



**County Government of Vihiga & 6 others v Kenya National Union of Clinical Officers & 15 others; Ministry of Labour & Social Protection & 2 others (Interested Parties) (Employment and Labour Relations Cause 731 & Meru 42 of 2019 & Nyeri 8 of 2020 & Cause E6605 & E041 of 2021 & E6538 of 2020 & Miscellaneous Case 004 of 2021 & Petition 208 of 2020 & 211 of 2019 (Consolidated)) [2024] KEELRC 2595 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2595 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**EMPLOYMENT AND LABOUR RELATIONS CAUSE 731 & MERU 42 OF 2019 & NYERI 8 OF 2020 & CAUSE E6605 & E041 OF 2021 & E6538 OF 2020 & MISCELLANEOUS CASE 004 OF 2021 & PETITION 208 OF 2020 & 211 OF 2019 (CONSOLIDATED)**

**MA ONYANGO, J**

**OCTOBER 24, 2024**

**BETWEEN**

**THE COUNTY GOVERNMENT OF VIHIGA ..... CLAIMANT**

**AND**

**KENYA NATIONAL UNION OF CLINICAL OFFICERS ..... 1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL UNION OF MEDICAL & LABORATORY OFFICERS ..... 2<sup>ND</sup> RESPONDENT**

**KENYA MEDICAL PRACTITIONERS & DENTIST UNION 3<sup>RD</sup> RESPONDENT**

**KENYA COUNTY GOVERNMENT WORKERS UNION ..... 4<sup>TH</sup> RESPONDENT**

**AS CONSOLIDATED WITH**

**EMPLOYMENT AND LABOUR RELATIONS CAUSE NYERI 8 OF 2020**

**BETWEEN**

**KENYA NATIONAL UNION OF NURSES ..... CLAIMANT**

**AND**

**SAMBURU COUNTY PUBLIC SERVICE BOARD ..... RESPONDENT**

**AS CONSOLIDATED WITH**



**EMPLOYMENT AND LABOUR RELATIONS CAUSE MERU 42 OF 2019**

**BETWEEN**

**THE COUNTY GOVERNMENT OF MERU ..... CLAIMANT**

**AND**

**KENYA NATIONAL UNION OF CLINICAL OFFICERS ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**CAUSE E6605 OF 2021**

**BETWEEN**

**KENYA NATIONAL UNION OF CLINICAL OFFICERS ..... CLAIMANT**

**AND**

**CHAIRMAN COUNCIL OF GOVERNORS ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF HEALTH ..... 2<sup>ND</sup> RESPONDENT**

**47 COUNTY PUBLIC SERVICE BOARDS ..... 3<sup>RD</sup> RESPONDENT**

**THE NAIROBI METROPOLITAN SERVICES ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**MINISTRY OF LABOUR & SOCIAL PROTECTION ..... INTERESTED PARTY**

