



**County Government of Meru v Kenya Medical Practitioners Pharmacists and Dentists
Union & 2 others; Meru County Public Service Board & 2 others (Interested Parties)
(Constitutional Petition E004 of 2024) [2024] KEELRC 2449 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2449 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

CONSTITUTIONAL PETITION E004 OF 2024

ON MAKAU, J

OCTOBER 9, 2024

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT
OF THE RIGHTS AND FREEDOMS IN ARTICLES 26, 28,
43, 46 AND 47 OF THE CONSTITUTION OF KENYA, 2010.**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 6,
10, 19(2), 20(1), 24(1) (D), & 260 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: SECTION 81 OF THE LABOUR RELATIONS ACT &
THE SALARIES & REMUNERATION COMMISSION ACT, NO.57 OF 2012**

AND

**IN THE MATTER OF: SCHEDULE 4 PART 2 PARA
2 (A) OF THE 2010 CONSTITUTION OF KENYA**

BETWEEN

COUNTY GOVERNMENT OF MERU PETITIONER

AND

**KENYA MEDICAL PRACTITIONERS PHARMACISTS AND DENTISTS
UNION 1ST RESPONDENT**

KENYA UNION OF CLINICAL OFFICERS 2ND RESPONDENT

KENYA NATIONAL UNION OF NURSES 3RD RESPONDENT

AND

MERU COUNTY PUBLIC SERVICE BOARD INTERESTED PARTY

SALARIES AND REMUNERATION COMMISSION INTERESTED PARTY



JUDGMENT

1. The petitioner is a County Government established under Article 176 of *the Constitution* while the respondents are trade unions registered under the *Labour Relations Act* to represent Medical Practitioners, Pharmacists, Dentists, Clinical Officers and Nurses respectively.
2. By the petition dated 10th September 2024, the petitioner accuses the respondents' members of engaging in a strike which has completely paralyzed services in the public health facilities for over 39 days contrary to rights of the people of Meru to life, human dignity, and highest standard of health as guaranteed under Article 26, 28 and 43 of *the Constitution*. Consequently, it prays for the following reliefs:
 - a. A declaration that the continuation or participation in any way of the strike by the Meru County healthcare workers called by the Kenya Medical Practitioners Pharmacists and Dentists Union (KMPDU), Kenya Union of Clinical Officers (KUCO) and Kenya National Union of Nurses (KNUN) vide strike notices dated 1st August 2024 (by KMPDU), 15th July 2024 (by KUCO), and 18th July 2024 (by KNUN) respectively is unlawful.
 - b. A declaration that the continued participation by the Meru County healthcare workers in the strike called by the 1st, 2nd and 3rd Respondents vide strike notices dated 1st August 2024 (1st August 2024 (by KMPDU), 15th July 2024 (by KUCO), and 18th July 2024 (by KNUN) respectively is unlawful for violating the rights enshrined under Articles 26, 28, 43 & 47 of *the Constitution* of Kenya, 2010.
 - c. A declaration that the continued participation by the Meru County healthcare workers in the strike organized by the 1st, 2nd and 3rd Respondents vide strike notices dated 1st August 2024 (1st August 2024 (by KMPDU), 15th July 2024 (by KUCO), and 18th July 2024 (by KNUN) respectively is unlawful for violating the rights enshrined under Articles 26, 28, 43 & 47 of *the Constitution* of Kenya, 2010 2, 10, 19(2) & 20 of *the Constitution* of Kenya, 2010.
 - d. An order of Judicial Review in the nature of Mandamus compelling the healthcare workers through the 1st, 2nd & 3rd Respondents to resume to their work.
 - e. Costs of this petition be borne jointly and severally by the Respondents.

Factual background

3. The petitioner signed agreements with the respondents separately following grievances from its health workers. The first was between it and the 1st respondent on 6th October 2023 followed by those with the 2nd and 3rd respondents on 17th November 2023.
4. The petitioner failed to implement the said agreements for the following reasons:
 - a. The 1st and 2nd respondent joined nationwide strikes which lasted for several months and due to absence of the union members the issues in agreement were not addressed.
 - b. On 8th May 2024, the County Assembly of Meru passed a resolution that the petition ought to undertake urgent policy measures of curbing the County's huge wage bill which negatively impacted on the petitioners attempts to review the salaries for the health workers.



