



**Kenya Union of Clinical Officers v County Government of Vihiga & another
(Petition E003 of 2025) [2025] KEELRC 1673 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1673 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
PETITION E003 OF 2025
DN NDERITU, J
JUNE 5, 2025**

BETWEEN
KENYA UNION OF CLINICAL OFFICERS PETITIONER
AND
COUNTY GOVERNMENT OF VIHIGA 1ST RESPONDENT
PUBLIC SERVICE BOARD 2ND RESPONDENT

RULING

I. Introduction

1. In a petition dated 14th January, 2025 filed through AKO Advocates LLP, the petitioner, a trade union, is seeking for the following orders –
 1. Declaratory orders that
 - a. The respondents are in breach of the said members right to fair labour practices under Article 41 of the *Constitution* by unfairly refusing and/or failing to effect promotions and re-designations as provided for in PSC Human Resources Management Policies, the guidelines for transition of staff to counties published in Vol. CXVI. No. 20 of the Kenya Gazette on the 7th February 2014, Public Service Commission Human Resources Manual, 2016 and PSC Career Guidelines for Clinical Officers, May 2024.
 - b. The respondents, by failing to undertake promotions and re-designations have breached the Petitioners members’ legitimate expectation and right to fair labour practices by failing honour the terms of the Recognition Agreement dated 19th December 2017 and under the terms of the RTWFs that they have signed on 4th September 2023 and 11th July 2024.



- c. The respondents, by failing to put in place a comprehensive medical insurance cover have breached the Petitioners members' legitimate expectation and right to fair labour practices by failing to honour the terms of the Return-to-Work Formula dated 4th September 2023.
 - d. The Respondents are in breach of the Petitioners members' right to fair labour practices under Articles 41 and 43(1)(a) of the Constitution by failing to put in place an effective medical insurance scheme for the employees as also envisaged under Section 34 of the Employment Act.
 - e. The respondents have defeated the Petitioners members' legitimate expectation and are therefore in breach of the said members' right to fair administrative action under Article 47 of the Constitution for failing to honour their undertakings in various agreements in respect of promotions and re-designations and medical insurance scheme.
 - f. The Respondents are in breach of the Petitioner's members right not to be discriminated upon as enshrined under Section 5 of the Employment Act and Article 27 of the Constitution by giving preferential treatment in promotions and redesignations to other employees in other cadres in the health sector at the expense of the Petitioner's members.
 - g. The Respondents pose a threat to the said members right to go on strike under Article 41(2)(d) of the Constitution by perpetually sabotaging strike notices issued by the Petitioner.
2. A judicial review orders of mandamus directing the Respondents to forthwith:
 - a. effect promotion and re-designations of the members of the Petitioners as provided for in Public Service Commission Human Resource Policies and Procedures Manual for the Public Service May, 2016, PSC Career Guidelines for Clinical Officers dated May 2024 and as agreed in the Recognition Agreement dated 19th December 2017 and under the terms of two RTWs that they signed on 4th September 2023 and 11th July 2024.
 - b. Procure, effect and operationalize a comprehensive medical insurance scheme for the members of the petitioner as agreed in RTWF dated 4th September 2023.
 3. A declaratory that the Petitioner and its members have a constitutional right to call for and proceed on strike on account of the Respondents' failure to meet their mandate in law and as per the terms of undertakings as agreed in the Recognition Agreement dated 19th December 2017 and under the terms of the two RTWFs that they signed on 4th September 2023 and 11th July 2024 and such other and or other future agreements regarding the issues entailed in the agreements.
 4. Costs on full indemnity basis.
 5. Such further or other orders as it may deem just and expedient for the ends of justice.
2. Alongside the petition the petitioner filed a notice of motion of even date (the application), expressed to be brought under Articles 23(3)(b)(c) of the Constitution of Kenya and Rules 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, seeking for the following orders –



