for citation for contempt): unless and until they purge the contempt and comply with subsisting orders issued on 24.05.2024.
 - c. That an order quashing the purported decision by the respondent to submit to the National Assembly for consideration of the draft regulations titled “The Salaries and Remuneration Commission (Remuneration and Benefits of State and other Public Officers) Regulations, 2022” that were tabled before the National Assembly on 25.06.2025 in contravention of the orders issued by this court on 24.05.2024.
 - d. That this Honourable Court be and is hereby pleased to cite the respondent, through all of its commissioners jointly and severally for contempt of the Honourable Court for wilful and deliberate disobedience and defiance of the orders of the Court of 24.05.2024 and sentence each to a custodial sentence of not less than six months (or otherwise appropriately punished) and fined Kshs 5,000,000/=
 - e. That the Honourable Court be pleased to issue any further orders and/or direction as may be necessary to give effect to the orders sought herein and that it deems fit in the interest of justice.
 - f. That the costs of the application be provided for on a full indemnity basis.
5. The respondent replied to the application by filing the replying affidavit of Anne R. Gitau, MBS, EBS sworn on 18.11.2024, though and filed through Mr. James Sitienei Advocate. It was replied and stated thus:
- a. The respondent’s notice of motion application seeking stay of execution pending appeal before the Court of Appeal was lodged first in time, specifically 05.08.2024 well before the petitioner’s application dated 18.10.2024; therefore, the application for stay of execution should take precedence.
 - b. The purpose of the respondent’s notice of motion application seeking stay of execution is to preserve the subject matter in dispute so that the respondent’s undoubted right of appeal is safeguarded and the appeal if successful is not rendered nugatory.
 - c. That pursuant to section 26(1) of the SRC Act, the respondent made and issued the SRC (Remuneration and Benefits of State and Public Officers) Regulations, 2013, which came into force, vide legal notice no 2 of 16.01.2013.
 - d. By virtue of section 21 of the *Statutory Instruments Act*, all statutory instruments, including regulations are automatically revoked on the day, which is, ten years after the making of



the statutory instrument. Consequently, the 2013 SRC regulations were due for automatic revocation on 15.01.2023.

- e. Prior to the Court’s judgment and orders of 24.05.2024 the respondent had in its 2019/2020 – 2023/2024 strategic plan expressly identified and incorporated as a strategic objective, the review and promulgation of new SRC regulations.
- f. In anticipation of the impending regulatory vacuum that would ensue following the automatic revocation of the 2013 SRC Regulations, the respondent, in or about the year 2020 commenced a comprehensive review process of the aforementioned regulations with the intention of promulgating new regulations prior to the statutory revocation date of 15.01.2023.
- g. In line with articles 10 and 47 of *the Constitution*, among other legal provisions the respondent subjected the draft SRC Regulations, 2022 to extensive stakeholder engagement and public participation which included the county public service boards.
- h. Following the preparation of the Draft SRC Regulations 2022 in line with section, 26(2) of the SRC Act on 10.05.2022 the respondent for the first time submitted the draft SRC Regulations 2022 to the National Assembly for prepublication scrutiny and approval.
- i. On 03.06.2023, the respondent attended a prepublication meeting convened by the Parliament Committee on Delegated Legislation (CDL) whereat the respondent presented the draft regulations. The Committee duly considered the draft SRC regulations 2022 and the annexed stakeholder or public participation report and gave guidance on finalization of the draft regulations.
- j. The respondent took into account the recommendations made by the Parliamentary Committee on Delegated Legislation and on 06.06.2022 for the second time forwarded the revised draft regulations to the National Assembly for consideration and approval.
- k. By letter dated 09.11.2022 the Parliamentary Committee on Delegated Legislation invited SRC to another pre-publication scrutiny meeting on 22.11.2022. The Commission duly attended the meeting and presented the revised draft regulations once again.
- l. Arising from the meeting held on 22.11.2022 the Parliamentary Committee on Delegated Legislation guided the respondent to revise the definition of the terms “benefit” and “job description manual” as set out under regulation 2 and the provisions of regulation 21 on rewarding productivity and performance.
- m. The respondent duly revised the draft regulations as guided by the Parliamentary Committee on Delegated Legislation and for the 3rd time resubmitted them on 05.12.2022 for approval and publication.
- n. On 07.03.2023, the committee on delegated legislation prepared a report on the consideration of the draft SRC Regulations. In the report, the Committee recommended to the house not to approve the publication of the draft SRC regulations for; failing to conduct public participation as required by *the Constitution* and *Statutory Instruments Act* and contravening the provisions of *the Constitution* and the SRC Act.
- o. In light of the extensive public participation undertaken, the careful consideration given to stakeholder views and the alignment of the draft regulations with the provisions of the SRC Act and *the Constitution* on 19.06.2024 for the fourth time, the respondent re-tabled the draft