- c. There was delay in passing the Supplementary Budget which was supposed to provide the budget for the negotiated salary review.
- d. The delay in passing the said supplementary Budget was caused by: -
 - i. Governance wrangles between the Government of Meru and its County Assembly which led to impeachment three times. One of the allegations was that the CBA provided for payment of allowances to the doctors leading to bloated wage bill.
 - ii. Lack of additional funds after the Meru County Revenue Board reported a collection deficit.
 - iii. There was no increase to salary budget due to a substantial revenue shortfall in the Financial year 2023/2024 which hindered the implementation of the proposed common cadre promotions within the said year 2023/2024.
5. In view of the foregoing, the review of salaries for the health workers was deferred to the 2024/2025 financial year budget. As a show of good factor, the petitioner wrote to the respondents updating them of the progress made towards implementation of the said negotiated agreements and requested them to refrain from strike. The gesture by the petitioner was rejected and the respondent went on strike.
6. As a result of the escalation of the strike, the petitioner invited the respondents to a meeting on 29th August 2024 and 30th August 2024. During the meetings, it was agreed that;
 - a. The Petitioner's Health Department would write to the 1st Interested party (CPSB) through its County secretary to initiate the promotion process for non-common cadre staff.
 - b. The public service department would write a letter to the Health Department indicating that common cadre promotions would be implemented in September 2024.
 - c. Once promotion letters were issued, the union leaders would be invited for a final engagement, with the aim of calling off the strike.
7. On 2nd September 2024, the County Secretary wrote to the chief officer for Public Service Management and Administration, instructing him to take necessary steps to implement promotions for common cadre health staff and to ensure that arrangements are made to include the said promotions in the September 2024 payroll.
8. On the same day, the Chief Officer for Health Services wrote to the Secretary/CEO of the CPSB, forwarding a list of officers within the Health Department who had stagnated in the same job group and were eligible for promotions under the non-common cadre. He also provided a list of doctors who needed to be placed in medical specialist positions.
9. Subsequently, the County Executive Committee Member (CECM) for Health Services invited the respondents for a follow up meeting on 4th September 2024 where it was agreed that the unions would prepare Return-to-Work formula to be presented in the next meeting with the aim of ending the strike. However, the respondents have changed their demands and thereby shifted goal posts by introducing new conditions before calling off the strike.
10. The petitioner has since taken measures to implement the said negotiated agreements but maintains that despite the assent given to the Meru County Appropriation Act 2024 on 27th August 2024, and the speaker forwarding the same to the Controller of Budget on 29th August 2024, it was received on 5th September 2024. According to the petitioner the delayed payment of salary arrears and statutory



deductions are not unique to the respondents' members but it cuts across all its employees due to delay in release of funds from the National Exchequer and therefore it urged for their patience.

11. Besides, the petitioner contends that the respondents have ignored the fact that health care is an essential service under section 81 of the [Labour Relations Act](#) and are hell bent to collapsing the health care system in the County despite the good faith from the County Government.
12. The petition is supported by Affidavit sworn by Dr. Mukundi Joseph Wahome, Chief Officer Health on 10th September 2024 and a Supplementary Affidavit sworn by him on 24th September 2024. The affidavits reiterated the averments in the petition.
13. It is the petitioner's case that the strike by the respondents is uncalled for and unlawful considering that the grievances raised are due to circumstances beyond the petitioner's control. That, as a result, the strike has violated the Bill of Rights as follows: -
 - a. Article 26- the residents of Meru County continue to lose and risk losing their lives on account of the on going strike as the majority cannot afford to access expensive health care facilities.
 - b. Article 28- by ignoring the health care of citizens and acting as though the personhood of Meru residents does not matter.
 - c. Article 43- denying the socio-economic rights of the people of Kenya including right to highest standard of health and freedom from hunger.
 - d. Article 47-taking unlawful administrative actions by engaging in an unlawful and malicious strike.

Responses

14. The respondents opposed the petition through separate Replying Affidavits. The 1st respondent's case is that it issued strike notice on 26th September 2023 to the petitioner and the CPSB raising the following grievances: -
 - a. Delayed and denied promotions contrary to the Schemes of Service 2016 and the registered CBA.
 - b. Shortage of doctors especially in Meru Level 5, Nyambene Level 4 and Kanyakine Level 4.
 - c. Conversion of doctors under contract terms to Permanent and Pensionable.
 - d. Non-remittance of statutory deductions and contributions.
 - e. Non-release of doctors for study leave.
 - f. Unfavorable work environment for doctors.
 - g. Implementation of CBA 2017-2021
15. On 6th October 2023, a free will agreement was signed between the petitioner, CPSB and the 1st respondent in order to forestall the industrial action. The agreement was that:
 - a. The petitioner committed through the CPSB to issue all common cadre doctors from Job Group M-N with appointment letters by 1st November 2023.
 - b. All doctors from Job Group N-P, O-R and R-S for non-common cadre advertisement, shortlisting, interview and issuance of letters be done by 1st February 2024.



