Kirinyaga University v Universities Academic Staff Union (UASU) & another (Cause E038 of 2024) [2025] KEELRC 399 (KLR) (14 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 399 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

CAUSE E038 OF 2024

ON MAKAU, J

FEBRUARY 14, 2025

BETWEEN

KIRINYAGA UNIVERSITY ..... APPLICANT

AND

UNIVERSITIES ACADEMIC STAFF UNION (UASU) ..... 1ST RESPONDENT

UNIVERSITIES ACADEMIC STAFF UNION (UASU) KIRINYAGA UNIVERSITY CHAPTER ..... 2ND RESPONDENT

RULING

Introduction

1. This ruling relates to the claimant's Notice of Motion dated 6th September 2024, seeking the following orders: -

    1. That this Honourable court certifies this Application as urgent and service upon the Respondents be dispensed with in the first instance and the Application be heard ex-parte.

    2. That this Honourable court be pleased to order that the Claimant/Applicant's Application by way of Notice of Motion be heard and determined during the current High Court vacation.

    3. That this Honourable court be pleased to issue an order restraining the Respondents, the officials, agents and/or members from taking part in, calling, instigating or inciting others to take part in unprotected strike, picketing, demonstrations or any form of industrial action pending the hearing and determination of this Application.

    4. That this Honourable court be pleased to issue an order restraining the Respondents, the officials, agents and/or members from taking part in, calling, instigating or inciting others to take part in unprotected strike, picketing, demonstrations or any form of industrial action pending the hearing and determination of the claim herein.

5. That this Honourable court declares the strikes, picketing or industrial actions called or threatened by the Respondents in the first Respondent's Picketing Notice dated 6th September, 2024 unlawful and therefore unprotected strike.

6. That the Respondent be ordered to pay the costs of this Application.

2. The application is premised on the grounds on the body of the motion and the supporting affidavit sworn on the even date by the claimants' legal officer Ms.Jane Ndegwa. The respondents has opposed the motion vide Replying Affidavits sworn by Dr.Contatine Wesonga, General Secretary of the 1st Respondent and Dr.Robert Gitau Muigai, Branch Secretary of the 2nd Respondent.

3. The applicants' case is that the respondents served it with a Picketing Notice dated 6th September 2024 listing the following grounds: -

a. Failure to implement the 2017-2021 National CBA for the Academic Members of Staff on diagonal basis.

b. Failure to apply the Academic Members of Staff their 9% balance of National CBA arrears computed upon implementation of the new salaries in July 2020.

c. Failure to pay the Academic Members of staff their full CBA arrears computed on the basis of diagonal implementation of the 2017-2021 National CBA.

4. It is applicant's further case that the grievances raised in the Picketing Notice were covered by this courts Judgment dated 15th January 2021 in ELRC CBA 1 of 2020, CBA 2 of 2020 and CBA 3 of 2020. The judgment was challenged by appeal and it was stayed by a ruling of the Court of Appeal dated 22nd July 2022 in Civil Application No. E418 of 2021. The stay order was to remain in force until the appeal was heard and determined. Its therefore the applicants' case that the impugned picketing notice was issued in blatant disregard to the aforementioned stay order since the 1st respondent is a signatory of the Recognition Agreement between it, the claimant and the Inter-Public University Councils Consultative Forum (IPUCCF) of the Federation of Kenya Employers (FKE). See Annexure "JN-3".

5. It is further applicant's contention that the Picketing Notice was issued in total disregard of section 62, 76, 77 and 78 of the *Labour Relations Act* and as such the intended picketing and demonstration would be in blatant violation of the law since no conciliations have been undertaken. Besides, the respondents have failed to engage the claimant in negotiations with respect to the demands raised in the Picketing Notice.

6. In view of the foregoing matters, the applicants contend that the unlawful picketing would disrupt its operations and occasion irreparable damage in terms of its academic calendar which is not possible to compensate by damages. Consequently, the applicant prayed for the orders sought in the motion.

7. The respondents' case is that the suit against the 2nd Respondent is a nullity because it has no legal personality to sue or be sued. It is their contention that the correct person to sue on behalf of the 2nd Respondent is the 1st Respondent.

8. It is further respondents' case that they were not party to Civil Application No.418 of 2021 that lead to the stay order given by the Court of Appeal on 22nd July 2022. They further averred that they have constitutional right under Article 37 of *the Constitution* to withdraw their labour and there is no way that the University operations would be disrupted.