SRC Regulations, 2022 and requested the National Assembly to reconsider its position of 07.03.2023.

- p. That on the same day of re-tabling the draft SRC Regulations 2022, the Clerk of the National Assembly advised the respondent that the Regulations should be revised to reflect the current year of submission to the National Assembly.
 - q. That in compliance with the advice, the respondent revised the draft SRC regulations, 2022 to now become the Draft Salaries and Remuneration Commission (Remuneration and Benefits for state and other public officers) Regulations 2024. The draft regulations 2024 were subsequently resubmitted for the 5th time on 24.06.2024.
 - r. Based on the chronology it is manifestly clear that the process leading to preparation and issuance of the draft SRC Regulations 2024 (formerly draft SRC Regulations 2022) was initiated as early as 2020 as part of the respondent's strategic planning.
 - s. The issuance of the SRC Regulations was not among the matters placed before this Honourable Court for consideration prior to its judgment of 24.05.2024 when the Court proceeded to issue an order of Mandamus compelling the respondent to issue sufficient regulations providing for participatory process of determining methods of objective appraisals and determination of fair and transparent compensation.
 - t. The Honourable Court did not have the benefit of considering the full historical background and context of the matter, including the extensive work already undertaken by the respondent since 2020, the comprehensive public participation and stakeholder engagement, the multiple submissions and revisions of the draft regulations and the ongoing interactions with the National Assembly all of which demonstrate the respondent's substantial progress towards establishing the required regulatory framework well before the Court's orders.
 - u. The petitioners' application for contempt of court is fatally incompetent as it seeks to cite a corporate body, namely the Salaries and Remuneration Commission rather than any natural persons for contempt of court. This is contrary to established legal principles, as quasi-criminal proceedings cannot lie against a corporate entity but must be directed at specific natural persons who are alleged to have disobeyed the Court orders in their personal or official capacity.
6. The parties filed their respective submissions. The Court has considered the parties' respective positions and makes finding as follows:
7. The 1st issue is whether the respondent has passed the threshold for grant of the stay of execution orders pending appeal. With respect to the application for stay of execution, it is urged for the petitioners that the same should not be allowed because the applicant has not met learned Counsel Mr specifically submitted the threshold. it. Ngwele as follows:
- a. On the substantial loss test, it was submitted that the respondent filed the appeal against the judgment to scuttle the obligations imposed upon it by *the Constitution*, the statute and as found in the judgment. Further, the respondent had not disclosed factors that showed that the if execution proceeded, the respondent's appeal would be destroyed in any material respects.
 - b. On prejudice test, it was submitted for the petitioners that it was the petitioners who are suffering and will continue suffering if judgment is not implemented. In particular, the petitioners continue to be paid based on the outdated respondent's circular of 2017 and they continue to suffer irreparably. Thus, the orders of stay of execution of the judgment and decree should be denied towards mitigating the petitioners' continuing suffering.