- c. The petitioners and the 1st Respondent to place all the 39 consultants to Job Group Q.
 - d. The county to remit statutory deductions, loan payments, SACCO contributions, Insurance premiums and KPMDU member contributions by 5th day of the next month upon deduction.
 - e. Eligible doctors who expresses interest in pursuing further studies to be released on paid study leave as advised by the Training and Needs Assessment Committee.
 - f. Necessary facilities, equipment and support staff to be provided in order to create favorable work environment.
 - g. The county to form a CBA implementation committee in accordance with the “harmonized implementation matrix for the Doctors CBA” issued by the Council of Governors. The union to be represented in the committee within 45 days.
16. Item number (a) –(c) above were to be implemented in the payroll from 1st April 2024 and any arrears be factored in the budget for the year 2024/2025. The petitioner failed to implement the said agreement and the 1st respondent issued strike notice dated 1st August 2024 raising the following issues:
- a. Immediate internal advertisement, shortlisting, interviews and issuance of letters for all doctors due for promotion under non-common cadre including Job Group N-P, Q-R and R-S.
 - b. Immediate placement of all medical pharmacy and Dental specialist in the correct Job Group namely Job Group Q as per the Doctors Scheme of Service.
 - c. Immediate formation of CBA implementation committee in accordance with the “harmonized implementation matrix for Doctors CBA” issued by the Council of Governors.
 - d. Immediate replacement of all medical officers, Pharmacists and Dentists who have exited service since 2021.
 - e. Provide implementation plan to ensure all pending statutory deductions are paid.
17. The 1st respondent denied the alleged violation or illegality in the strike by its members and averred that the petitioner is the cause of the strike by failing to implement the said mutual agreement dated 6th October 2023. It was clarified that the 1st respondent is not asking for salary increment but promotion, placement of doctors in the proper Job Group as per the Schemes of Service, and payment of pending statutory deductions.
18. It further averred that the petitioner failed to provide documents discussed in a meeting held on 29th August 2024 and 10th September 2024 and rushed to court before waiting for the meeting scheduled for 18th September 2024. The court was urged to note that the union members are agitating for fair labour practices, fair remuneration, reasonable working conditions through their right to go on strike.
19. As a preliminary point, the 1st respondent avers that the petition does not meet the legal threshold of a Constitutional reference claim as was established by *Anarita Karimi Njeru v Republic* (1979) KLR 54 and reiterated in *Mumo Matemu v Trusted Society of Human Rights Alliance* (2013) eKLR. In the end, the court was urged to strike out the entire petition with costs.
20. The 2nd and 3rd Respondents’ case is similar to that of the 1st respondent save for slight variations of the material dates and some particulars of mutual agreement signed in 2023 to forestall industrial action. Their issues/grievances relate to the members’ proffession and their agreement was signed on 17th November 2023. Among the issues agreed was transfer allowances.



21. It is the case by the 2nd and 3rd respondents that the petitioner breached the agreements signed on 17th November 2023 and they served fresh strike notices. In their view, a strike is an economic tool placed in the hand of every worker by Article 41 of the Constitution from which the employee invites an errant employer into negotiations.
22. Since 30th July 2024, the petitioner has severally invited the respondents to meetings but no resolutions were reached. In the meeting held on 30th August 2024, progress was made but no agreement was reached. They averred that the petitioner has not been truthful as it has lied about release of promotion letters and that only Kshs.74 million was available for all promotions, yet the County Assembly approved Kshs.200,000,000.00. Therefore, they maintained that the strike is justified and lawful.
23. The 3rd respondent also raised a preliminary objection to the petition contending that the petitioner lacks locus standi to sue them because it's not the employer of Nurses. It averred that the employer in this case is the CPSB which has signed employment contracts with the nurses by dint of section 59 of the County Government Act. Besides the petition has not been brought under Article 22 (1) of the Constitution which deal with enforcement of the Bill of Rights.
24. On 18th September 2024, the court issued conservatory orders suspending the impugned strike on the basis of agreements contained in the minutes of the meeting held on 29th and 30th August 2024 between the parties to this suit. When parties attended court for hearing on 24th and 25th September there was no disagreement as to whether the conservatory orders were complied with. Nevertheless, the parties agreed to argue the petition for the court to determine the dispute once and for all. Therefore, I extended the conservatory orders and invited oral submissions in the open court.