**HON. ATTORNEY GENERAL ..... INTERESTED PARTY**

**AS CONSOLIDATED WITH**

**CAUSE E041 OF 2021**

**BETWEEN**

**KENYA NATIONAL UNION OF NURSES ..... CLAIMANT**

**AND**

**MINISTRY OF HEALTH & 43 OTHERS ..... RESPONDENT**

**AND**

**MINISTRY OF LABOUR & SOCIAL PROTECTION ..... INTERESTED PARTY**

**AS CONSOLIDATED WITH**

**CAUSE E6538 OF 2020**

**BETWEEN**

**THE CABINET SECRETARY MINISTRY OF HEALTH ..... CLAIMANT**



AND

KENYA NATIONAL UNION OF NURSES ..... RESPONDENT

AND

THE HON. ATTORNEY GENERAL ..... INTERESTED PARTY

THE CABINET SECRETARY LABOUR & SOCIAL  
PROTECTION ..... INTERESTED PARTY

AS CONSOLIDATED WITH  
MISCELLANEOUS CASE 004 OF 2021

BETWEEN

KENYA NATIONAL UNION OF CLINICAL OFFICERS ..... CLAIMANT

AND

COUNTY GOVERNMENT OF KISII ..... 1<sup>ST</sup> RESPONDENT

KISII COUNTY PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT

AND

THE HON. ATTORNEY GENERAL ..... INTERESTED PARTY

AS CONSOLIDATED WITH  
PETITION 208 OF 2020

BETWEEN

THE COUNTY GOVERNMENT OF MACHAKOS ..... CLAIMANT

AND

KENYA UNION OF CLINICAL OFFICERS ..... 1<sup>ST</sup> RESPONDENT

NATIONAL UNION OF NURSES ..... 2<sup>ND</sup> RESPONDENT

AS CONSOLIDATED WITH  
PETITION 211 OF 2019

BETWEEN

KENYA UNION OF CLINICAL OFFICERS ..... CLAIMANT

AND

BARINGO COUNTY MOVEMENT & 47 OTHERS ..... RESPONDENT



## JUDGMENT

1. The suits herein are varied and involve multiple parties. The suits were filed pursuant to a nationwide strike by members of the 1<sup>st</sup> Respondents.
2. In Nairobi ELRC Cause No. 731 of 2019 the County Government of Vihiga sought orders declaring the strike/lock out and /or industrial action called by the Respondents jointly and severally in their notice dated 25<sup>th</sup> and 28<sup>th</sup> October, 2019 unlawful and therefore unprotected, a declaration that the strike notice and lock out notices dated 25<sup>th</sup> and 28<sup>th</sup> October, 2019 by the Respondents jointly and severally, and any other notices pursuant thereto are illegal, irregular, invalid and unenforceable, and for costs of the suit.
3. In Machakos ELRC Petition No. 208 of 2020, the County Government of Machakos filed the Petition dated 9<sup>th</sup> December 2020 against the Respondents seeking for the following orders:
  - i. A declaration that the members of the Respondents provide an essential service.
  - ii. A declaration t/hat the strike called by Respondents vide their letters dated 23<sup>rd</sup> November 2020 and commenced on 7<sup>th</sup> December 2020 is illegal, null and void ab initio
  - iii. A declaration that the Respondents ongoing industrial action by way of a strike is prohibited and unlawful and thus unprotected under the *Labour Relations Act*
  - iv. A declaration that the right to health and the right to life are rights that cannot be limited.
  - v. A prohibitory injunction restraining the Respondents, their officials and members from engaging in, participating and or carrying out any strike at any other time whatsoever.
  - vi. Any other order that this Honourable court may deem fit and just to grant.
  - vii. The costs of this Petition be borne by the Respondents
4. In Meru ELRC Cause No. 42 of 2019, the County Government of Meru sued the Kenya National Union of Clinical officers vide a statement of Claim dated 5<sup>th</sup> December seeking for orders;
  - i. A declaration that the ongoing strike and/or withdrawal of services by members of the Respondent in Meru county is illegal, unlawful and unprotected
  - ii. An order compelling the Respondent and its members to resume back to their various working stations in Meru county
  - iii. Costs of the suit.
5. The Kenya National Union of Clinical officers filed Nairobi ELRC Cause No. E6605 of 2021 against the Chairman of Council of Governors and 4 others, what is on the court record is only an application dated 5<sup>th</sup> January 2021, seeking for orders that:
  - i. Spent
  - ii. Spent
  - iii. That an ex parte order be and is hereby issued staying and suspending the implementation of the circular Ref: COG/6/40 Vol. 60(89) dated 21<sup>st</sup> December 2020 by the 1<sup>st</sup> Respondent



either by itself, its agents, assigns, servants and or representatives or anyone abiding through it or otherwise pending the hearing and determination of the Application

- iv. That an ex parte order be and is hereby issued barring the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, their agents, assigns, servants and or representatives or anyone abiding through it from instituting and initiating any form of disciplinary action and processes against members of the Claimant / Applicant including those who serving under contract and universal health coverage terms arising out of their participation in the strike notice dated 23<sup>rd</sup> November 2020 pending the hearing and determination of this application.
  - v. threatening an order be and is hereby issued consolidating all the existing suits already filed and any other that may come past issuance of this order touching on the subject matter of the strike notice dated 23<sup>rd</sup> November 2020 pending before different courts and to be placed before the principal judge for hearing directions pending the hearing and determination of this application.
  - vi. That an order be and is hereby issued restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents by themselves, their agents, assigns, servants and or representatives or any other person claiming through them or otherwise from harassing and intimidating the claimant's members on the basis of this litigation within the pendency of this suit.
6. In Nairobi ELRC Cause No. E6538 OF 2020, The CS, Ministry of Health vide an application dated 9<sup>th</sup> December 2020 sought for the following orders against the Kenya National Union of Nurses and the Kenya Union of Clinical officers;
- i. Spent
  - ii. Spent
  - iii. The Honourable court do issue an order of injunction restraining the Respondents herein, and or their members , representatives, employees, agents and or any other person acting under their instructions from implementing or purporting to implement the strike notice dated 23<sup>rd</sup> November 2020 calling upon its members to picket and or demonstrate at KICC building starting from 7<sup>th</sup> December 2020 pending the hearing and determination of this claim.
  - iv. The costs of this application be provided for
7. In Nyeri ELRC Cause No. 8 of 2020 the Kenya National Union of Nurses filed the application dated 14<sup>th</sup> May 2020 against Samburu County Public Service Board and Council of Governors seeking for the following orders;
- i. An order directing the 1<sup>st</sup> Respondent to resume and continue deducting and remitting union dues to the specified bank account and at scheduled in the legal notice No. 160 of 2018
  - ii. An order directing the 1<sup>st</sup> Respondent to pay from their funds all the non-deducted union dues from the month February to date amounting to Kshs. 734,897.80
  - iii. An order declaring that the 2<sup>nd</sup> Respondnet either by itself or through its servants, representatives, agents or assigns have no legal capacity to issue directives to County Public Service Boards interfering with employment, membership, remittance and or deduction of the trade union dues from Claimant members
  - iv. Costs of the suit to be borne by the Respondents