- c. On the unreasonable delay test, it was submitted for the petitioners that the application was filed in Mid-August 2024 while judgment had been delivered in May 2024. Further, the term or tenure of the Commissioners was ending on 1st September 2024 and in the circumstances, there exists unexplained inordinate delay in filing the application.
 - d. On the arguable test, it was submitted that the orders sought to be stayed did not stop the respondent from performing its statutory powers. Further, the Court in the judgment made declaratory orders setting out a procedural path the respondent should follow in performance of its constitutional and statutory mandate. Further, the judgment elaborated that the respondent does not enjoy powers to act suo moto but that their advisory must be based on the recommendations of the county public service boards. It was submitted that the judgment did not grant the petitioners the salaries that had been claimed and prayed for but the judgment interpreted *the Constitution* and which did not affect individuals. It was submitted that it would be unfair for the Court to stay the determination and review of salaries of all the petitioners and county government employees, and, in a procedure in line as found by the Court.
 - e. On the nugatory test it was submitted for the petitioners that that the respondent urged that if new regulations were issued then, the same would not be reversed. However, it was urged for the petitioners that the legislative function be vested in the Parliament. All the judgment did was to direct the respondent to make regulations first, on procedure on job appraisals and workload analysis, and second, on procedure to determine compensation due. Further, the judgment had directed the respondent to undertake the drafting of the regulations through stakeholder engagement and accordingly, the respondent's statutory and Constitutional powers were not affected in any manner as it initiates the regulations, petitioners will give their input, and, the Parliament will legislate by passing them. Thus, the respondent is not affected at all and the judgment has not ousted the respondent's advisory powers to consider memoranda by the petitioners and then render advisory. In that sense, the respondent's powers and functions being intact and undisturbed, the respondent had failed to show the appeal would be rendered nugatory.
 - f. On the public interest test, it was submitted for the petitioners that the petitioners employed about 60 % of public officers but their salaries had not been reviewed since 2017. Accordingly, public interest favoured review of the petitioner's salaries and that of their employees in county governments.
 - g. It was submitted that since the judgment's delivery, the respondent had not taken even a single step in implementing the final orders and findings and the contempt application had been filed. For the stated reasons it was urged that the application be dismissed.
8. For the respondent, learned Counsel Mr Sitienei submitted as follows in support of the grant of the orders of stay of execution pending appeal:
- a. The respondent had filed a notice of appeal against the judgment. The appeal had already been filed on 11.09.2024 being Civil Appeal No. 685 of 2024 at Nairobi. The appeal had been filed without reasonable delay. The grounds of appeal raised arguable points including that the judgment imposed limitations on the respondent on exercise of the powers in Article 230(4) of *the Constitution* as read with section 59(1) (g) of the *County Governments Act*. Thus, the respondent had filed an arguable appeal.