Petitioner's submissions

25. The petitioner's case was urged by Mr.Mutembei learned counsel. He submitted that the preliminary points raised by the respondents are just procedural technicalities which do not hold water. He submitted that the petitioner has locus standi to sue on behalf of the people of Meru. He further submitted that the petition meets the competence threshold established by Anarita Karimi Njeru case.
26. As regards the merits of the petition, he submitted that the respondents have walked away from resolutions made between them and the petitioner on 29th and 30th of August 2024. He contended that the petitioner has implemented the said resolutions but the respondents have changed the goal post by raising new demands in order to justify the on-going strike. He contended that the petitioner has forwarded names of Health Workers to the CPSB for promotion but the respondents have failed to call off the strike.
27. He contended that after the agreements entered into in 2023 with the respondents the petitioner was faced with external challenges including budget allocation from the National Exchequer; there were wrangles between the County Assembly and the petitioner leading to three impeachment motions; and then the said impeachment process led to the failure by the Assembly to approve the budget until August 2024. Consequently, he submitted that the failure to implement the negotiated agreements was not deliberate but due to factors beyond control of the petitioner.
28. He submitted that the strike called by the respondent is unlawful and unjustified since the petitioner has shown good will in resolving all the grievances. He submitted that the services by the respondents are essential and the prolonged strike has far reaching effects. He referred to photographs annexed to the supplementary affidavit showing empty hospital facilities after all the respondent's members walked away from the health facilities without mitigating measures to address emergencies.



29. He submitted that respondents did not leave a minimum number of health officers to attend to emergency case as required by the law. To fortify the foregoing submission, he cited the decision in *Joseph Otieno Oluoch v KPMDU (2021) eKLR* where the court held that it is necessary for doctors to have minimum number of doctors remaining on duty during strike.
30. He contended that the respondents have not shown any good faith and are in contempt of court. He cited exhibit JM2 annexed to the Supplementary Affidavit to demonstrate that the respondents have not attended work after the court order but they merely sign the attendance and go away. Consequently, he urged the court to grant the reliefs sought in the petition but pending judgment, the interim order be extended because they meet the threshold established by the Supreme Court in the Peter Gatirau Munya case.

Respondents' submissions

31. Mr. Washika, learned counsel argued the case for the 1st respondent. From the onset he urged that the conservatory order given against its clients was based on false information given by the petitioner and urged the court to vacate the same. He submitted that the petitioner and 1st respondent signed a free will agreement on 26th October 2023 to forestall a looming industrial action initiated by a strike notice issued on 26th September 2023. The agreement had clear terms and set timelines but the petitioner breached all of them.
32. He submitted that on 6th March 2024 there was a nation-wide strike which was resolved but Meru did not, hence the third strike notice on 16th July 2024 raising the same grievances agreed in the negotiated agreement of 2023. He contended that the parties attempted to resolve the issues but the petitioner filed this suit waving invalid document titled resolutions. He maintained that the alleged resolutions were written unilaterally by the petitioner and the union never signed the same.
33. He submitted that the petition as drawn does not meet the degree of precision enunciated by the court in *Anarita Karimi Njeru* case as does not demonstrate the alleged violations.
34. He contended that the petitioner blames leadership wrangles for the problems it is in, but argued that the grievance by the respondents is only about their employment issues which have been agreed and written down including promotions, delay of salaries, and remittance of statutory deductions. He contended that Leadership wrangles should not extend to the employees.
35. He submitted that there is no explanation given as to why promotions were not done and advertisement done as agreed in 2023. He submitted that there is evidence that budget allocation was done but the CPSB who is responsible for the grievances raised by workers did not show up in court. He urged the court to consider Article 159 of *the Constitution* which obliges the court to promote ADR and adopt the agreement by the parties.
36. Mr. Ngetu learned counsel argued the 2nd respondent's case on behalf of Mr. Ataka. He adopted the Replying Affidavit by 2nd Respondent's Secretary General and submitted that conservatory order in place was issued on basis of false allegation that the parties had resolved the disputes on 29th and 30th August 2024. Therefore, he urged the court to vacate the said orders.
37. He contended that the strike by his client arose from a mutual agreement signed by the parties on 17th November 2023 which was disregarded by the petitioner. He submitted that the petitioner gave no reason for dishonoring the said agreement whose terms and effects were known to it.



