



The Notice of Motion is expressed under Sections 12 and 20 of the Employment and Labour Relations Court Act, Sections 76, 78, 80 and 81 of the Labour Relations Act, Articles 50 and 159 of the Constitution of Kenya, Sections 1A, 1AB and 3A of the Civil Procedure Act and Order 40 Rule 1 and 2 of the Civil Procedure Rules and is based on the grounds enumerated on its face and the Supporting Affidavit of Joseph Onyango Ogutu sworn on 30<sup>th</sup> October 2025.

The claimant's case is that the respondent called and engaged in an on-going strike without due process and the strike was illegal and unprotected as nurses and midwives provide essential services and are excluded from engaging or participating in any strike.

That the applicant and the public will continue to suffer if the strike is not restrained and public service interest justified the court's intervention.

In a Further Affidavit sworn on 13<sup>th</sup> November 2025, in response to the respondent's response, Mr. Joseph Onyango Ogutu deponed that the strike commenced on 17<sup>th</sup> September 2025 and was unprotected and no contingent plan was made to ensure minimum services

were being rendered and the staff rota availed related to nurses at the Siaya County Referral Hospital and the claimant had 176 facilities.

That the matters in question and decision called for participation of the National Government and the circumstances in Kisumu ELRC E001 of 2023 and the instant case were different and no employee had been intimidated.

According to the affiant, the respondent's strike was illegal for failure to ensure minimal services were retained.

### **Respondent's case**

The respondent filed Grounds of Opposition dated 3<sup>rd</sup> November 2025 and a Replying Affidavit of Evans Mwendwa sworn on 4<sup>th</sup> November 2025 who deposed that the strike was neither illegal nor protected as due process was followed.

The affiant deposed that the respondent issued a strike notice on 29<sup>th</sup> May 2025 after which conciliation meetings were held on 18<sup>th</sup> June 2025, 4<sup>th</sup> July 2025 and 16<sup>th</sup> July 2025, but no agreement was arrived at and a Certificate

of unresolved Trade dispute dated 31<sup>st</sup> July 2025 was issued and every worker had the constitutional right to go on strike and minimal services were being rendered and the strike had not been declared illegal.

According to the affiant, the unresolved issues included failure to remit 3<sup>rd</sup> Party deductions such as bank and SACCO loans, absorption of UHC Nurse, Salaries and Remuneration Commission (SRC) Circular on salary review dated 2024/2025, unfulfilled return to work formula dated 2017 delays in salary, shortage of nurses and failure to negotiate and conclude a CBA for nurses and midwives.

That a Return to Work Agreement dated 11<sup>th</sup> August 2025 was entered into and whose breach precipitated the strike notice dated 10<sup>th</sup> September 2025 and the claimant intimidated the respondent in *lieu* of engaging it and striking nurses and midwives were injured by goons on 30<sup>th</sup> September 2025, an act the respondent publicly condemned on 1<sup>st</sup> October 2025.

The affiant further deposed that the instant suit was intended to avoid negotiations, claimant ought to be

compelled to honour return to work Agreements dated 18<sup>th</sup> February 2021 and 11<sup>th</sup> August 2025.

That the proper party in the suit was the County Public Service Board as the employer and the claimant had unclean hands on account of non-disclosure.

### **Applicant's submissions**

As to whether the application met the threshold for grant of an injunction, counsel for the applicant relied on the decision in **Giella V Cassman Brown Co. Ltd** [1973] EA 358 on the three elements and the sentiments of the Court in **Mrao Ltd V First American Bank of Kenya Ltd & 2 others** [2003] KLR 125, **Kenya National Union of Nurses V Lamu County Public Service Board & 2 Others** [2024] KEELRC 1495 KLR on *prima facie* case and limitation of the right to go on strike.

The decision in **Joseph Otieno Oruoch V Kenya Medical Practitioners Pharmacists & Dentists Union & another** [2021] eKLR was also cited to reinforce the submission on limitation of the right on those offering essential services and urge that the applicant had

demonstrated that members of the respondent union had been on strike since 17<sup>th</sup> September 2025 and it was unprotected as no minimum services were being rendered and the duty rota related to one facility only.

On irreparable injury, reliance was placed on **Nguruma Ltd V Jan Bonde Nielsen [2014]** eKLR and **Joseph Otieno Oruoch V KMPDU & another** (supra) to urge that lost life was irrecoverable or capable of being compensated in damages. That the issue involved people and health.

