REPUBLIC OF KENYA

THE SUPREME COURT OF KENYA

NATIONAL HOSPITAL INSURANCE FUND MANAGEMENT BOARD Vs THE KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS & 2 OTHERS

SC PETITION NO. E024 OF 2024

DATE OF JUDGMENT: 30TH MAY, 2025

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Final Orders: ***The Court dismissed the appeal***

Background

In 2012, the **Salaries and Remuneration Commission (the Commission)** directed all public institutions to adopt a four-year cycle for reviewing staff remuneration, effective July 2013, also indicating that existing collective bargaining agreements ("CBA") would expire on 30th June, 2013. The Appellant, **NHIF**, requested for an extension to conclude its negotiations with the 1st respondent, **Kenya Union of Commercial and Allied Workers** and negotiated a Collective Bargaining Agreement (CBA) with the 1st respondent without prior Commission advice. The Commission rejected the CBA for non-compliance with the new guidelines and although a revised CBA was submitted, Commission approved only limited increments and allowances subject to funding availability. The Union rejected such advice, insisting on the original terms but NHIF instead implemented the Commission's recommendations, prompting the Union to declare a trade dispute and issue a strike notice, which strike, was stopped through a restraining order.

ELRC: The Employment and Labour Relations Court in a Judgment delivered on 18th March, 2016, held that NHIF was not subject to the direction of the Commission because it was not a public office, since Parliament did not appropriate NHIF's employees' remuneration from the Consolidated Fund. Further, that NHIF drew its funding from its members' contributions, which membership was drawn from both the public and private sectors and as such did not constitute public funds. The ELRC also found that the Commission's role concerning public officers was purely advisory and that the Salaries and Remuneration Commission Act, (SRC Act) Regulations only offered a guideline and were not binding.

Court of Appeal: On appeal, the Court of Appeal set aside the Judgment of the ELRC stating that NHIF was a State Corporation, and deemed a public service institution and its officials and employees were public officers; it had jurisdiction over the determination of remuneration and benefits of the Appellant's employees, and it's advice was binding.

Supreme Court: In the appeal before the Supreme Court, the following issues fell for determination:

i. *Whether the Court has jurisdiction to hear the appeal?*

ii. *Whether NHIF fell under the jurisdiction of the Commission?*

iii. *Whether the Commission's advice was binding on NHIF?*

iv. *What orders should issue?*

Upon consideration, the Supreme Court has dismissed the appeal for the following reasons:

1. **Issue 1:** The Court found that it had jurisdiction to settle weighty constitutional questions, including, the definition of a public officer and public office, and the place of the Commission in the negotiation of CBAs affecting this cadre.
2. **Issue 2:** The Court determined which parameters are to be applied in the definition of a public officer, namely: whether the person concerned in an office in the national government, the county government or the public service; whether that person receives remuneration or benefits payable by the Consolidated fund or directly by moneys provided by Parliament; whether that person perform a function within a state organ or a state corporation and; whether the person holding public office under the terms of the former Constitution. Applying these parameters to the present cast, the Court found firstly, NHIF, being a State corporation under the State Corporations Act, and the NHIF Act, was in the public service and therefore, its employees would be officers in the public service. Secondly, the Fund was a national government entity as its financial reporting had to be in conformity with the Public Finance Management Act and the Public Audit Act. Thirdly, the Fund handled public money since the Fund's members remitted their contributions to it and it held public funds in trust for third parties, its members.
3. **Issue 3:** The Court held that the Commission is tasked with ensuring that the total public compensation bill is fiscally sustainable, as its advice affects the economic, fiscal and even social landscape of the country. The Court therefore held that the Appellant ought to have sought the Commission's advice before completing the CBA negotiations with the Union. It follows then, that any CBA entered between NHIF and the Union, absent the advice and approval of the Commission, prior to entering the said CBA, has no legal effect.

Upon considering the appeal, the Supreme Court issued the following orders:

a. The Appeal dated 7th June 2024 and filed on 24th June 2024 is hereby dismissed.

b. The Judgment of the Court of Appeal delivered on 26th April 2024 is hereby affirmed.

c. Parties shall bear their respective costs.

d. We hereby direct that the sum of Kshs.6,000 deposited as security for costs upon lodging of this Appeal be refunded to the Appellant.