38. He submitted that the workers should not be denied their rights simply because they work in essential services sector. He contended that the workers are entitled to salary without delay, statutory deductions should be remitted and transfer allowances paid promptly.
39. He submitted that petitioner should not go against its own words on allegation of governance issues. He relied on *Combe v Comber* 195 ALLR 766 at 770 where the court held that once a party makes a representation and the other acts on it, the maker of the statement cannot go against the promise.
40. As regards budget allocation, the counsel referred to a letter dated 12th September 2024 by the Clerk Meru County Assembly confirming that Kshs.211,000,000 has been exclusively allocated for promotions and a further Kshs.100,000,000 allocated for recruitment of Health workers. The budget was passed on 13th August 2024 and as such the petitioner had money to meet the issues raised in the strike notice but ignored it.
41. He further submitted that the strike was caused by the petitioner and it is lawful and protected under Article 41 of *the Constitution* of Kenya, 2010 and section 62 of the *Labour Relations Act*. Besides, the negotiated agreement dated 17th November 2023 has not been nullified by the court and therefore it should be fully implemented.
42. He further submitted that his clients have reported back to work in compliance with the court orders and contended that the photographs produced by the petitioner are not supported by a certificate and therefore they are not good evidence. In addition, he submitted that the Attendance Sheets produced by the petitioner are not clear when they indicate no attendance.
43. He prayed for the petition to be dismissed and the conservatory orders lifted. In the alternative, he submitted that extension of the order should be on condition that all the salaries be paid before the judgment.
44. Mr.Kinoti Industrial Relations Officer, argued the 3rd respondent's case. He submitted that the issues raised in the petition are employment matters and ought to be raised by the CPSB which is in charge of HR function in the County. Consequently, he submitted that the petitioner has no locus standi to bring the petition herein.
45. As regards the merits of the petition, he submitted that the strike arose from a mutual agreement dated 17th November 2023 which was breached by the petitioner. Attempts to conciliate the grievances were made in meetings held between the petitioner CPSB and the unions on 29th and 30th August 2024 but no resolutions were reached but only recommendations on the way forward.
46. A further meeting was held on 12th September 2024 at the Labour Office in an attempt to end the strike but no agreement was reached. Consequently, the foregoing was proof that the conservatory order herein was given on false allegations.
47. He urged the court to compel the petitioner to implement the agreement dated 17th November 2023 or else the workers will continue to enjoy their right to strike. Finally, he submitted that a party who has breached an agreement should not be protected by the court.

Rejoinder by petitioner

48. Mr.Mutembei submitted that the respondents are trivializing matters of life and death and argued that the petitioner, has provided evidence to show that the respondents have not reported back to work. He contended that the respondents have held press conference saying that they will not comply with the court order directing them to report back to work.



49. He admitted that the agreement dated 6th October 2023 and 17th November 2023 are the basis of the impugned strike but submitted that the petitioner has adduced evidence to prove that it has complied with the said agreements. He cited exhibit JM 5a, b, c and 69 to fortify the foregoing submission.
50. He further submitted that the 3rd respondent had admitted that there were meetings held on 29th and 30th August 2024 where deliberations were made on promotions and resolutions made in tandem with the issues of implementation of the said agreements. He cited exhibit “JM 9” which is the Attendance list showing attendees to the said meetings including the Respondents.
51. As regards the budget allocation, he submitted that the Appropriation Act was passed in August 2024 for the Year 2024/2025 and just like other Counties in the Country, no funds have been disbursed for the current year. He contended that the petitioner had borrowed money by an overdraft to pay salaries to avoid delays.
52. He further cited a letter from the Controller of Budget to submit that Wage Bill in Meru County has been an issue. He maintained that the failure to implement the said agreements was due to reasons beyond control of the petitioner. He clarified that the budget allocation of Kshs.211,000,000 was not for promotions alone but inclusive of salary increment arrears. Besides the said budget process was subject to approval by the Controller of Budget. Consequently, he admitted that the letter by the Clerk of the Meru County Assembly was misleading.
53. Finally, he submitted that the respondents have violated the rights of residents of Meru County as guaranteed under Article 43 of *the Constitution* through the impugned strike. He further submitted that the CPSB was served with the petition but failed to appear in court.