Finally, counsel relied on the sentiments of the court in **Paul Gitonga Wanjau V Gathuthi Tea Factory Co. Ltd & 2 Others** [2016] eKLR, on the balance of convenience, to submit that the balance of convenience was in favour of granting the injunction as the respondents could be sufficiently compensated by way of damages.

Council urged that an injunction would compel members of the respondent to resume duty.

### **Respondent's submissions**

The union contended that the County Government of Siaya had no *locus standi* to institute the instant suit as

the County Public Service Board of Siaya was the employer.

Reliance was placed on the sentiments of Wasilwa J in **Kenya National Union of Nurses V Nairobi County Government & others** on the powers of the County Public Service Board as well as the decision in **Alfred Njau & 5 others V City Council of Nairobi** [1982] eKLR on enforceable legal rights.

Mr. Mwendwa submitted that the strike commenced on 17<sup>th</sup> September 2025 was lawful and protected as due process was followed and all other mechanisms of resolving the dispute had been exhausted. It was further submitted that essential services do not extinguish the right to go on strike and strike notices were served on the employer and the right was affirmed in **County Government of Machakos V Kenya Union of Clinical Officers**.

Mr. Mwendwa further submitted that applicant failed **Giella V Cassman Brown Co. Ltd** (supra) on urgency?

That the respondent had ensured that minimum services were being rendered and perhaps that was why the

applicant came to court 44 days after the event and could not have waited if there was total paralysis and nursing service managers were at their work stations to enhance service delivery.

It was submitted that applicant did not deny having sent goons to attack striking members of the respondent.

### **Analysis and determination**

It is common ground that the respondent's members at the Siaya County Government have been on strike since 17<sup>th</sup> September 2025, a strike the applicant characterises as illegal and unprotected while the respondent contends otherwise.

For contextual purposes, the applicant filed the instant case on 30<sup>th</sup> October 2025 together with a Notice of Motion under Certificate of Urgency and when the matter came up on even date, the court did not certify it urgent as no urgency had been demonstrated by the applicant.

The applicant sought a temporary injunction to restrain the officials, agents and members of the respondent from calling or continuing with any strike or industrial action.

Although the grounds in support of the Notice of Motion mentioned that there was a strike called by the respondent, and it was unprotected and illegal, the applicant by design did not disclose the date when the strike commenced or to other relevant circumstances.

The Supporting Affidavit was equally unhelpful on the facts germane to the strike.

When the matter came up for hearing, Mr. Okanda for the applicant sought an oral hearing, ostensibly to hasten the process, but Mr. Mwendwa suggested that the Notice of Motion be canvassed by way of written submissions.

To facilitate the hearing and determination of this application the court restrained members of the respondent from continuing with the strike effective 12<sup>th</sup> November 2025.

The court is indeed at a loss why it took the applicant over 40 days to seek the Orders of injunction to restrain continuation of the strike in respect of which notice had been given after conciliation hit a dead end.

The court is left wondering why the County Government did not reach out to the respondent and engage it after it received the notice of the strike or just in case, rush to court for pre-emptive Orders, if the court was inclined to grant the Order to enable the parties engage further.

The only issue for determination is whether the applicant is entitled to an injunction pending the hearing and determination of the main suit.

Before delving into the main issue, it is important to dispose of the issue of *locus standi* of the claimant/Applicant.

While the respondent contended that the applicant had no standing in this case, the applicant did not address the issue directly preferring to dwell on the injunction exclusively.

Under Article 176 of the Constitution of Kenya,

**(1) There shall be a County Government for each County consisting of a County Assembly and a County Executive.**

On the other hand the County Public Service Board is established under Section 12(1) of the County Governments Act, as a body corporate with perpetual succession and a common seal.

Clearly, the County Public Service Board is one of the bodies established by law to ensure that the County Governments function effectively and efficiently by *inter alia* constituting offices and appointing and supervising office holders.

It is subservient to the County Government which is a legal entity to as constituted by the constitution.

Although the County Public Service Board employs staff, once employed, the officers become employees of the County Government as opposed to the County Public Service Board.

The employer of the County Public Officers is the County Government through the County Public Service Board.

Simply put, the County Public Service Board is to the County Government what the Public Service Commission is in the civil service. The Public Service Commission employs public officers who serve in the national

Government and the employer is the National Government.

*Locus standi* simply means the right to bring an action or to be heard in a given forum.

In the court's view the applicant herein has standing to sue or be sued on behalf of its employees and need not sue through the County Public Service Board.

Nothing turns on at the issue.