9. They contended that the industrial is justified because the claimant has not implemented the 2017-2021 CBA and is not interested in engaging in negotiations towards resolving the matter amicably within the framework of the Recognition Agreement or the *Labour Relations Act*.

10. They further contended that the Picketing Notice served transcends the 2017-2021 CBA and goes to the basic terms of service including failure to pay staff full salaries as and when they fall due.

11. Finally, the respondents averred that the claimant ought to undertake its mandate in consultation with the respondents as required under Article 232 (1) (b) (c) (d) and (f) of *the Constitution* of Kenya, 2010.

Applicants Submissions

12. The applicant submitted that the picketing notice was for only four (4) days instead of 7 days provided under section 76(c) of the *Labour Relations Act* and therefore it renders the intended picketing unprotected. Reliance was placed on Benjamin Menza Kirimo v Kilifi County Public Service Board & another (2021) eKLR.

13. It was further submitted that the respondent failed to comply with the conciliation as required by section 62 of the Act and the Recognition Agreement dated 28th October 2019. Reliance was placed on Kenya Ports Authority v Joseph Makau Munyao & 4 others (2023) KESC 112(KLR) where the court underscored that conciliation before industrial action is mandatory. Further reliance was placed on University of Nairobi v Kenya Universities Staff Union & others (2018) KEELRC 2163 where it was held that failure to comply with dispute resolution procedures renders a strike to be unprotected.

14. It was submitted that the applicant has established a prima facie case with high chances of success as the stay order issued by the Court of Appeal in Civil Application No.E418 of 2021 regarding the non-implementation of the 2017-2021 CBA directly impacts the respondents' right to strike. It was further submitted that the respondents' served the impugned Notice while fully aware that the Court of Appeal had stayed the matter. Reliance was placed on Kenya Universities Staff Union v National Treasury & others (2018) eKLR to confirm that ongoing litigation can suspend the right to strike if a CBA's implementation is legally contested.

15. Finally, the applicant submitted that the respondents' actions threaten its rights and interest under the Recognition Agreement. It was submitted that a strike would significantly harm students and staff by disrupting essential operations including paralysis of academic programs which would be irreparable harm. Consequently, the applicant maintained that the orders sought ought to be granted.

Respondents' submissions

16. It was submitted for the respondents that the intended picketing was not unlawful or unprotected since it is a tool authorised under Article 41 (1) of *the Constitution* to compel an employer to confirm to the terms of Employment. It was further submitted that section 76 of the *Labour Relations Act* allows a person to participate in a strike if the trade dispute involved concerns terms and conditions of service; and seven (7) days written notice of the strike has been given to the other parties, and the Minister by the authorised representative of the trade union.

17. It was submitted that the intended action concerns terms and condition of service since the applicant has to pay the staff their full salaries as and when they fall due; that the claimant has also failed attempts by the respondent to resolve the matter through conciliation; that they issued a seven (7) days' notice on 26th August 2024 and therefore all ingredients of protected strike were fulfilled.

18. It was submitted that the dispute involved is miscalculation of the 2017-2021 horizontal arrears due to the respondents' members by 9% which is a legal right. Consequently, since the claimant had the audacity of grossly breaching the CBA even after calls for dialogue, the only single remaining tool to compel it to comply with the law is the intended strike. In the respondents' view, rendering services without payment amount to forced labour contrary to Article 30 (2) of *the Constitution* of Kenya, 2010.

19. It was further submitted that the claimant has come to court with unclean hands and it is therefore not entitled to the injunction sought. It was argued that the applicant has failed to discharge its contractual obligation to pay respondents' members salaries in full by withholding 9% horizontal arrears under the CBA for 2017-2021.

20. It was again submitted that the application has not met the threshold for granting injunction as established in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others, *CA No. 77 of 2012*; (2014) eKLR, namely, prima facie case, irreparable injury and balance of convenience.

21. It was submitted that the applicant has not adduced evidence to establish a prima facie which is arguable. Further, it has not demonstrated that it will suffer irreparable loss that cannot be compensated by an award of damages. Reliance was placed on Mrao Ltd v First American Bank of Kenya Ltd & 2 others (2003) eKLR, Peter Kihika Ng'ang'a v Amos Kimeli Chamdala (2021) eKLR and Tritex Industries Limited & 3 others v National Housing Corporation & Another (2014) eKLR.