Issues for determination

54. The issues for determination are:
 - a. Whether the petitioner has locus standi to bring this petition.
 - b. Whether the petition meets the competence threshold.
 - c. Whether the respondents have violated the constitutional rights of the residents of Meru.
 - d. Whether the relief sought should be granted.

Locus standi

55. The respondents contended that the petitioner lacks locus standi to sue them but the petitioner has maintained that it has every right to petition the court since the respondents have violated the Bill of Rights against the residents of Meru through a prolonged and unlawful strike. Locus standi is defined by the Blacks Law Dictionary as follows:

“ the right to bring an action or to be heard in a given forum.”

56. Article 22 of *the Constitution* of Kenya, 2010 provides as follows: -

“ 22.

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.



- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.” [emphasis added]

57. Again Article 258 of [the Constitution](#) provides that: -

“258.

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.”

58. In this case, the petitioner alleges that the respondents have engaged in an unlawful strike for over a month now for no justifiable reason. It alleged that the strike violates Article 26, 28, 41, 43 and 47 of [the Constitution](#) all of which are in the Bill of Rights. Consequently, I find that the petitioner has the Locus standi to petition the court under Article 22 and 258 of [the Constitution](#).

59. I gather support from Mumo Matemu case where the Court of Appeal held that:

“The NGO Act must be interpreted in conformity with [the Constitution](#). Although Section 12(2) and (3) of the Act provides for the legal status of the 1st respondent, when read together with Articles 22, 258 and 260 of [the Constitution](#), and in the public interest, it is to be inferred that the 1st respondent did not lose its locus standi, even if it were to be assumed to have lacked registered status. The three Articles give an enlarged view of locus standi, to the effect that every “person”, including persons acting in the public interest, can move a Court of law contesting infringements of any provisions in the Bill of Rights, or [the Constitution](#). [emphasis added]

See also *Ombayo v AG & others* (2024) eKLR



Competence threshold

60. The respondents contended that the petition did not meet the threshold set by Anarita Karimi Njeru case on the degree of precision in constitutional pleadings. In the said case, the court held that: -

“If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if any to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they were alleged to be infringed.”

61. The petitioner has maintained that it has set out the provisions of the constitution that have been violated and demonstrated how they have been violated by the respondents’ strike. I have perused the petition and noted that paragraph 28 and 29 the petitioner has given particulars of the provisions of the constitution that it alleges to have been violated, and the manner in which the respondents have violated the same. Consequently, I find that the petition meets the threshold of a constitutional reference pleading established by Anarita Karimi Njeru case.

Violation of provisions of Bill of Rights

62. The petitioner alleges that the respondents have engaged in an unlawful strike which violates or threatens to violate the rights to life, to dignity and highest standard of health of the people of Meru County. It further alleges that the strike is for no justifiable reason as all the demands have been met albeit delay due to factors beyond its control.

63. The petitioner further contended that the strike is unlawful since the respondents have withdrawn essential services without leaving behind a minimum number of officers to address emergency cases. As a result, people have died or face death due to lack of medical services.

64. However, the respondents denied the alleged violations and averred that they have left some officers on duty to attend to any emergency cases. Further, they have reported back to work after the court ordered them to do so. They have also averred that the petitioner has failed to implement good will agreements signed with them in October and November 2023 with respect to promotions, employment of more health officers, delayed salaries and unremitted statutory deductions. They have maintained that their strike is lawful because it is their right under Article 41 of the Constitution to force the employer to negotiate with them.

65. I have considered the rival contentions and noted that it is not in dispute that the parties herein signed agreements on 6th October 2023 and 17th November 2023; that the agreements were in relation to promotions, replacement of officers who had exited; delayed salaries; unremitted statutory deductions; and that the agreement had clear timelines. It is also a fact that the petitioner failed to implement the agreements and hence the instant strike situation.

66. The question that arises is whether the strike by the respondents is lawful and justified. Article 41 of the Constitution of Kenya, 2010 provides that: -

1. “Every person has the right to fair labor practices;
2. Every worker has the right-
 - a. To fair remuneration,
 - b. To reasonable working condition,



- c. ...
- d. To go on strike”

67. The right to go on strike is not one of the absolute rights listed under Article 25 of *the Constitution*. In fact, with respect to essential services, the right to go on strike has been taken away altogether in Kenya. Section 81 of the *Labour Relations Act* provides that: -

- “(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) ...
- (3) There shall be no strike or lock-out in an essential service.
- (4) ...”