8. In Nairobi Cause No. E877 of 2020, formerly Kisumu Cause No. E027 of 2020, the County Government of Kisii vide an application dated 10<sup>th</sup> December 2020 sought for the following orders against the Kenya National Unity of Clinical Officers and Kenya National Union of Nurses.
- i. Spent
  - ii. Spent
  - iii. That pending the hearing and determination of this application interparte, this honorable court be pleased to suspend the strike by members of the Respondents within Kisii county and compel the 1<sup>st</sup> Respondents, their officials, agents, representatives, and or their members to call off the strike and resume duties at their respective work stations within Kisii County
  - iv. That pending the hearing and determination of this suit, interpartes, this Honorable Court be pleased to grant an order of a mandatory injunction prohibiting /restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, agents, officials and representatives and all their members from mobilizing, causing effecting, inciting or otherwise calling for any industrial action and withdrawal of offering health services in Kisii county
  - v. That pending the hearing and determination of this suit, this Honourable Court be pleased to grant an order of a mandatory injunction prohibiting /restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondnet, agents, officials and representatives and all their members to call off the strike and immediately return to work and resume offering health services within Kisii County unconditionally
  - vi. That pending the hearing and determination of this suit, this Honourable Court be pleased to grant an injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondent members, their officials, agents, officials and representatives and or any person claiming through them from mobilizing, causing, effecting, inciting or otherwise calling for any industrial action and withdrawal of health services within Kisii County without following due process.
  - vii. threatening the costs of this Application be provided for
9. In Nairobi ELRC Misc No. E004 of 2021, the Kenya National Union of Clinical Officers filed an application dated 15<sup>th</sup> January 2021 seeking for the following orders against the County Government of Kisii and Kisii County Public Service Board;
- i. That this application be certified urgent, service be dispensed with in the first instance and the same be heard ex parte for the grant of prayers 2,3 and 4 below
  - ii. That pending hearing and determination of this Application, a temporary injunction be and is hereby issued restraining the Respondents from threatening, harassing, intimidating and victimizing, replacing or otherwise undertaking any other disciplinary actions against the members of the Applicant who are in their employment as a consequence of the interim orders issued on 16<sup>th</sup> December 2020 in Nairobi ELRC Cause No. E6494 of 2020 by Hon. Justice Nzioki wa Makau
  - iii. That pending the hearing and determination of this Application an order does issue staying the implementation of all such show cause letters, notices, interdictions, dismissal letters and adverts of positions issued by the Respondnet against the Applicant and or Applicant's members as a consequence of the interim orders issued on 16<sup>th</sup> December 2020 In Nairobi ELRC Cause No. E6494 of 2020 by Hon. Justice Nzioki wa Makau