22. Finally, the respondents' submitted that the balance of convenience is titled in their favour because the applicant is in breach of the CBA for 2017-2021 by withholding horizontal arrears due to the union members of 9%. They urged the court to be guided by Article 259 of *the Constitution* which requires the court to interpret *the constitution* in a manner that promotes the purpose, values and the principles provided by *the Constitution*. Accordingly, the court was urged to reject the application since granting the orders sought would undermine Article 41 (2) (d) of *the Constitution* of Kenya, 2010 which guarantee the right of every worker to go on strike.

Determination

23. Having considered the motion, affidavits and written submissions filed, the following issues arise for determination: -

    a. Whether the claim against the 2nd Respondent is a nullity for want of legal personality.

    b. Whether the application meets the threshold for grant of interlocutory injunction.

    c. Whether the orders sought should issue

Case against 2nd Respondent

24. The contention that the 2nd respondent lacks legal capacity to sue or be sued has not been controverted by the claimant. I agree with the respondents that 2nd respondent lacks legal capacity to be sued. Section 21 of the *Labour Relations Act* only gives the trade union, and not its branches the status of a body corporate. Branches are registered under section 25 of the Act but there is no provision that grants a branch of a trade union the status of a body corporate. Consequently, I find that the suit against the branch is null and void for want of legal capacity to be sued.

Threshold for interlocutory injunction

25. The threshold for granting interlocutory injunction was established in Giella v Casman Brown (1973) EA 358, thus:

    a. "The applicant must show a prima facie case with probability of success.

    b. The applicant must show that irreparable harm will befall him if injunction is withheld.

    c. If the court is in doubt, to determine the application on a balance of convenience."

Prima facie case

26. Prima facie case was defined by Court of Appeal in Mrao Limited case, supra, as follows: -

> "A prima face case includes but it is not confirmed to a 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 exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

27. In the instant case, the applicant has faulted the picketing notice for being shorter than the 7 days provided for under section 76 of the *Labour Relations Act* and for being prematurely served as no conciliation was done. Finally, the said notice was faulted for being served in blatant disregard to stay order issued by the Court of Appeal in Civil Application No. E418 of 2021 in relation to the CBA for 2017-2021.

28. I have perused the Picketing Notice dated 6th September 2024. It states in the last paragraph that: -

> "The picketing SHALL commence on Tuesday 10th September 2024 and thereafter on a weekly basis until all the aforementioned issues are settled."

29. There is no dispute that from 6th September 2024 to 10th September 2024 is not equal to 7 days' notice but rather 4 days. Therefore, I agree with the claimant that the notice was in breach of section 76 (c) of the *Labour Relations Act* which provides for 7 days' notice. The notice was also not addressed or even copied to the Cabinet Secretary as required by the above subsection, and it further was issued before referring the trade dispute for conciliation as required under section 76 (b) of the *Labour Relations Act*. Consequently, serving a picketing notice in the circumstances highlighted above rendered the notice premature and unlawful.

30. The notice was also contrary to the stay order granted by the Court of Appeal on 22nd July 2022 in Civil Application No.E418 of 2021. The stay order by the Court of Appeal halted execution of the Judgment by this court in ELRC CBA 1, 2 and 3 of 2020 which concerned implementation of 2013 -2017 CBA. The respondents alleged that they were not parties to the proceedings leading to that stay order. However, I have noted from the Recognition Agreement ("JN-3") signed between the IPUCCF and the 1st respondent that it covers the claimant herein. Consequently, I find that the Court of Appeal order staying implementation of the 2013-2017 CBA applies to the claimant herein and members of the 1st respondents who work for the claimant.

31. Having found that the Picketing Notice dated 6th September 2024 was premature and contrary to section 76 of the *Labour Relations Act*, and also the stay order given by the Court of Appeal, I am satisfied that the applicant has established a prima facie case with possibility of success.

Irreparable loss

32. The applicant contended that the intended picketing will unjustifiable disrupt operations in the University including students' academic calendar which is a loss that cannot be compensated by damages. I agree with the applicant that the picketing will disrupt the learning in the University. Disruption of academic calendar would be irreparable loss to the applicant especially if the appeal before the Court of Appeal is decided against the respondents.

33. Having found that the applicant has proved a prima facie case and that irreparable harm is likely to be suffered, I hold that the application meets the legal threshold for granting interlocutory injunction.

Conclusion

34. I have found that the case against the 2nd Respondent is null and void for want of legal capacity to be sued. I have further found that the application meets the threshold for granting interlocutory injunction. Consequently, I allow the Notice of Motion dated 6th September 2024 by granting order (4) and (6) as prayed.

DATED, SIGNED AND DELIVERED AT NYERI THIS 14TH DAY OF FEBRUARY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE