



County Government of Kisii v Kenya Medical Practitioners Phahmacists & Dentists Union (KMPDU) & another (Cause E016 of 2024) [2024] KEELRC 561 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 561 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E016 OF 2024
CN BAARI, J
MARCH 14, 2024**

BETWEEN

COUNTY GOVERNMENT OF KISII CLAIMANT

AND

KENYA MEDICAL PRACTITIONERS PHAHMACISTS & DENTISTS UNION (KMPDU) 1ST RESPONDENT

KENYA UNION OF CLINICAL OFFICERS (KUCO) 2ND RESPONDENT

RULING

1. Before Court is the Claimant/Applicant's motion dated 5th March, 2024, brought pursuant to Section 76(c) of the *Labour Relations Act*, Section 3(1) of the *Employment and Labour Relations Court Act*, Section 3A of the *Civil Procedure Act* and Order 51 rule 1 of the *Civil Procedure Rules*. The Claimant/Applicant seek orders THAT: -
 - i. Spent.
 - ii. Spent.
 - iii. The Honourable Court be pleased to order the Respondents and/or their officials, agents or servants, assigns and/or anybody else claiming under them to immediately call off the ongoing strike, picketing or industrial action by the members of the Respondents declared on 4th March, 2024, pending the hearing and determination of the suit.
 - iv. Spent.
 - v. The Honourable Court be pleased to order the members of Respondents' Union immediately report back to work pending the hearing and determination of the suit.
 - vi. Spent.



- vii. This Honourable Court do hereby issue a temporary order prohibiting the members of the Respondents, their employees, agents, servants, assigns and/or anybody else claiming under them and all health workers employed by the Claimant from proceeding, participating, inciting or taking part in any way in a strike, go slow or any industrial action or engaging or taking part in any conduct, activity or meetings in contemplation of or towards preparation for a strike in the County Government of Kisii pending the hearing and determination of the suit.
 - viii. Spent.
 - ix. The Honourable Court be pleased to issue an injunction restraining the Respondents their employees, agents, servants, assigns and/or anybody else claiming under them from interfering with the smooth running of health services at the County Government of Kisii pending the hearing and determination of the suit.
 - x. Spent.
 - xi. This Honourable Court do hereby issue a temporary order prohibiting the members of the Respondents, their employees, agents, servants, assigns and/or anybody else claiming under them and all health workers employed by the Claimant from proceeding, participating, inciting or taking part in any way in a strike, go slow or any industrial action or engaging or taking part in any conduct, activity or meetings in contemplation of or towards preparation for a strike in the County Government of Kisii pending the hearing and determination of the suit.
 - xii. That Officer Commanding Station (OCS), Kisii Police Station be and is hereby directed to assist in the enforcement of these Orders.
 - xiii. The cost of this application be awarded to the Applicant.
2. The motion is supported by grounds on the face thereof and the affidavit of Robert Ombasa the Ag. County Secretary of the Applicant. The crux of the motion is that the Claimant/Applicant and the Respondents have had a series of meetings to discuss the welfare of the Respondents' members who are the Claimant's employees, and a Memoranda of Understanding between the parties herein, and other stakeholders were born out of the aforesaid discussions.
 3. The Applicant avers that it invited the Respondents to a consultative meeting on 22nd February, 2024, and to yet another meeting on 27th February, 2024, where the Respondents officials were present, and deliberated on key concerns raised by the Respondents.
 4. It is the Applicant's aversion that as a result of the deliberations, the Respondents were invited to sign the MOU between the Applicant and the Respondents vide a letter dated 1st March, 2024. The Applicant further avers that notwithstanding the invitation to sign the MOU born out of negotiations between the parties herein, the Respondents failed, ignored and/or refused to honour the invitation.
 5. The Applicant further avers that without any justification, and in utter breach of the resolutions born out of the negotiations between the parties under the MOU, and without any notice at all or whatsoever, the Respondents have directed their members to go on strike, and which strike commenced on the 4th of March, 2024.
 6. The Applicant argues that the subject strike is illegal, unprotected, inimical to public policy, and is in breach of the *Constitution of Kenya* and declared in very bad taste.