- iv. That pending the hearing and determination of this application, the court does stay the orders of 30th December 2020 by Hon. Justice Nzioki wa Makau in Kisumu ELRC No. E027 of 2020.
  - v. threatening an order be and is hereby issued clarifying that the orders issued on 16<sup>th</sup> December 2020 in Nairobi ELRC Cause No. E6494 of 2020 by Hon. Justice Nzioki wa Makau are not and were not intended to compel a return to work by members of the Applicant who are employees of the Respondent
  - vi. That the court does set aside or otherwise vary the orders of 30<sup>th</sup> December 2020 by Hon Justice Nzioki wa Makau in Kisumu ELRC No. E027 of 2020
  - vii. That there be no victimization of the Applicant's members on account of the industrial action against the Respondent that commenced vide notice of 23<sup>rd</sup> November 2020 specifically that members are to receive full wages during the pendency of this Application
  - viii. threatening the suit herein be consolidated and/or be heard together with other related or similar cases in line with the orders of the ELRC in Kisumu ELRC No. E027 of 2020
  - ix. threatening this Honourable court be pleased to issue any other and/or further orders and directions as it may deem fit in the interest of justice.
  - x. That the costs of this application be borne by the Respondents on full indemnity basis.
10. In ELRC Petition No. 211 of 2019, the Kenya Union of Clinical Officers sought for the following orders against Baringo County Government and 47 others;
- i. threatening this application be and is hereby certified urgent and to be heard on 1<sup>st</sup> priority basis
  - ii. threatening this honourable court be pleased to and hereby issue an order suspending the ingoing strike by nurses pursuant to the strike notice dated 23<sup>rd</sup> November 2020 pending the hearing and determination of this application, all nurses to report back to work within 24 hours.
  - iii. That an order be and is hereby issued directing that all suits filed in court and relating to the strike notice dated 23<sup>rd</sup> November 2020 be consolidated with the instant suit and that the instant suit be made the lead file.
  - iv. That pending the hearing and determination of this application and the main suit, an order be and is hereby issued staying all the proceedings in this suit filed in relation to the strike notice dated 23<sup>rd</sup> November 2020.
11. As can be noted from a perusal of the prayers sought in the different suits above, the cause of action in all the suits relate to the strike notices of 25<sup>th</sup> and 28<sup>th</sup> October 2019 to commence on 1<sup>st</sup> November 2019 and the strike notice of 23<sup>rd</sup> November 2020 for the strike commencing on 7<sup>th</sup> December 2020.
12. By orders of the court issued on 24<sup>th</sup> February 2021, directions were given that all related cases be transferred to Nairobi for consolidation. This file, Nairobi ELRC Cause No. 731 of 2019 was selected as the lead file.



## Determination

13. The court appreciates that because of the nature of the disputes in the various suits and the passage of time, most of the issues in dispute in the various suits have since been resolved or have been overtaken by events. This judgment will only deal with issues that are still alive.
14. Having considered the pleadings in all the related files and the submissions of the parties, I find that the issues that fall for determination are:
  - i. Whether the members of the Respondents are engaged in the provision of essential services and if the answer is in the affirmative,
  - ii. Whether the 1<sup>st</sup> Respondent was justified in calling for a strike.
15. At the core of the dispute herein is the right to strike in respect of employees engaged in essential services. The various contended that the strike that commenced on 7<sup>th</sup> December 2020 by 1<sup>st</sup> Respondent's members pursuant to the strike notice dated 23<sup>rd</sup> November 2020 was unlawful on the basis that the 1<sup>st</sup> Respondents' members are engaged in the provision of essential services and further, that the dispute was not referred to conciliation as envisaged by section 78 of the [Labour Relations Act](#).
16. The 1<sup>st</sup> Respondent on the other hand maintains that the Petitioner as well as other counties were duly notified of the strike Notice of 23<sup>rd</sup> November 2020 which they ignored and as a result, its members proceeded on strike on 7<sup>th</sup> December 2020.
17. Section 78 provides for prohibited strikes or lock-outs as follows:
  - (1) No person shall take part in a strike or lock-out or in any conduct in contemplation of a strike or lock-out if—
    - (a) any law, court award or a collective agreement or recognition agreement binding on that person prohibits a strike or lock-out in respect of the issue in dispute;
    - (b) the subject matter of the strike or lock-out is regulated by a collective agreement or recognition agreement binding on the parties to the dispute;
    - (c) the parties have agreed to refer the trade dispute to the Employment and Labour Relations Court or to arbitration;
    - (d) in the case of a dispute concerning the recognition of a trade union, the trade union has referred the matter to the Employment and Labour Relations Court;
    - (e) the trade dispute was not referred for conciliation in terms of—
      - (i) this Act; or
      - (ii) a collective agreement providing for conciliation;
    - (f) the employer and employees are engaged in an essential service;
    - (g) the strike or lock-out is not in furtherance of a trade dispute; or
    - (h) the strike or lock-out constitutes a sympathetic strike or lock-out.
  - (2) For the purposes of this section—
    - (a) an employee engages in a sympathetic strike if the employee participates in a strike in support of a trade dispute in respect of which the employee's employer—



- (i) is not a party to the dispute; or
- (ii) is not represented by an employer’s organisation that is a party to that dispute; or
- (b) an employer engages in a sympathetic lock-out if the employer locks out an employee in support of a trade dispute—
  - (i) to which the employer is not a party; or
  - (ii) in respect of which the employer is not represented by an employer’s organization that is a party to dispute.

18. Section 81 of the *Labour Relations Act* further reads:

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.
19. The provisions of section 78 and 81 of the *Labour Relations Act*, 2007 are mandatory. A trade union whose members are engaged in the provision of essential services is prohibited from calling its members to strike action.
20. On the other hand, the right of employees to strike is entrenched in *the Constitution* under Article 41(2)(d) which stipulates:

“Every worker has the right—

- a. ....
- b. ...
- c. ....
- and
- d. to go on strike”

21. The 1<sup>st</sup> Respondent in this case has submitted that it called for a lawful strike and that the instant suit is based on misapprehension of the workers right under Article 41 of *the Constitution*. According to



the 1<sup>st</sup> Respondent, section 76, 78 and 81 of the *Labour Relations Act* are inconsistent with Articles 41 of *the Constitution* and are null and void for purporting to outlaw the strike.

22. Article 25 of *the Constitution* provides;

Fundamental Rights and freedoms that may not be limited

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
- (b) freedom from slavery or servitude;
- (c) the right to a fair trial; and
- (d) the right to an order of habeas corpus.

23. From a reading of Article 25, above, the right to go on strike is not one of the absolute rights and can, therefore, be limited.

24. Article 24(1) of *the Constitution* provides that 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. The factors to be taken into account are: the nature of the right or fundamental freedom; the importance and purpose of limitation; the nature and extent of the limitation and the need to ensure that enjoyment of rights and fundamental freedoms by an individual does not prejudice rights and fundamental freedoms of others.

25. Under the International Labour Organization, the right to strike is recognized as an intrinsic corollary of the right to organize protected by Convention No. 87, deriving from the right of workers' organizations to formulate their programmes of activities to further and defend the economic and social interests of their members. However, there is consensus that the right to strike is not absolute and may be subject to certain legal conditions or restrictions, and may even be prohibited in exceptional circumstances as stated by the Committee of Experts in the General Survey on Freedom of Association and Collective Bargaining, at paragraph 151.

26. Paragraph 159 of the General Survey indicates that the ILO's supervisory bodies have taken the position that it is admissible to limit or prohibit the right to strike in essential services, defined as those the interruption of which would endanger the life, personal safety or health of the whole or part of the population.

27. In the instant case, it is not in dispute that the members of the 1<sup>st</sup> Respondent are engaged in the provision of essential services. Should they be allowed to strike, the consequence would be that the fundamental rights of other persons to freedom from torture and cruel, inhuman or degrading treatment or punishment that are inviolable under Article 25 of *the Constitution* would be infringed. The denial of the right to the highest attainable standard of health which includes the right to health care services and the right to emergency medical treatment in my view would rank higher than the right to strike and is thus protected under Article 24(1). It is in my view a limitation reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.



28. The denial of medical treatment especially emergency medical treatment would in my view subject persons who need such care to torture and cruel, inhuman or degrading treatment or punishment.
29. It is for these reasons that I find that the prohibition of strikes in essential services in section 81 of the Labour Relations Act, meets the conditions set under Article 24 of the Constitution on limitation of rights and fundamental freedoms of employees engaged in the provision of essential services from participating in strikes.
30. The 1<sup>st</sup> Respondent's members were therefore prohibited from engaging in a strike and the subsequent was therefore unprotected and therefore unlawful.
31. The Court however notes that the Labour Relations Act was enacted before the Constitution of Kenya, 2010. There is therefore need to review the Act to harmonize the provisions thereof with the Constitution. It is also important to make provision of the resolution of disputes in essential services where no strikes are permitted to ensure that the rights of employees engaged in essential services to fair labour practice as envisioned in Article 41 of the Constitution are protected and realized.
32. Consequently, judgment is entered in in the following terms:
- a. A declaration be and is hereby made that the members of the Respondents provide an essential service.
  - b. A declaration be and is hereby made that the strike called by Respondents on 30<sup>th</sup> October 2019 and on 7<sup>th</sup> December 2020 was unprotected as it was in violation of section 81 of the Labour Relations Act which prohibits strikes in essential services.
  - c. Each party to bear their own costs.
33. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 24<sup>TH</sup> DAY OF OCTOBER, 2024**

**MAUREEN ONYANGO**

**JUDGE**

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**NRB ELRC NO 731 OF 2019 JUDGMENT**

