



**Kenya National Union of Nurses v Ministry of Health & another (Cause E617 of 2022) [2023] KEELRC 1082 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1082 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E617 OF 2022  
SC RUTTO, J  
APRIL 28, 2023**

**BETWEEN**

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

**AND**

**MINISTRY OF HEALTH ..... 1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Claimant/Applicant which is a registered Trade Union representing the interests of nurses, has moved this Court vide a Notice of Motion Application dated September 5, 2022, through which it seeks the following orders: -
  1. Spent
  2. That an ex parte interim order be and is hereby issued staying the decision by the 1<sup>st</sup> Respondent to exclude the position of the Directorate of Nursing services from the Ministry of Health as advertised through the Public Service Commission website as attached in the list of documents and marked as KN-5 pending the hearing and determination of this Application.
  3. That an ex parte interim order be and is hereby issued restraining the Ministry of Health and Public Service Commission from recruiting officers of the Ministry of Health pursuant to an advertisement through the Public Service Commission as attached in the list of documents and marked as KN-5.
  4. That any other order that the court deems fit to grant.



2. The Application is supported by the Affidavit of Ms. Jane Wangari, who describes herself as the Applicant's Industrial Relations Officer. Briefly, she avers that:-
- a. The Applicant and the Respondents signed a recognition agreement dated June 26, 2013 pursuant to Section 54 of the [Labour Relations Act](#).
  - b. Following the gazettelement of the [Health Act](#), the 2<sup>nd</sup> Respondent formulated an Administrative organogram as provided for under Section 15(1)(b) but ignored the provisions of Section 18 of the [Health Act](#) and excluded the Directorate of Nursing.
  - c. The 1<sup>st</sup> Respondent forwarded the Administrative Organogram to the 2<sup>nd</sup> Respondent for recruitment as required under Article 234 of the [Constitution](#).
  - d. The 2<sup>nd</sup> Respondent posted an advertisement in its website on June 14, 2022 declaring vacant various positions in the public service, including health department and invited interested and qualified persons to apply for the same.
  - e. The position of the Director Nursing services was approved through a Scheme of Service for Nursing Personnel which came into effect from May, 2014. However, the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent have acted in contravention of the Scheme of service for nursing personnel.
  - f. The position of the Director of Nursing services has been existent since 2017 just as other directorate positions as provided for in the [Health Act](#) No. 21 of 2017.
  - g. The Claimant was not involved in the decision of excluding the Directorate of Nursing which is a statutory provision as per Section 15 (1)(a)(b) of the [Health Act](#).
  - h. The issue in dispute forms part of a collective claim which directly affects the members of the Claimant as contained in the Recognition Agreement.
  - i. On June 16, 2022, the Claimant wrote to the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents and registered its objection to the posted advert together with the administrative organogram which letter both respondents refused to respond to.
  - j. Section 18 of the [Health Act](#) provides for five mandatory directorates to deal with matters of medical services, nursing, pharmaceutical services, public health and administration.
  - k. No other directorate is capable of dealing with nursing matters except the Nursing Directorate itself and the delivery of quality and efficient nursing services in the country will be hampered if its management is vested on any other Directorate.
  - l. The action by the 1<sup>st</sup> Respondent amounts to unfair labour practices and violates the right to fair administrative action and therefore ought to be stopped.
  - m. The action by the 1<sup>st</sup> Respondent to exclude the Directorate of Nursing while formulating the administrative organogram without notice as provided for in law is a subversion of law and a well calculated measure to weaken the career progression of nurses.
  - n. The action to exclude the position of the Directorate of Nursing is discriminatory and contrary to the scheme of service for nurses.
3. The 1<sup>st</sup> Respondent did not respond to the Application. On its part, the 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn on October 5, 2022, by Mr. Simon K. Rotich, who describes himself as its Secretary/Chief Executive Officer. Briefly, he avers that: -



- a. The 2<sup>nd</sup> Respondent approved the reviewed organizational structure for the Ministry of Health and in so doing relied on the Fourth Schedule of the Constitution.
  - b. Under the Fourth Schedule health is majorly a devolved function and the national government only deals with health policy and National Referral Health Services.
  - c. Whereas it is true that Section 18 of the Health Act provides that there should be a directorate responsible for nursing services among other services, the Act does not state that the same shall be a stand-alone directorate.
  - d. The reviewed organogram is function based and not cadre based and is designed in such a way that any person with qualifications in a health related field can rise to the top most position including becoming a Director General.
  - e. The Ministry of Health has over thirty-three cadres and as such it is not possible to have an organogram where each of the cadres has a stand-alone directorate. As such it is not true that without a dedicated directorate for nursing, the issues of nurses will not be addressed.
  - f. Whereas there is a scheme of service for nurses which provides for the position of nursing director, there must be reasons why the said position has not been filled. Considering that nurses were eligible to apply for the positions, there is no reason why the recruitment process for the advertised position should stop especially since the process is at an advanced stage and stopping it now will only disadvantage Kenyans and cost tax payers more money should it be cancelled.
  - g. The applicant has not demonstrated any form of discrimination against its members nor provided justification why the recruitment process should be stopped.
4. On November 10, 2022, the Court directed that the Application be disposed of by way of written submissions. The Applicant and the 2<sup>nd</sup> Respondent complied and the Court has considered their respective submissions.