7. That the members of the Respondent Unions being employees in the health sector, viz, nurses, clinical officers, dentists and pharmacists, are essential service providers pursuant to Section 81 of the [Labour Relations Act](#), hence the ongoing strike may lead to deaths and unprecedented health complications.
8. The Applicant argues further, that there is real danger that the members of the public are bearing the brunt of the obtaining illegal strike, and there is need for the Honourable Court's intervention with great urgency.
9. It is the Applicant submission that the CBA that the Respondents have based their opposition to the motion on, has since expired and has no legal effect.
10. The 1st Respondent opposed the motion vide a replying affidavit sworn by DR. Steven Onyango Ndong'a on 8th March, 2024, while the 2nd Respondent the application through a replying affidavit sworn by George Maroah Gibore on 11th March, 2024.
11. The 1st Respondent avers that the Claimant/Applicant and the Respondents entered into a Collective Bargaining Agreement (CBA) on 1st July, 2017, which covered various aspects of the employment relationship between the members of the 1st Respondent and the Claimant/Applicant, such as promotions, salaries and allowances, study leave, disciplinary issues and other terms and conditions of service.
12. The 1st Respondent further states that under Article III(B) of the said CBA, parties agreed that the members of the 1st Respondent would be promoted as per the prevailing scheme of service and the Claimant had an obligation to promote the said employees subject to the meeting of certain qualifications.
13. The 2nd Respondent on her part, states firstly, that the Applicant has not established a prima facie case against the Respondents, and secondly, that this Court does not have jurisdiction to entertain this claim on the basis that the CBA between the parties provides modalities for resolution of disputes such as those between the parties herein, and which it has not exhausted prior to approaching this court.
14. The 2nd Respondent further avers that the Applicant has not denied the issue raised and that it has not shown that it has resolved the issues and is simply running away from the dispute.
15. The 2nd Respondent further argues that nothing has been placed before this Court to prove that the strike is illegal, having issued the Applicant with a strike notice.
16. It is the 2nd Respondent's position that the Applicant's failure to annex the strike notice was intended to deny Court the opportunity to know whether the Respondents gave sufficient notice for the strike.
17. Parties urged the application orally on 11th March, 2024, wherein, they reiterated their pleadings.

Analysis and Determination

18. I have considered the motion, the grounds and affidavit in support, the replying affidavits and the oral submissions by parties. The singular issue for determination is whether the strike called by the Respondents is lawful.
19. The Respondents' position is that they issued a strike notice on 19th February, 2024, which notice expired on 4th March, 2024, heralding the start of their strike at midnight of 4th March, 2024. They further aver that Article 41 (2)(d) guarantees their membership's right to strike and that the provision of Section 81 of the [Labour Relations Act](#), that forbids strikes for workers in essential services does not supersede the [Constitution](#).



20. Article 41(2) of the Constitution provides for the right of employees to go on strike in the following words: -

“Every worker has the right—

- a. to fair remuneration;
- b. to reasonable working conditions;
- c. to form, join or participate in the activities and programmes of a trade union;
and
- d. to go on strike”

21. Section 81 of the Labour Relations Act on the other hand, states thus on strikes in essential services: -

1. In this Part “essential services” means a service the interruption of which would probably endanger the life of a person or health of the population or any part of the population.
2. The Minister, after consultation with the Board—
 - a. shall from time to time, amend the list of essential services contained in the Fourth Schedule; and
 - b. may declare any other service an “essential service” for the purpose of this section if a strike or lock-out is so prolonged as to endanger the life, person or health of the population or any part of the population.
3. There shall be no strike or lock-out in an essential service.
4. Any trade dispute in a service that is listed as or is declared to be an essential service may be adjudicated upon by the Industrial Court.
5. A collective agreement may provide that any service may be deemed to be an essential service.”

22. The express provision of Section 81 of the Labour Relations Act, is clear, that a strike by workers in sectors defined as ‘essential’ services is prohibited. It is however, paramount that this Court determines the validity of this Section, read with Article 41(2)(d) of the Constitution that expressly guarantees workers’ right to strike.

23. Rights guaranteed under the Constitution can only be limited within the threshold set under Article 24 of the Constitution, which states thus:

“1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- a. the nature of the right or fundamental freedom;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;



- d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
- f. Despite clause (1), a provision in legislation limiting a right or fundamental freedom—
 - a. in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
 - b. shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
 - c. shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied....”

- 24. In my view, the prohibition of strikes in an important sector such as the health sector, is reasonable and justifiable, as to allow strikes would have the effect of prejudicing the rights and fundamental freedoms of the general public.
- 25. Further, the right to strike guaranteed under Section 41(2)(d) of the *Constitution* is not an absolute right. I therefore return that Section 81 of the *Labour Relations Act*, which prohibits strikes in essential services, meets the threshold set under Article 24 of the *Constitution* on limitation of rights and fundamental freedoms, and amounts to a reasonable limitation to the right to strike and does not in any way conflict with Article 41. (See No. 70 of 2014, *Okiya Omtatah Okoiti v The Attorney General*)
- 26. In the upshot, I find and hold that the Respondents strike is prohibited and thus unlawful, and make orders as follows: -
 - a. That pending the hearing and determination of the claim herein, the Respondents and/or their officials, agents or servants, assigns and/or anybody else claiming under them, are hereby ordered to immediately call off the ongoing strike, picketing or industrial action by their members declared on 4th March, 2024
 - b. That members of the Respondents’ Unions are hereby ordered to report back to work with immediate effect.
 - c. That an order of injunction is hereby issued restraining the Respondents, their employees, agents, servants, assigns and/or anybody else claiming under them from interfering with the smooth running of health services at the County Government of Kisii pending the hearing and determination of the suit herein.



- d. That the Parties are hereby ordered to conclude the negotiation on the issues in dispute, or in the alternative, submit the dispute for conciliation and a report filed in court within 30 days of this order.
- e. Costs shall be in cause.

27. It is so ordered.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 14TH DAY OF MARCH, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Odhiambo present for the Claimant/Applicant

Mr. Okelloh Present for the 1st Respondent

Mr. Odongo & Mr. Ataka present for the 2nd Respondent

Erwin Ongor - C/A