- b. If the appeal succeeds, it should not be defeated because there is no stay order. It will be irreversible to revert to existing regulatory framework once the new regulations are made as directed in the judgment. It was urged that reverting away from the new regulations would be cumbersome or impossible because the new regulatory order per the judgment would have become entrenched.
 - c. The application raised serious public interest issues on the respondent's constitutional and statutory mandate. It was about remuneration governance in the public service and the 47 county governments and parties not before the Court had been affected by the judgment.
 - d. Even if appeal succeeds, no prejudice will be visited upon the the petitioners.
9. The Court has considered the rival submissions on the application for stay of execution and returns as follows:
- a. The respondent has already filed the appeal. There is manifest evidence of good faith that the appeal is being pursued expeditiously. The Judgment was in May 2024 and the application filed in August 2024. While indeed the appeal is already filed, no explanation has been offered by the respondent to explain the time lapse between the date of the judgment and the date of the filing of the application. The Court has considered that an application for stay could as well go the the Court of Appeal in the intervening period and the belated and unexplained filing of the application is found to be unreasonable delay in the circumstances of the case.
 - b. As urged for the petitioners the respondent has failed to show substantial loss that will result to the respondent. The judgment has not adjourned the performance of the respondent's powers and functions as vested in *the constitution* and the statute. The judgment makes a declaration on how the respondent should make regulations governing delivery of its mandate (which must involve public and stakeholder participation) as well as the floor contents of matters to be provided in such regulations as found in the judgment – being, step by step procedure on undertaking job appraisals and workload analysis, and, second, on step by step procedure to determine compensation due. A related issue was provision in the regulations for respect, promotion and implementation of the right of workers and employers to associate and collectively bargain as envisaged in Article 41 of *the Constitution* on the right to fair labour practices and ILO C100 – Equal Remuneration Convention, 1951 on objective appraisal of jobs on the basis of work to be performed; and, determination of methods to be followed during such objective job evaluation by involving authorities that determine remuneration rates, and, where remuneration rates are determined by collective bargaining, the involvement of the parties to the collective bargaining agreements. The judgment when implemented does not introduce strange or impose prohibition to performance of the respondent's statutory and constitutional powers and functions. The judgment instead enhances the respondent's statutory obligation to make regulations and the Court considers that it would be contrary to public interest as it is to public policy to stay a declaratory order designing that the respondent performs its statutory power to make fair regulations in a fair procedure. The Court is not inventing such proposition but the same was already set out in the constitutional and statutory prescription that the respondent shall be fair and transparent in undertaking its functions – including the statutory function to make regulations. Similarly, the *Statutory Instruments Act* and Article 232 of *the Constitution* on public service and values already imposed transparency, accountability, and participation of the people and stakeholders (those affected or their representatives) in the making of policies and delegated legislation. Accordingly, the Court finds that the respondent has failed to show substantial loss the will be occasioned to it if



the judgement's implementation is not stayed pending the hearing and determination of the appeal.

- c. The Court finds that as urged for the respondent, staying the judgment will prejudice the petitioners, their members, employees of county governments and indeed all public officers because their remuneration and benefits will stagnate and not get fairly reviewed as urged for the petitioners. The petitioner has confirmed that its outgoing regulations have indeed lapsed under the statutory ten years mandatory death age of such regulations. It is also confirmed that the attempted next generation draft regulations of 2022 and now 2024 have continued to suffer a not so smooth legislative approval partly for want of proper stakeholder and public participation as also found in the judgment. The Court finds that granting the stay orders as prayed for will be prejudicial to the petitioners as urged and further, no public interest will be served in granting the stay orders. The Court has surveyed the material on record and searched for a public interest that will be served if a stay order is granted for the respondent not to proceed to initiate regulations in accordance with a transparent, fair and participatory manner and returns none has been established. All that appears on record is that the petitioners' members, employees and indeed all public and state officers would be seriously prejudiced if the stay order were to issue.
 - d. No submission has been advanced for the respondent to justify why the Court should stay the order in the judgment thus, "Declaration orders that the petitioners, a year prior to the next every four years' remuneration review cycle for public and state officers, shall issue guiding instruments for undertaking the power and function to make recommendations to SRC including the related functions and powers as found in the judgment." The order is directed at the petitioners and who should comply.
 - e. The Court is precluded from sitting on appeal on its own decision. Thus, whether the appeal is nugatory or arguable are issues best left to the Court of appeal.
 - f. For the foregoing findings and reasons, the application for stay orders pending appeal will be declined and the application liable to dismissal. While so finding, the Court has considered that the declaratory orders defined the parties' rights and obligations as self-executory by the parties and in that case there exist nothing to stay.
10. The 2nd issue is whether the contempt application can succeed. The Court returns that it must fail because of the following reasons and findings:
- a. The Court has already elaborated that one of the declaratory orders set out a design on how the respondent should make fair regulations and in a transparent participatory manner. It is submitted for the petitioners that that declaratory order has been disobeyed when the respondent submitted to Parliament regulations which the respondent says were under formulation long before the petition herein was filed. The Court considers that the declaratory order in the judgment on how the respondent should proceed and make regulations defines the architecture of how that should be done. Accordingly, in the Court's view, the impugned regulations pending before the Parliament by themselves do not constitute a violation of the design set in the declaratory judgment and decree but may constitute a new cause of action based on the declaratory order and the facts and evidence of whatever has actually taken place when tested against the order. The prayer that the order has been violated or that the impugned regulations are unconstitutional is found beyond the matters before the Court in the petition and the judgment. On the material on record a finding of contempt in that regard has not



been established and as well, the impugned regulations cannot be declared null or unlawful and unconstitutional without a proper trial in a proper original proceeding.