1. That this application be certified urgent and be considered by the Honourable court ex parte in the first instance.
 2. That pending the hearing and determination of this application, an order does hereby issue restraining the respondents either by themselves or through their agents or officers from taking any disciplinary or adverse action towards the members of the petitioner on account of the ongoing strike by the members of the petitioner based on the strike notice dated 2nd December 2024.
 3. That Pending the hearing and determination of the petition herein, an order does hereby issue restraining the respondents either by themselves or through their agents or officers from taking any disciplinary or adverse action towards the members of the petitioner on account of the ongoing strike by the members of the petitioner based on the strike notice dated 2nd December 2024.
 4. That the court does issue any such other or further temporary orders that may be necessary for preserving the subject matter and for protecting the rights and interest of the petitioner's members pending the hearing and determination of the petition.
 5. That the costs of this application be borne by the respondents.
3. Both the petition and the application are supported with the affidavit of George M. Gibore sworn on even date with several annexures thereto.
 4. On 24th January, 2025 the respondents, through Tony Godia, a Counsel in Office of the County Attorney, filed a notice of motion dated 23rd January, 2025 seeking for the following orders –
 1. The application be certified urgent and proceeds for hearing on priority basis.
 2. The requirement for service be waived temporarily in order to allow for Honorable Court to grant prayer 3 of this application Ex Parte.
 3. Pending inter parties hearing, there be stay of taking into effect or execution of the order issued by this Honorable Court on 21st January 2025 and specifically paragraph iv of the said orders which directed the respondents in the following terms that's –

interim orders be and is hereby issued in terms of prayer 2 of the notice of motion dated 14th January 2025 in – THAT, pending the hearing and determination of the preliminary objection and the application herein or such other or further or further orders of the court, the respondents ne and are hereby restricted from taking any disciplinary action against members of the petitioner on account of ongoing strike by the members of the petitioner based on the strike notice dated 2nd December 2024”
 4. The orders of stay of execution once granted be extended and or otherwise remain in force until the application is heard inter parties and finally determined or until further orders of the Honorable Court.
 5. The resulting from the inter parties, the Honourable Court in its ruling do issue the following further or other orders.



- a. All the orders issued on or about 21st day of January 2025 by the Honorable Court in this matter on the application or the petitioner/respondent dated 14th January 2025 be recalled discharged and or set aside.
 - b. All other proceedings in this matter be stayed pending or until the preliminary objection filed by the respondents in the matter is finally determined.
 - c. Costs of this application to be recovered from the petitioner/respondent.
5. The application, expressed to be brought under Rule 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and Section 12 of the Employment and Labour Relations Court Act and Rule 17(7) of the Employment and Labour Relations Court (Procedure) Rules, is supported with affidavit of Mary Anyindah sworn on even date with several annexures thereto.
6. Alongside the above application, the respondents filed a notice of preliminary objection (PO) to the application by the petitioners and the petition seeking that the same be struck out on the following grounds –
1. The petitioner and all or any of their members lacks the required locus standi before Honourable Court in this petition having failed to comply in full with the provisions of the Recognition Agreement and specifically on dispute resolution.
 2. The Honourable Court lacks the requisite jurisdiction to enter or further entertain the petition as the dispute falls for resolution with the province of the Cabinet Secretary as prescribed in Section 62 of the Labour Relations Act and Part 5 of the Collective Bargaining Agreement signed between the parties on the 22nd day of February 2018 and relied upon by the petitioner in this petition and which states –
 5. Dispute Resolution
 - i. Any dispute between the parties concerning the interpretation, amendment or implementation of this Agreement shall be settled amicably through consultations and negotiations.
 - ii. In the event of failure to reach an amicable settlement on the interpretation, amendment, or implementation of this Agreement either party may refer the dispute to the Cabinet Secretary responsible for Labour Relations in accordance with the terms of the Labour Relations Act”
 3. The petitioner is guilty of violation of the Exhaustion Principle by circumventing the conciliation process anticipated by Clause 5 of the Recognition Agreement sought to be enforced by the same Petitioner through this petition.
 4. The petition is incompetent and incurably and fatally defective by reason of the prescribed procedures in resolution of industrial disputes.
 5. The petition raises no constitutional issues in the understanding of the Anarita Karimi Njeru v Republic [1979] eKLR that warrants the intervention of a Constitutional Court in the manner sought or at all.