### **Analysis and Determination**

5. Flowing from the pleadings and submissions on record, it is evident that the main issue for determination is whether the Applicant has met the required threshold for grant of the orders and whether the Court should issue the injunctive orders sought.
6. Grant of injunctive orders at an interlocutory stage, is guided by the principles set out in the celebrated case of Giella vs Cassman Brown [1973] EA 358 at page 360, thus: -
 

“ .... First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”
7. Consequently, an Applicant ought to demonstrate an arguable *prima facie* case with a likelihood of success and that in the absence of the orders, he or she is likely to suffer irreparable injury.



## Prima Facie Case

8. The Court of Appeal in the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* [2003] eKLR defined a *prima facie* case in the following terms: -

“A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

9. In this regard, the main consideration ought to be whether the Applicant has established the existence of a right that has been apparently infringed by the Respondents as to require a rebuttal. The Court is also mindful at this juncture, that this is not mini trial hence will not examine the evidence presented microscopically. It is also worth noting that a *prima facie* case is not a case which must succeed at the hearing of the main suit.
10. The crux of the Applicant’s case is that the 1<sup>st</sup> Respondent formulated an administrative organogram in which it has excluded the Directorate of Nursing. To this end, it has placed reliance on the provisions of Section 18 of the *Health Act* which provides for creation of Directorates. The Applicant further exhibited an organogram from the Ministry of Health and notably, the same does not contain the Directorate of Nursing.
11. According to the 2<sup>nd</sup> the Respondent, Section 18 of the *Health Act* does not provide that the Directorate of Nursing should be a stand-alone directorate. In this regard, several issues come to the fore, for instance, was there stakeholder engagement prior to the organogram being developed? Is the position of Directorate of Nursing statutory? Whether by statute, the said position as envisaged is to be under its own directorate; Is exclusion of the position of Directorate of Nursing in the administrative organogram discriminatory against the Applicant’s members?
12. Additionally, the Applicant exhibited a Scheme of Service which contains the position, Director Nursing Services. Hence the question, is the departure from the said Scheme of Service so significant and prejudicial to the Applicant’s members and what is the justification thereof?
13. No doubt, the foregoing are pertinent issues which will have to be ultimately resolved through the main suit. Therefore, having considered the Application, the Response by the 2<sup>nd</sup> Respondent together with the evidence presented at this interlocutory stage albeit in a cursory manner and having applied the same against the principle set out in the Mrao case (supra), I find that the Applicant has justified that it has an arguable *prima facie* case.
14. Establishing a *prima facie* case is not an end in itself and cannot form sufficient basis to grant an interlocutory injunction, hence the Court must further be satisfied that the injury to be suffered by an Applicant in the event the injunction is not granted, will be irreparable.

## Irreparable injury

15. With regards to the question of irreparable injury, the Court of Appeal had this in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others* [2014] eKLR, thus: -

“An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”



16. In line with the above holding, the question then should be, will the Applicant suffer irreparable injury in the event the Court declines to grant the injunctive orders sought at this stage?
17. In the instant case, the subject matter in dispute is the organogram developed by the 1<sup>st</sup> Respondent as well as recruitment of officers of the 1<sup>st</sup> Respondent. At the outset, I note that the Applicant has not demonstrated before Court that it will suffer irreparable injury if the injunctive orders sought are not granted. If anything, a determination on this issue will require evaluation of evidence following a full trial and not at this interlocutory stage.
18. Besides, if ultimately the main suit succeeds, the Court is at liberty to issue any appropriate order including quashing the said administrative organogram.
19. With regards to the recruitments, it is notable that persons holding a Bachelors Degree of Nursing are eligible to apply for the position of Director Health Management, (Family Health and Sanitation), Director Health Management (Clinical Services), Director Health Management (Health Systems) and Director Health Management (Health Products and Technologies). Therefore, members of the Applicant have not been locked out and will not be prejudiced and suffer irreparable loss should the Court fail to issue injunctive orders stopping the recruitment. Indeed, stopping the recruitments will be more prejudicial to the members of the Applicant who may be interested in the positions advertised.
20. In light of the foregoing, I am inclined to disallow the Application for grant of the interlocutory orders and will direct that the due to the nature of this dispute, hearing of the main suit be fast-tracked. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL, 2023.**

.....  
**STELLA RUTTO**

**JUDGE**

**Appearance:**

Mr. Rutere for the Claimant/Applicant

Mr. Mulili for the 1<sup>st</sup> Respondent

Ms. Iseme for the 2<sup>nd</sup> Respondent

Abdimalik Hussein Court Assistant

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**



**JUDGE**