Going back to the main issue, it is trite law that the principles that govern the grant of an injunction are well settled and were exquisitely captured by the Court of Appeal in its rendition in **Giella V Cassman Brown & Co. Ltd** (supra) as follows:

*“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.*

*Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.*

Strangely, the respondent did not delve into any of the essentials in any great detail or use case law on the requirements.

On *prima facie* case, the sentiments of the Court of Appeal in **Mrao Ltd V First American Bank of Kenya Ltd & 2 others** (supra) are worth restating.

*“A prima facie case is a civil application includes but not confined to “genuine and arguable case”. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.*

The pith and substance of the applicant’s case is that the respondent called its members for a strike, which in its view was unprotected and illegal as the respondent did not ensure that minimum services were being rendered.

On that ground alone, and based on the documents on record, the court is satisfied that the applicant has demonstrated that it has a *prima facie* case with probability of success.

It is not a requirement that the case be successful. As long as it is arguable, a *prima facie* case has been established. (See **Habib Bank AG Zunch V Eugene Marion Yakub** CA No. 43 of 1982.

As regards irreparable injury or harm, according to Halsbury's Laws of England paragraph 739 at 352.

**"...By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not which cannot possibly be repaired..."**

**In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured..."**

In **Nguruma Ltd V Jan Bonde Nielsen & 2 others** (supra), the court held:

*"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold required and the burden is on the applicant to demonstrate prima facie the nature and extent of the injury"*.

While the respondent contended that it had put in place arrangements to ensure minimal services were being rendered, the applicant submitted that the rota on record only referred to the County Referral Hospital not the other 175 facilities.

Significantly, the court is also alive to the fact that members of the respondent union render essential services, the right to go on strike notwithstanding, and human health and life suffers in the absence of their services.

It requires no emphasis that life is precious and has no replacement or substitute and human beings live only once. It follows that life ought to be protected and safeguarded from harm and diseases and when threatened, prompt action ought to be taken.

Human life as counsel for the applicant submitted is irreplaceable once lost and it is unquantifiable in monies counted.

The absence of the services rendered by members of the respondent union could occasion irreparable injury, if it

had not by the time the applicant acted, though exceedingly late.

On balance of convenience, the sentiments of the court in **Byran Chebii Kipkoech V Barnabas Tuitoek Bargona** [2018] eKLR are instructive:-

*“The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is decided in favour of the plaintiff the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if the injunction is granted and the suit dismissed...”*

In the court’s view, the balance of convenience in this case is invariably in favour of the applicant because the inconvenience the respondent union is likely to suffer is compensable with damages.

Applying the principles in **Giella V Cassman Brown Co. Ltd** (supra), it is clear that the case for an injunction pending the hearing and determination of the main suit has been made out.

Before concluding this ruling, it is essential to highlight a troubling issue.

From the documents on record, it is discernible that some of the grievances between the respondent and the applicant have a long history of almost 10 years, which is disconcerting.

Similarly, it is clear that the parties have been engaging in the past but no break through had been made.

However, the most worrisome matter is that the applicant has in the past failed or refused to implement Return to work Agreements. This is a negotiated agreement, typically concluded with the assistance of 3<sup>rd</sup> parties after withdrawal of labour and are based on good faith. Their implementation ought not be the subject matter of another negotiation.

Why would the union trust such employer in future. How can social partnership in industrial relations be nurtured and strengthened where an employer does not keep an undertaking and why would a union have second thoughts before calling upon its membership to go on strike?

It behoves employers to promote harmony in industrial relations by engaging unions in good faith and truthfully.

Finally, and adverted to elsewhere in this ruling and noted by the respondent, if the matters were as dire as the applicant would want the court to appreciate, it is puzzling why it took the respondent almost 45 days to seek the Orders sought herein, too little too late, analogous to the idiomatic expression of “closing the stable door after the horse has bolted”.

Needless to belabour, patients and those in need of services rendered by members of the respondent union have been suffering for more than 45 days.

In conclusion, the court is satisfied that there is need for some orderliness pending the hearing and determination of the main suit.

Consequently, pending the hearing and determination of the main suit the:

- (a) *Orders of injunction issued on 12<sup>th</sup> November 2025 extended to enable members of the respondent to resume duty within 2 days, if they had not.*
- (b) *Applicant shall not victimize/threaten, intimidate or discriminate any employee on account of participating in the strike.*

(c) Applicant shall report the dispute to Minister for Labour and Social Protection within 7 days for another attempt at conciliation and resolution of the grievances and parties should engage positively and in good faith.

(d) Parties shall bear their own costs of this application.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT  
KISUMU ON THIS 4<sup>TH</sup> DAY OF DECEMBER 2025.**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of

the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**  
**JUDGE**