68. Article 24 of *the Constitution* allows for limitation of a right or fundamental freedom as follows: -

“A right or fundamental freedom in the Bill of Right 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...”

69. This court has dealt with several cases where the right to go on strike by workers in health sector has been raised. In the said cases, the court has agreed that the right to go on strike is not absolute and therefore it can be limited under Article 24 above. However, there seems to be no case where the court has determined whether or not the provisions of section 81(3) of the *Labour Relations Act* is unconstitutional. The court has also not been invited to make such a determination in this case.

70. In the case of *Okiya Omtatah Okoiti v Attorney General & 5 others* (2015) eKLR Nduma J held that: -

“ 58. In this case we are concerned with the prohibition of strikes in essential services prohibited under section 78 (1) (f) and section 81 (3) of the *Labour Relations Act*, 2007.

59. These provisions derogate from the core content of the right to strike provided under Article 41 (2) (d) of *the Constitution* and the Legislature should revisit the law with a view to remove the apparent conflict between the constitutional provision and the statutory law.”

71. In *County Government of Kakamega and another v Kenya National Union of Nurses and another* (2017) eKLR, Onyango J held that: -

“It is my opinion that the limitations under section 81 of the *Labour Relations Act* meet the tests under Article 24 (1). Withdrawal of Hospital services derogates on the right to life under Article 26, the right to the highest attainable standard of health under Article 43 (1) and the right to emergency medical treatment under Article 43 (2). I think it is not a disputed fact that withdrawal of medical services is likely to, and in fact does, lead to loss of life to people who need medical services. The right to life is in a wider sense part of the right to human dignity under Article 28. The withdrawal of health services may therefore



lead to cruel, inhuman or degrading treatment of patients and their relatives who do not have the resources to get treatment at private medical facilities and who have to suffer death or watch their loved ones die without medical attention. Freedom from cruelty, inhuman or degrading treatment are part of the rights under Article 25 and cannot be limited or derogated.”

72. In the case of Joseph Otieno Oluoch v KPMDU (2021) eKLR cited by the petitioner a three Judge bench of the court considered the South African and Canadian jurisprudence and also sought guidance from the ILO Digest of Decisions of the Freedom of Association Committee of the Governing body and the European Social Charter. The court confirmed that the right to go on strike in essential services can be restricted or prohibited for public servants. However, the right can be enjoyed if “minimum service” can be maintained during the strike to ensure that life, personal safety or health of the whole or part of the prohibition will not be endangered.
73. In the end, the court agreed with Nduma J in the Okiya Omtatah Okoiti case supra, that an outright prohibition of the right to go on strike for employees in essential services would derogate from the core of that right, which is not what *the Constitution* contemplates. The court then went on to hold that: -
- “We are however convinced that the right to go on strike is qualified and is therefore contingent upon retention of ‘Minimum service’ at the affected facilities to ensure that there is no danger to life or health of members of the public.”
74. Finally, the court made the following orders: -
- a. “Industrial action by health workers is not permitted unless there is a known and acceptable formula of ‘Minimum Service’ retention at every affected health facility. This limitation is in addition to those imposed by the conciliation procedures set by the *Labour Relations Act*.
 - b. The Cabinet Secretaries in charge of Health and Labour, in conjunction with all major stakeholders within the health sectors, shall within the next 12 months from the date of this Judgment, develop and publish guidelines to give effect to order (a) above;
 - c. ...” (emphasis added)
75. Since the said decision, there have been numerous strikes in the health sector some extending for months. In the instant case, the strike by the respondents’ members has extended two months. There is evidence that all the doctors, clinical officers and nurses in the petitioner’s public health facilities went on strike and left no one to attend to emergency cases.
76. This court has not been shown any evidence that the decisions of this court cited above, on the limitation of the right to go on strike, were set aside by a higher court. There is also no legal or policy framework put in place since the decision in Joseph Otieno Oluoch case, supra, to regulate strike in the essential services sector.
77. Consequently, I find that the law as it is in Kenya, is that the right to go on strike in essential services for public service is prohibited under section 81 of the *Labour Relations Act*, 2007 until that law is repealed or otherwise changed to provide for a balance between the right to go on strike under Article 41 (2) (d) of *the Constitution* and the right to life; right to be treated with dignity; and right to the highest standard of health under Article 26,28 and 43 of *the Constitution* of Kenya, 2010. The said balance is only possible if the law or CBAs or HR Policy Manuals are formulated to provide for ‘Minimum service’ in essential services sector during the period of strike.