6. The petition is Res Judicata and or otherwise defeated by the application of Rule 10 of the Mutunga Rules and Section 7 of the [Civil Procedure Act](#) as read with Section 12 of the [Employment and Labour Relations Court Act](#) on jurisdiction of this Honorable Court.
 7. The petitioners are guilty of non-disclosure of relevant matters required to be disclosed to the court by parties under Rule 10 of the Mutunga rules namely the existence of another suit in court which is pending involving the same parties namely Bungoma Employment and Labour Relations Court Case No. E008 of 2021 County Government of Vihiga and another versus Kenya Union of Clinical Officers and 4 others and further for non-disclosure of the negotiations which had been held with the Respondents to resolve the dispute and whose outcome they rejected before rushing to court.
 8. The petition vexatious and amounts to gross abuse of the process of the Honorable Court on the part of the Petitioner.
7. On 21st January, 2025 the court issued interim orders stopping the respondents from taking any disciplinary action against the members of the petitioner who are on strike and directed the parties to engage and explore an out of court settlement of the issues in dispute.
 8. However, the respondents filed a further application dated 13th February, 2025 seeking for the following orders –
 1. This application be certified as of extreme urgency and be heard on priority basis.
 2. Requirement for service of the application be temporarily waived for the sake of prayer No.3 of this application.
 3. The order sought by the respondent/applicants are prayer No.3 in the application dated 23rd February 2025 be allowed pending inter parties hearing.
 4. This application be consolidated with the Respondents/Application dated 23rd of February 2025 for the purposes of hearing and or final determination.
 5. Costs of or incidental to this application to abide the outcome of the petition.
 9. The above application is expressed to be brought under the provisions of Articles 50(1) and 159(2) (d) of the [Constitution](#), Rule 25 of the [Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Section 12 of the [Employment and Labour Relations Court Act](#), and Rule 17(7) of the Employment and Labour Relations Court (Procedure) Rules.

II. The Evidence

10. The uncontested facts are that members of the petitioner are clinical officers in employ of the 1st respondent in its various facilities across the county. The said employees have been on strike since November, 2024 protesting what they consider to be unfair labour practices visited upon them by the respondents and hence the prayers sought in the petition as reproduced above.
11. However, the three applications above are all seeking interlocutory or interim orders that do not, obviously, call for detailed analysis of the evidence placed before the court as there is the high risk of prejudging the petition at this interlocutory stage.
12. The orders sought in the three applications are self-explanatory as reproduced above and hence the court shall go straight into the submissions and arguments advanced by counsel for both sides.



Submissions by Counsel

13. On 20th February, 2025 the court gave directions that the three applications be heard concurrently and canvassed by way of written submissions. Further, it was by consent directed that the application by the respondents dated 23rd January, 2025 be treated as a reply to the application by the petitioner dated 14th January, 2025. Counsel for the parties were directed to file one set of submissions in regard to the three applications.
14. Counsel for the petitioners filed written submissions dated 14th March, 2025 identifying the following issues for determination by the court –
 - a. Whether the petitioner has made out a case to warrant the grant of interim orders pending the hearing and determination of the petition?
 - b. Whether the Respondents have met the principles, requirements and practicality on staying of execution of orders, setting aside, discharging and/or recalling of orders issued on the 21st January 2025?
 - c. Whether the Respondents are justified to withhold salaries of the Petitioner’s members.
15. On the first issue, citing *Kevin Mwititi & Others V Kenya School of Law & 2 Others* (2015) KEHC 2294 (KLR), it is submitted that the petitioner has established a prima facie case with a likelihood of success and there is a danger that if the conservatory orders are not granted its affected members shall suffer prejudice. Further, citing *Centre for Rights Education Awareness (CREAW) & Another V Speaker of the National Assembly & 2 Others* (2017) eKLR it is submitted that the purpose of a conservatory order is to prevent violation of rights and fundamental freedoms and preserve the subject matter pending the hearing and determination of the petition.
16. It is further submitted that the petitioner has met the provisions in Article 23(3) of the [Constitution](#) for grant of a conservatory order. It is submitted that the petitioner has established and demonstrated that its members’ constitutional rights, including the labour rights under Article 41(2) of the [Constitution](#), are under real threat of violation by the respondents.
17. The court is urged to apply the principles laid down in *Board of Management Uhuru Secondary School V City Director of Education & 2 Others* (2015) KEHC 2174 (KLR) and find in favour of the petitioner and grant the conservatory orders as prayed.
18. In regard to the second issue, it is submitted that Order 42 Rule 6(1) of the [Civil Procedure Act](#) is clear on the conditions upon which stay of execution may be granted. It is submitted that the respondent has not demonstrated any substantial loss that may be occasioned if the stay is denied. It is further submitted that the application by the respondent is contradictory and improper as it seeks for stay of execution of orders of the court issued on 21st January, 2025 while in the same breath seeking for recalling, discharging, and or setting aside of the same orders.
19. On the third issue of withholding of salaries payable to the affected members of the petitioner, it is submitted that it is the inaction and indifferent attitude by the respondents that has dragged on this matter since 2023 with no end in sight. It is further submitted that the respondents have delayed this longstanding dispute between the parties and are in breach of Sections 79(6) and 81 of the [Labour Relations Act](#) that obligate them to pay salaries as agreed.
20. The court is urged to be persuaded by the holding in *Machakos ELRC Petition No. E005 of 2024 – County Government of Machakos V Kenya Union of Clinical Officers* (unreported) and find that the legitimate expectations of the members of the petitioner have been violated by the respondents.