- b. For the order of mandamus it was submitted that the petitioners have by correspondence and a visit initiated steps for the respondent to comply but no action has been taken on the part of the respondent. It is urged for the petitioners that the failure to engage on the part of the respondent amounted to disobedience of the order of Mandamus. The Court has considered the submission by learned Counsel Mr. Wahome for the respondent that the petitioners have not submitted a memorandum to the respondent as per terms of the order for mandamus and it cannot be said that the respondent has disobeyed in that regard. Further, the Court did not give timelines and the terms of the order of mandamus are that the respondent can consider the recommendations any time, from time to time, as occasion shall arise. The Court upholds submissions by counsel for the respondent. The order of mandamus was that the respondent considers the recommendations by the petitioners, the county public service board of the respective counties individually or collectively, as occasion shall arise. In any event, the judgment as well makes a declaratory order that the petitioners institute guidelines on how they will undertake the function of making recommendations to the respondent. In view of those considerations, the Court finds that the order of mandamus had not been disobeyed. As submitted by Mr Wahome, the letter by the respondent of 12.09.2024 was not a new advisory done without input of the petitioners but it was about impact of the ill-fated Finance Bill, 2024 on implementation of the already made advisories – the letter looked at previous advisories rather than the future. Thus, again the Court finds that letter did not amount to disobedience of the declaratory orders and in any event, it would amount to a new cause of action allegedly in consistent with the declared parties’ positions.
 - c. The parties mentioned the respondent was a corporate body and whether the corporate body would be held in contempt. The Court finds that a corporate body as such independent of directors or commissioners can be held in contempt and appropriate orders like fines and sequestration orders may issue in appropriate cases. The petitioners were therefore entitled to cite the respondent as such or its members who by law are the embodiment of the Commission per Articles 230(2) and 253 of *the Constitution* of Kenya 2010.
 - d. The Court has considered the parties’ respective margins of success and each to bear own costs of the applications.
11. In the process of drawing this ruling, the Court has observed some errors in the judgment and the decree delivered and given herein on 24.05.2024, which are liable for correction. In doing so the Court relies on rule 75 of the Employment and Labour Relations Court (Procedure) Rules, 2024 that the Court shall, at the request of the parties or on its own motion, cause any clerical mistake, incidental error or omission to be rectified and shall notify the parties of such rectification. In that regard the judgment and the decree will be corrected as follows:
- a. In the final orders , order (2) and (3) are similar and order (2) is deleted and order (3) renumbered (2); order (4) renumbered (3); order (5) renumbered (4); order (6) renumbered (5); and order (7) renumbered (6) accordingly.
 - b. In order (2) as renumbered delete 234(b) wherever it appears and insert 230(4) (b) to reflect proper Constitutional provision of the respondent’s power and function in that regard.
- In conclusion, both the contempt and stay of execution applications herein are hereby determined with orders as follows:
1. The two applications are each dismissed and each party to bear own costs.



2. The judgment and the decree delivered and given herein on 24.05.2024 are hereby corrected as follows:
 - a. In the final orders, order (2) and (3) are similar and order (2) is deleted and order (3) renumbered (2); order (4) renumbered (3); order (5) renumbered (4); order (6) renumbered (5); and order (7) renumbered (6), accordingly.
 - b. In order (2) as renumbered delete 234(b) where it appears and insert 230(4) (b) to reflect proper constitutional provision of the respondent's power and function in that regard.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 19TH DECEMBER 2024

BYRAM ONGAYA

PRINCIPAL JUDGE