78. Having said that, and in view of the undisputed fact that the respondents have called a strike in essential service contrary to section 81 (3) of the [Labour Relations Act](#) without guaranteeing minimum service, I find and hold that the strike has violated and continues to violate Article 26, 28 and 43 (1) (a) of [the Constitution](#) which form part of the Bill of Rights as alleged.
79. The respondents have alleged that they had some officers left on duty to provide minimum service in the health facilities. However, they have not filed a list of the said officers or provided any proof that the list was served upon the petitioner. It follows that the allegation by the respondents that a few officers were left on duty is unsubstantiated. The fact remains that all the members of the three respondents herein downed tools and left no one to attend even to emergency cases in all the petitioner's public health facilities.

Is the strike justified

80. The petitioner contended that the strike is unjustified because the grievances raised in the agreements signed on 6th October 2023 and 17th November 2023 have been sorted out. Further the delay was caused by factors beyond the petitioner's control. However, the respondents maintained that the strike is justified because there are negotiated agreements which have been breached by the petitioner. Further that the petitioner has been provided with the budget allocations but failed to implement the negotiated agreement.
81. Without prejudice to my finding above that the impugned strike violates several Articles of [the Constitution](#), I must agree with the respondents that the reason raised in the strike notices were genuine and just. However, it has been shown by the petitioner that the circumstances have since changed.
82. There is evidence to show that the parties have been in meetings including 29th and 30th August, 2024 where the implementation of the said agreements were discussed. There is further evidence that salaries have been paid, albeit using borrowed money. There is also evidence that the process of promoting the health officers has commenced and budgetary allocation for that exercise has been approved for the current financial year.
83. It follows that the strike called by the respondents is no longer justified and the grievances raised have since been addressed or they are being addressed by the petitioner and the CPSB of Meru.

Reliefs

84. In view of the finding that the impugned strike by the respondents is contrary to section 81(3) of the [Labour Relations Act](#), and that no health officers were left to provide minimum service during the period of the strike, I am satisfied that the petitioner is entitled to declaration that the strike is unlawful and it violates the rights of the residents of Meru as enshrined under Article 26, 28 and 43(1) (a) of [the Constitution](#).
85. The petitioner has also prayed for an order of mandamus to compel the members of the respondents to resume their duties. In my view, such an order can only be issued within the province of public law against public bodies or office. The application of the said writs has not been extended circumstances of this suit. Nevertheless, it is obvious that the striking health officers are engaging in an unprotected strike and they must report back to work with immediate effect.

Conclusion

86. I have found that the law as it stands now is that the right to go on strike in essential service for public workers is prohibited by dint of section 81(3) of the [Labour Relations Act](#) read with Article 24 of [the](#)



Constitution. The court has continued to make recommendations for change of the law to give effect to the right to go on strike in the essential sector services but the concerned persons and stakeholders have shied away from the recommendations.

87. I have further found that the impugned strike is contrary to section 81(3) of the Labour Relations Act and violates the rights protected under Article 26, 28 and 43(1) (a) of the Constitution. Finally, I have found that, although at the start, the respondents had justifiable reasons for serving the strike notices, the circumstances have since changed and the strike should now be called off. Consequently, I enter judgment for the petitioner against the respondents in the following terms: -
- a. A declaration is hereby made that the continuation or participation in any way of the strike by the Meru County healthcare workers called by the Kenya Medical Practitioners Pharmacists and Dentists Union (KMPDU), Kenya Union of Clinical Officers (KUCO) and Kenya National Union of Nurses (KNUN) vide strike notices dated 1st August 2024 (by KMPDU), 15th July 2024 (by KUCO), and 18th July 2024 (by KNUN) respectively is unlawful.
 - b. A declaration is hereby made that the continued participation by the Meru County healthcare workers in the strike called by the 1st, 2nd and 3rd Respondents vide strike notices dated 1st August 2024 (1st August 2024 (by KMPDU), 15th July 2024 (by KUCO), and 18th July 2024 (by KNUN) respectively is unlawful for violating the rights of the residents of Meru County as enshrined under Articles 26, 28 & 43 of the Constitution of Kenya, 2010.
 - c. Since the strike was necessitated by the petitioner's fault, I will not condemn the respondents to pay costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF OCTOBER, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment 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