It is submitted that the respondents have failed and or refused to respect and implement agreements and return to work formulae based on negotiated and agreed promotions, re-designations, medical insurance scheme, and effecting new career guidelines.

21. The court is thus urged to dismiss the motions by the respondents dated 23rd January, 2025 and 13th February, 2025 respectively, with costs.
22. Counsel for the respondents submitted that the single issue for determination in the application by the petitioners dated 14th January, 2025 is whether an order should issue restraining the respondent from taking disciplinary action against members of the petitioner who remain on strike.
23. In regard to the two applications by the respondents it is submitted that on 20th February, 2025 the court clarified that the order restraining the respondents from taking disciplinary action against the striking members of the petitioner did not compel the 1st respondent to continue paying monthly salaries to those employees who remain on strike. It is submitted that the respondents are not opposed to the above interim orders and maintaining of that status pending the hearing and determination of the petition.
24. It is the respondents' position that the court should maintain the above status quo and proceed to hear and determine the petition.

III. Issues for Determination

25. Section 80(1)(b) of the *Labour Relations Act* provides as follows –
 1. An employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with this Act is deemed to have breached the employee's contract and –
 - a. is liable to disciplinary action; and
 - b. is not entitled to any payment or any other benefit under the *Employment Act* during the period the employee participated in the strike.
 2. A person who refused to take part or to continue to take part in any strike or lock-out that is in compliance with this Act may not be –
 - a. expelled from any trade union, employers organization or other body or deprived of any right to benefit as a result of that refusal; or
 - b. placed under any disability or disadvantaged, compared to other members or the trade union, employers' organization or other body as a result of that refusal.
 3. Any issue concerning whether any strike or lock-out or threatened strike or lock-out complies with the provisions of this Act may be referred to the Industrial Court.
26. It is not in dispute that members of the petitioner have been on strike since November, 2024 for reasons and or grievances that they consider to be genuine and legitimate. On the other hand, the respondents argue that they cannot meet the demands by the petitioner due to the serious budgetary implications that the implementation shall entail.
27. The respondents have undertaken not to take any disciplinary action against the striking employees pending the hearing and determination of the petition especially following the clarification by the court on 20th February, 2025 that the respondents were not legally obligated to pay monthly salaries to the striking employees.



- 28. In the circumstances and the scenario set out above, there is nothing for this court to be elaborate about in the three applications. The most appropriate order that the court should make is that of maintaining the status quo and then fast track the hearing and determination of the petition.
- 29. The provisions of the law cited above is clear that no employee should earn a salary when on strike. An employer pays an employee for services rendered and, logically, where no services are rendered or such services are withheld, an employer is not obliged to pay and should not be compelled to pay a salary – see Kenya Plantation & Agricultural Workers Union V Carzan Flowers (2013) KEELRC 690 (KLR).
- 30. However, the decision as to whether the strike is legal or illegal is subject of the petition and the outcome thereof shall inform whether the employees may be paid in arrears.
- 31. It is for the very reasons stated above that the court has all along persuaded counsel for the parties to bring their respective clients to a roundtable meeting with a view of reaching an amicable resolution in the matter. However, so far, this request by the court has not been heeded.

IV. Orders

- 32. For all the foregoing reasons, the court makes the following orders in regard to the three applications –
 - a. The notice of motion by the petitioner dated 14th January, 2025 is allowed to the extent that the respondents by themselves, their employees, agents, servants, and or others howsoever, are hereby restrained from taking any disciplinary action against the striking members of the petitioner pending the hearing and determination of the petition.
 - b. The respondents are not obligated to pay salaries to the striking members of the petitioner pending the hearing and determination of the petition.
 - c. Orders (a) and (b) above dispose of the two applications by the respondents dated 23rd January, 2025 and 13th February, 2025 respectively.
 - d. The petition shall be fast tracked for an early hearing and determination.
 - e. The court hereby reiterates its earlier call to counsel to bring both parties together for an amicable resolution of this matter in view of the essential nature of the services offered by the striking members of the petitioner.
 - f. Costs of the three applications shall be in the petition.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 5TH DAY OF JUNE 2025.

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DAVID NDERITU
JUDGE

