



National Nurses Association of Kenya v Nursing Council of Kenya & 3 others; Cabinet Secretary Ministry of Health & 3 others (Interested Parties) (Employment and Labour Relations Petition E230 of 2023) [2024] KEELRC 1280 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1280 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS PETITION E230 OF 2023

MN NDUMA, J

MAY 23, 2024

BETWEEN

NATIONAL NURSES ASSOCIATION OF KENYA PETITIONER

AND

NURSING COUNCIL OF KENYA 1ST RESPONDENT

PROF EUNICE NDIRANGU, CHAIRPERSON NURSING COUNCIL OF KENYA 2ND RESPONDENT

DR EDNA CHEMUTAI TALLAM, REGISTRAR/CEO 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

AND

THE CABINET SECRETARY MINISTRY OF HEALTH INTERESTED PARTY

COMMISSION ON ADMINISTRATION OF JUSTICE INTERESTED PARTY

PUBLIC SERVICE COMMISSION INTERESTED PARTY

PRINCIPAL SECRETARY, MINISTRY OF HEALTH INTERESTED PARTY

RULING

1.

- i. The court lacks jurisdiction to hear and determine the petition.
- ii. There is no employer employee relationship between the respondents and the petitioners nor is this a labour dispute as contemplated under section 12(1)(a) to (j) of *Employment and Labour Relations Court Act* (ELRCA).



- iii. The petition violates the doctrine of constitutional avoidance and ripeness and
 - iv. The petition as drawn does not disclose with reasonable precision the employment and labour rights infringed or threatened.
2. The parties have filed submissions in respect of the preliminary objection which the court has carefully considered together with the petition as filed. The respondents have not yet filed any replying affidavits to the petition.
 3. The court is guided by the decision in *Mukisa Biscuit Manufacturing Company Ltd. Versus West End Distributors Ltd* [1969] EA 696 where it was held:

“ a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

4. in determining whether or not the objection raised qualify to be pure points of law that may be determined without considering controversial issues of fact.

The cause of action as set out in the petition include:

- a. Alleged illegal remainder of Ms. Edna Chemutai Tallam in service in the position of Registrar/ Chief Executive Officer of the Nursing Council of Kenya her two mandatory terms of service having lapsed on 10/12/2022 pursuant to section 11(6) of *Midwives Act*, Cap 257 Laws of Kenya.
 - b. Impugned increment of nurses and midwives (fees) by the Nurses and Midwives (Fees) Regulation, 2023 allegedly promulgated by the Registrar together with the Council without public participation and involvement of relevant stakeholders contrary to the provisions of Article 10 and 47 of *the Constitution* of Kenya 2010 as read together with section 4 and 5 of the *Fair Administrative Act* 2015.
 - c. Replacement of Ms. Edna Chemutai Tallam as Registrar/CEO of the Nursing Council of Kenya and direct reimbursement of salary illegally earned by her upon expiry of her two terms mandatory service.
5. The court finds at the outset that the appointment of the Registrar/CEO of the Nursing Council of Kenya and any dispute arising therefrom is a matter that relates to employment and labour within the meaning given to the term by the Court of Appeal in **Civil Appeal No 6 of 2012 *Prof Daniel Mugendi and Kenyatta University, Benson I Wairegi, Eliud Mathiu Prof Olive M Mugenda* (2013) eKLR.**
 6. Furthermore, nurses and midwives are public officers in terms of the relevant provision of *the Constitution* and applicable statutes and regulations.
 7. Promulgation of regulations that impact negatively or otherwise on the practice of the nurses and midwives is a matter related to employment and labour. Accordingly, the lawfulness of the nurses and midwives (Fees) Regulation 2023, is a proper matter for adjudication by the Employment and Labour



court within the meaning given to the term by the Supreme Court in the case of *Kenya Tea Growers Association and 2 others versus National Social Security Fund Board of Trustees and 13 others* 2024 KESC 3 KLR where the court held that;

‘We now come to the specific question whether the ELRC correctly assumed jurisdiction to determine the constitutional validity of the NSSF Act 2013. Towards this end, we are persuaded by the appellants’ argument to the effect that the Court of Appeal adopted a rather restrictive view of the reach of the NSSF Act 2013, in holding that the matter before the ELRC did not emanate from an “employer employee” dispute. The extensive provisions of the Act, requiring employers and employees to contribute specific amounts of money to a Social Security Fund cannot be said to have nothing to do with an employer-employee relationship. Even if the matter did not emanate from an employer employee dispute within the confines of the ELRC Act, to the extent that it introduces enhanced and mandatory contributory amounts of employee earnings, the Act has potential to ignite justiciable grievances from certain cadres of employees. No doubt these grievances would end up at the ELRC which would likely be called upon, as it was in this case, to determine the constitutional validity of the same. But even beyond the employer-employee dispute resolution regime, the NSSF Act 2013, seeks to expansively regulate a wide array of labour relations especially the social security of the employed cadre when they finally exit formal employment’.....For the avoidance of doubt, and so as to stop the pendulum of jurisdictional re-jigging that has characterized this case from the beginning, we hereby restate that the ELRC has jurisdiction to determine the constitutional validity of a statute in matters employment and labour. Suffice it to say that the statute in question must be in focus and at the centre of the dispute in question.”

8. It need not be gainsaid that the petitioner has set out a raft of alleged threats to and violations of the Constitutional rights of the petitioner arising from the said twin dispute aforesaid.
9. The petitioner has a statutory mandate to bring this petition on behalf of its members and in public interest.
10. The respondent will no doubt contest the matters of fact set out in the petition in their replying affidavits and therefore objection (ii) (iii) and (iv) are also not proven points of law within the meaning of *Mukisa Biscuits case (Supra)*.
11. Accordingly, the preliminary objections lack merit and are dismissed with costs in the cause.

DATED AT NAIROBI THIS 23RD DAY OF MAY, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Odongo with Ms. Onyango and Ms. Ouko for 1st to 3rd respondents/objectors

Mr. Paul Muchiri with Ms. Mungai and Ms. Gatho for petitioner/respondents

Mr. Kemboi, Court Assistant

